

ARTICLE

THE MEDIA THAT CITIZENS NEED

C. EDWIN BAKER[†]

INTRODUCTION	317
I. DEMOCRATIC THEORIES AND THEIR CORRESPONDING MEDIA.....	320
A. <i>Elitist Democracy</i>	320
B. <i>Liberal Pluralism or Interest Group Democracy</i>	327
C. <i>Republican Democracy</i>	331
D. <i>Complex Democracy</i>	335
E. <i>Methodological Aside</i>	340
F. <i>Participatory Theories' Ideal Media</i>	343
II. JOURNALISTIC IDEALS.....	348
A. <i>Social Responsibility</i>	348
B. <i>Public Journalism</i>	353
III. FEARS AND POLICIES.....	359
A. <i>Perspective of Elite Democracy</i>	361
B. <i>Perspective of Republican Democracy</i>	364
C. <i>Perspective of Liberal Pluralist Democracy</i>	372
1. <i>Inadequate Pluralism</i>	372
2. <i>Corrupt Segmentation</i>	374
3. <i>Policy</i>	380
D. <i>Perspective of Complex Democracy</i>	383
IV. CONSTITUTIONAL IMPLICATIONS.....	387
CONCLUSION.....	408

INTRODUCTION

Democracy is impossible without a free press. At least courts and commentators tell us so.¹ This consensus, however, floats above crucial,

[†] I have benefited from many comments on earlier drafts, even when failing to respond adequately. For this I thank Oscar Gandy, Lani Guinier, Michael Madow, Carlin Meyer, and Jim Pope.

¹ Justice Murphy expressed the common sentiment when he stated, "A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty." *Craig v.*

more controversial matters. What type of free press does democracy need and why does democracy need it? Answers to these questions allow the next question. Are existing media in this country adequate? Do they provide for the informational or communication needs of democracy? And if not, in what way do they fail, and what can be done? If there are inadequacies, do they reflect bad decisions made by media professionals, such that the prime need is for better, smarter, tougher editors and reporters or better training in journalism schools? Or do inadequacies reflect, at least in part, deeper structural problems? And if governmental policy correctives are necessary to make matters better, what interventions would promote a more "democratic press"—that is, a press that properly serves a society committed to democracy?

These questions implicate central issues of First Amendment theory. Agreement on two abstractions—that democracy requires a free press and that the First Amendment protects a free press—is relatively easy. But what constitutes "freedom of the press"? That question cannot be answered without understanding the role or purpose of the constitutional guarantee. If the Press Clause is a structural provision designed either to support or to protect a press that adequately serves democracy, how does this premise affect the interpretation of the Press Clause?

Well, that's the agenda. But how to proceed? To assess the media's service to democracy requires a theory of democracy. A choice among possible theories will largely reflect why the chooser values democracy, a normative issue about which people inevitably disagree. Although variations may be infinite, three or four rough approaches may capture most people's view of the normative rationale for democratic government. First, *elitist* theories of democracy often reflect the somewhat cynical view that the only good thing (although a very important thing) about democracy is that it is

Harney, 331 U.S. 367, 383 (1947) (Murphy, J., concurring). Compare Justice Frankfurter's statement that "[a] free press is indispensable to the workings of our democratic society." *Associated Press v. United States*, 326 U.S. 1, 28 (Frankfurter, J., concurring). More striking is Madison's claim that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910). Despite deploring "the putrid state into which our newspapers have passed," Jefferson argued that "our liberty depends on the freedom of the press, and that cannot be limited without being lost." THOMAS JEFFERSON, DEMOCRACY 150-51 (Saul K. Padover ed., 1939), quoted in *Dyson v. Stein*, 401 U.S. 200, 208 n.6 (1971) (Douglas, J., dissenting). And this view, generally accepted as a truism, is certainly not merely American. See, e.g., Henricus G. Schermers, *International Human Rights in the European Community and in the Nations of Central and Eastern Europe: An Overview*, 8 CONN. J. INT'L L. 313, 316 ("Freedom of the press is an essential element of democracy."). See generally Pnina Lahav, *An Outline for a General Theory of Press Law in Democracy*, in PRESS LAW IN MODERN DEMOCRACIES 339 (Pnina Lahav ed., 1985).

better than the next best alternative. Somewhat more optimistically, many people value democracy as the only form of government that respects people's equality and affirms their autonomy. It embodies the equal right of each person to participate in matters of collective self-determination. Democracy is a political order that respects each person as an equal in her status as a citizen and as a moral agent. Democracy provides a form of public liberty that is inextricably bound to private liberties, whose existence requires, and is required by, public liberty.² Within the legal- and political-theory literature, two dramatically different ways of respecting people's equality are often described. In a *liberal pluralist* or interest group conception of democracy, an ideally functioning democratic system is equally influenced by the desires of each person; a well-functioning democracy is the fairest mechanism of aggregating preferences or desires for purposes of making law and policy. In a *republican* conception, an ideally functioning democracy is open to everyone's participation in the formulation of collective ideals and public goals; democracy is an open process of defining and advancing the public good.

The next Part fleshes out these three theories of democracy, describing premises that make each plausible and maybe even appealing.³ It also de-

² The argument for this claim is complex, but it has been a theme in recent works of Jürgen Habermas and Frank Michelman. See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1996); Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in JUSTIFICATION, NOMOS XXVIII 71 (J. Roland Pennock & John W. Chapman eds., 1986). Roughly, public liberty can only result from choices of autonomous agents whose autonomy is constituted by private liberties, and the necessary content of private liberties can only be determined collectively by the exercise of public liberty.

³ The different "theories" are presented as ideal types or models, not as descriptions of the views of any particular theorist. They also differ from any full theory of democracy in that they simplify with the goal of noting features that are particularly relevant for press theory. Important themes of more robust versions of a particular theory, for example, republican theory's worry about the corruption of civic virtue, are sometimes ignored or marginalized to the extent that the theme seemed less relevant for the concerns canvassed here.

Moreover, since my concern is with justification, I have tried to describe normative reasons why each "ideal type" would have appeal even if many of the most prominent theorists usually connected with the corresponding notion of democracy tried to present a solely descriptive (or scientific), not a normative, theory. This attempt at a descriptive or scientific theory is a characteristic common among elite democrats and also proclaimed by many pluralist or interest group theorists. See, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951). My categorization aims at seeing how different possible elements of democratic theory have implications for evaluating the media. For other purposes, the categories could be drawn differently. For example, some theoretical accounts of pluralism provide a basis for explaining why *elitism* produces reasonably acceptable results. Thus, Macpherson's "pluralist elitist equilibrium" model combines what I am calling elitist democracy and liberal pluralist democracy. See C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 77-92 (1977) (critiquing an account of the democratic process based on an analogy to economic markets). However, a pluralist vision can also provide a quite powerful account of the point of democratic *partici-*

scribes what each theory—the elitist, the liberal pluralist, and the republican theory—require of or hope for in the media. In addition, the next Part describes a fourth approach, which I label “complex democracy,” that may be somewhat less familiar, but which I defend and to which I believe our constitutional order is roughly committed. Complex democracy claims to express a more realistic empirical, and a sounder normative, perspective than offered by either liberal pluralist or republican democracy. It expects the media to take on the tasks assigned by each of these theories and, in addition, to support the self-constitution of pluralist groups.⁴ Since these different tasks are sometimes in tension, complex democracy complicates the problem of assessing media performance. It turns out, or so I argue in Part IV, that this complication restricts the issues that should be resolved constitutionally. Before getting to the constitutional issue, however, Part II identifies the democratic theory implicitly held by several prominent conceptions of journalism, and Part III considers each democratic theory’s implications for media policy.

I. DEMOCRATIC THEORIES AND THEIR CORRESPONDING MEDIA

A. *Elitist Democracy*

Modern societies require governments for a host of reasons, many involving the need to sidestep collective-action problems that would exist in a world of purely private action. Governments can increase the flexibility, the

pation. Because of the normative power of the account, I have isolated this version of pluralism and labeled it as one type of participatory democracy. Finally, my descriptive choices have been guided by factors that I find provide the most persuasive versions of a particular theory. For instance, I emphasize the need to handle technical complexity in justifying elite democracy. Other versions of this theory could, however, emphasize the merits of government by wise leaders. See, e.g., EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), reprinted in 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE at 53, 111 (L.G. Mitchell & William B. Todd eds., 1989) (“The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *a priori*. Nor is it a short experience that can instruct us in that practical science . . .”).

⁴ Although the notion of a group is important for my discussion, I should emphasize now that it is neither formal nor essentialist; it does not assume any necessary institutional embodiment, although that will sometimes occur. Groups refer basically to situations where some people identify with other people on some basis—although I do not exclude the notion of latent groups, that is, groups with which people would identify on the basis of reflection or circumstance that has not occurred. Although people sometimes identify with a group because outsiders do identify them, that is hardly necessary; moreover, a person is not a member unless she sees herself as such. Membership is hardly forced; on the other hand, although groups will often have organizational embodiments from which people can be excluded, there is a sense in which a person can be relevantly part of a group whose other constituents do not identify her as a member.

usefulness, and the effectiveness of a legal or normative order that is used to resolve disputes, help people coordinate private behavior, and encourage productive or "pro-social" behavior. The question is what type of government would be best at performing these functions. At least one analysis, the first to be considered here, suggests democracy, but democracy of a distinctly limited sort.

Good governments must routinely respond to problems that are technically complex. Moreover, governmental interventions are often most effective if implemented before people experience a problem. Effective responses frequently rely on intricate economic and scientific analyses. Most people have neither the interest nor the ability to understand, much less to devise solutions for, the problems facing society that government should address. Experts and specialists at understanding the economic, human, and natural environments must do the bulk of the government's decision making work. As Walter Lippman argued seventy-five years ago:

"There is no prospect . . . that the whole invisible environment will be so clear to all men that they will spontaneously arrive at sound public opinions on the whole business of government. And even if there were a prospect, it is extremely doubtful whether many of us would wish to be bothered, or would take the time"⁵

More recently, Vince Blasi questioned whether citizen involvement describes either the "reality" or the "shared ideal of American politics"; he suggested that "occasions for involvement in public affairs [such as the necessity to stop totalitarian forces] are a cause of sadness," not a description of the good society.⁶ Widespread popular involvement in government seems, to many, at best a romantic, but idle, fantasy—and at worst a disaster.⁷ The complexity of the modern world requires that policy-oriented de-

⁵ WALTER LIPPMAN, *PUBLIC OPINION 197* (Free Press paperback ed. 1965) (1922); see *id.* at 157, 250-51; JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 260-62 (Harper & Row 1976) (1942).

⁶ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 562.

⁷ Lippman argued that democratic theory falls apart given its view that human dignity depends on each person being involved in all public decisions. It would be wiser, he argued, to recognize that self-determination is only one interest and that a government should be measured by how well it serves people's "desire for a good life, for peace, for relief from burdens." Lippman, *supra* note 5, at 195; see *id.* at 197 (arguing that "if, instead of hanging human dignity on the one assumption about self-government, you insist that man's dignity requires a standard of living," then government should be judged on whether it provides such a standard). Lippman argued that even in legislative bodies, most laws are "rejected or accepted by the mass of Congressmen without creative participation of any kind." *Id.* at 183; cf. SCHUMPETER, *supra* note 5, at 247 ("[T]he people never actually rule but they can always be made to do so by definition.").

cision making be a full time activity. A country can only be governed sensibly by vanguard leadership elites or skilled experts. Nevertheless, three practical problems come with government by experts, by technicians, or by purportedly wise leadership elites. These three problems point to the desirability of a limited form of democracy—that is, where “people have the opportunity of accepting or refusing the men who are to rule them” as a result of “a free competition” for votes⁸—as the most practical form of government, at least for more developed societies.

First, an effective government cannot rely primarily on force to gain obedience. Reliable legal orders require high levels of voluntary compliance to most of their laws, by most of the population, for most of the time. To a significant degree, voluntary compliance often reflects habit, lack of reason to deviate, or the overlap of the laws’ substantive directives with behavior adopted for a person’s own practical or normative reasons. Still, compliance with legal commands that require conscious conformance can be expected to be more stable and secure when people view the government as basically legitimate.⁹ The problem is, at least in a world dominated by Enlightenment values, that people are unlikely to accept a self-perpetuating government of elite technicians as legitimate.

Second, some experts and technicians will be more skilled than others in responding to a society’s problems. In the economy, the invisible hand of the market (hopefully) works to determine which “experts” do the best job. Competition assures that ineffective solutions and inept problem solvers lose out.¹⁰ In governance, however, no such system works automatically. Optimistically, badly managed regimes will collapse in the long run, as arguably happened with the Soviet Empire. But the long run is hardly heartening for those living at any moment. Think of the pain that could have been avoided and the gains that could have been obtained if the Soviet regime (at least, accepting common critical assessments of it) could have been replaced earlier (at least, if replaced by something better). A country needs

⁸ SCHUMPETER, *supra* note 5, at 285. Even as to this limited form of democracy, Schumpeter argues that its advantages are empirical and only exist under certain, specifiable conditions. *See id.* at 290.

⁹ This empirical claim, which is heavily indebted to the work of Weber, *see generally* MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978), obviously requires more support, and may turn out to be wrong or more complicated in various circumstances. *See, e.g.*, Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 385 (asserting that “the Weberian model . . . at best is problematic and unproven and at worst is probably wrong”). But for purposes here, the claim’s actual truth is less relevant than is the belief in its truth by elite democracy theorists.

¹⁰ *See* SCHUMPETER, *supra* note 5, at 258 (“No doubt, a manufacturer may be indolent, a bad judge of opportunities or otherwise incompetent; but there is an effective mechanism that will reform or eliminate him.”).

some systematic, structural means of replacing less effective, less intelligent experts with others who may do better.

Third, no one's commitment to the public good is ever perfect.¹¹ Cynics suggest that, as opposed to a person's dedication to her own personal or private good, dedication to the public good is seldom evident. Outright corruption, as well as small-time advantage seeking, is endemic to government and governmental leadership.¹² No matter how idealistic the revolutionaries, no matter how patriotic the coup's new rulers, history consistently portrays them as losing their civic virtue over time and well-intended government degenerating into corrupt administrations. Reasonably acceptable government, whether or not comprised of elites, depends on finding systematic, structural means to keep the level and type of corruption within limits.

Democratic elections provide partial solutions to each problem. For reasons not necessary to consider here, the legitimacy of unelected governments is widely challenged today. Simply as an empirical matter, people in the modern world are apparently much more likely to accept a government as legitimate if they perceive it as democratic. This legitimacy gain due to elections should improve governmental effectiveness, especially if the elections do not otherwise seriously interfere with governance by elites.

Elections also create some circulation of elites. People inevitably experience problems that they believe the government should—but did not—help solve. Other problems, they believe, the government has caused. The accumulation of grievances eventually leads voters to replace one set of rulers with another that make somewhat believable promises to govern better. The regular occurrence of elections also creates some incentive for leaders to do a better job and to avoid corruption or, at least, to avoid widespread, observable corruption. Of course, some incentives created by this system may be undesirable—for example, elections may create incentives for governmental leaders to look to the short-run, pleasing current voters while avoiding helpful but unpopular responses to long-run problems. On the whole, however, democratic elections provide a relatively

¹¹ Robert Dahl stated the central proposition of Madisonian democracy to be: "If unrestrained by external checks, any given individual or group of individuals will tyrannize over others." ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 6 (1956).

¹² Advocates of limited government routinely lodge this criticism, often without noting the ubiquitousness of corruption in private enterprise as well. Of course, market competition often generates monitoring techniques that provide some discipline in the private sector. Market discipline, however, does not necessarily further the public good. Illegal or corrupt practices by private firms are often profitable and, from the point of view of the firm, efficient. One complaint about market competition is that it encourages corrupt, socially inefficient, or otherwise objectionable practices. Think of profit pressures leading firms to secretly dump their pollutants or airline competition leading airlines to ignore safety requirements.

functional method both to dislodge less effective elites and to create incentives for better performance. Most importantly, an effective electoral process provides the best, and perhaps the only, process for preventing or limiting governmental tyranny and overt corruption.¹³

Of course, democratic elections hardly exhaust the list of structural devices that might improve governmental performance. Consider allocating authority to different branches and different levels of government, structuring the relation between these loci of power, and imposing process requirements on governmental operation. These are all methods that, if well designed, could facilitate the replacement of elites when appropriate, increase the incentives and capacity of elites to act intelligently for the public good, and provide potential checks on their abuses of power. Designing and explaining devices like these are major tasks of political science and are central to constitutional theory, especially in relation to the Constitution's structural provisions involving separation of powers and federalism. Nevertheless, even if one accepted elite rule as wise or necessary, democratic elections may perform the crucial tasks described above, thereby justifying this limited version of democracy.

To fulfill its mission, elite democracy requires a free press—a press to which it gives relatively specific assignments. A free and independent press can make important structural contributions that are as great or greater than the constitutional and administrative devices just mentioned. If corruption or incompetence of elites is the problem, exposure is at least part of the remedy. The possibility of exposure can deter corruption and create incentives for proper performance. Exposure promotes the orderly replacement or rotation of elites.

The press, however, need not provide for nor promote people's intelligent political participation or reflection. Meaningful understanding of social forces and structural problems is beyond the populace's capacity and marginal to its interests. Exposure of government corruption or incompetence—the watchdog role or what Vince Blasi dubbed the “checking func-

¹³ David Held identifies Max Weber and Joseph Schumpeter as his exemplar democratic elitists, noting that some commentators find a point by point correspondence between their views of democracy. See DAVID HELD, *MODELS OF DEMOCRACY* 179 (2d ed. 1996). Held argues that “virtually the only role [Weber] envisaged for the electors” was “being able to dispense with incompetent leaders.” *Id.* at 173. Held also argues that, for Schumpeter, the “essence of democracy was . . . the ability of citizens to replace one government by another,” a capacity that checks “the threat of tyranny.” *Id.* at 179. C.B. Macpherson observed that after Schumpeter's identification of this capacity as a key function and after his critique of democratic theory, there is little left for democracy “except the sheer protection-against-tyranny function.” MACPHERSON, *supra* note 3, at 91.

tion"¹⁴—is probably the most important contribution the press can make to either democracy or to the public sphere. Publication of the Pentagon Papers and, even more so, the Watergate episode, dramatically illustrates the press living up to this potential. But exposure of less dramatic corruptions and incompetencies and, even more, a constant deterrent effect, are more routine, day-to-day features of a free press.

A separate issue that will become especially relevant to later discussions of media policy and constitutional interpretation is whether an equally important role of the press is to expose private corruption and incompetence. Fear of elites' abuses of power could reasonably extend to private elites. Private enterprises exercise vast power in the modern world. A plausible policy goal is to create a press that will maximally "check" or expose abuses of power regardless of whether the abuser is public or private, governmental or corporate. A possible implication of this goal is the need to make the press structurally independent of both government and private economic power. In contrast, as long as exposing government corruption or incompetence remains the key concern, a press structured by private power might be as willing and able to perform this function as would any press resulting from government intervention.

For elite democrats, a press that checks the corruption or incompetence of private power is desirable but should not rank as an especially high priority.¹⁵ First, the danger created by the potential of private evil arguably does not compare to that created by governments, which have a monopoly on legitimate violence. Only governments could do what the United States did in Vietnam or the Nazi and Soviet governments did earlier in the century, examples that led Vince Blasi to conclude that "the threat posed by the totalitarian state represents . . . the overriding problem of twentieth-century politics."¹⁶ Second, two powerful forces potentially "check" private power—market competition¹⁷ and, most importantly, government regulation

¹⁴ Vince Blasi treats the checking function, which he sees as following from the democratic theories of John Locke and Joseph Schumpeter, as a major purpose of both the First Amendment's Speech and Press Clauses. See Blasi, *supra* note 6, at 542. On both theoretical and historical grounds, I have argued that this checking function is primarily relevant to an understanding of the Press Clause. See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 225-49 (1989); see also Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975). My own view is that the constitutional right of speech freedom has been and should be much more about individual liberty than about serving an instrumental political function.

¹⁵ See also Blasi, *supra* note 6, at 538-41 (discussing the greater importance of the press serving as a check on government).

¹⁶ *Id.* at 538.

¹⁷ Although market competition provides some check on incompetency, it is less clear that it checks, rather than encourages, many forms of illegality, corruption, and inefficient externalizing of costs onto members of the public. See *supra* note 12.

and law enforcement, hopefully crafted and implemented by competent, noncorrupt governmental elites. The central constitutional role of the media results from the unavailability of these forces to check abuse by government, which can only be controlled by "the power of public opinion."¹⁸ Public opinion, in turn, can only be a force for good if it is informed. Justice O'Connor is right, from this perspective, to emphasize that "the premise" of the First Amendment is that "government power, rather than private power, . . . is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals."¹⁹

Elite democracy has additional implications for the press. First, the media should not be expected to raise serious questions about the underlying legitimacy of the country's constitutional order. As long as elites are honest and competent, the press acts properly in reinforcing the general sense of the system's legitimacy. At most, the press should focus on critical substantive issues about which elites are divided. Despite commentators' criticism of this recurrent practice as "palace court journalism,"²⁰ only when elites are divided is public discussion really relevant. Division raises the possibility that the currently ruling elite should either change directions or be replaced. Second, since corruption and competence of elites rather than the public participation in determining the structure of society is the central democratic concern, heavy emphasis on the character and behavior of individual public figures is therefore appropriate. To facilitate competition among, and timely rotation of, elites, the press should also question how well the current governmental administration responds to particular problems. Third, public chronicling of elite debate as well as "neutral" development of information that aids elites in their own position-taking is useful. Finally, the provision of objective information about major problems in society can help assure appropriate elite rule in two ways. First, it provides elites with valuable information. Then, by identifying unsolved problems, the information also provides a basis for identifying possible elite incompetence in handling the problems, thereby stimulating both deterrence of incompetence and elite rotation.

¹⁸ Blasi, *supra* note 6, at 539.

¹⁹ Turner Broad. Sys. v. FCC, 512 U.S. 622, 685 (1994) (O'Connor, J., concurring in part and dissenting in part).

²⁰ MARK HERTSGAARD, ON BENDED KNEE: THE PRESS AND THE REAGAN PRESIDENCY 54-76 (1988) [hereinafter HERTSGAARD, ON BENDED KNEE] (attributing the problem in part to the press's dependence on the very officials it is supposed to be checking); see also Mark Hertsgaard, *Media Matters: The Star Wars Mirage*, NATION, June 24, 1996, at 10 (describing palace court journalism).

B. *Liberal Pluralism or Interest Group Democracy*

Fourth of July speeches extol the will of the people, not the virtues of elites who govern an ignorant or apathetic population. Despite attracting supporters among some self-perceived hard-nosed or realistic academics, elite democracy has little popular appeal.²¹ Sloganizing for democracy praises popular participation and praises a self-governing people. People have a right to rule; the popular will ought to prevail. Widespread and popular critiques of existing practice bemoan the lack of voting and the lack of participation. The necessity for popular discourse to have this content suggests that deeply ingrained values are at stake in people's purported democratic commitments.

Here and in the next Subpart, I will outline two strikingly different accounts of the point of popular participation. These accounts, which I label "liberal pluralist democracy" and "republican democracy," share certain objectives. Possibly most important, both purport to explain why popular participation or, at least, real opportunity for participation, is crucial for normative legitimacy.

Elite theory values democracy, in part, to maintain a popular sense of legitimacy for government. Its concern with legitimacy, however, is purely sociological. Elite theory predicts (or observes) that people feel and treat their government as more legitimate—and thus are more prepared to obey its laws—if it is democratic.²² In contrast, for the various participatory accounts of democracy, the concern with legitimacy is usually ethical. The normative defensibility of government is at stake.

A jurisprudential illustration can help here. Jurisprudents observe that the legal order asserts that people are obligated, not just obliged, to obey the law.²³ Of course, the persuasiveness of any assertion of obligation depends on the values and perceptions of those addressed. Given values or premises that are widespread in the modern world, theorists find that only orders that respect people's right of self-government—that is, only the existence of democracy—can support the claim of obligation that the legal order presupposes. Of course, no argument or discussion will, in fact, convince all that

²¹ It has also received considerable social science criticism. See generally PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* (1980) (arguing that democratic elitism is unsound in theory and has failed to meet contemporary political needs in practice).

²² Cf. Hyde, *supra* note 9, at 384 (critiquing this notion of legitimacy).

²³ See H.L.A. HART, *THE CONCEPT OF LAW* 79-88 (1961) (showing that obligation is not a matter of actually being obliged or forced or the probability of negative consequences from noncompliance, thereby rejecting Austin's predictive interpretation of obligation).

are subject to a law of the law's legitimacy or its obligatory force. Some will always resist unless "obliged" to conform.

Even putting aside this problem of convincing the subjects of law, there is the parallel concern that those exercising governmental power should be able to explain to themselves why they are justified in exercising power over those who object. Their best answer, I think, includes the claim that their exercise of power grows out of a practice that treats the subjects of law as intrinsically significant moral agents whose liberty and equality the legal order respects. Only such a practice justifies their "request," whether or not accepted by the subject, that the subject recognize herself as obligated rather than merely obliged. A large part of the debates within normative political theory involves disputes about what content such a practice requires. A common element, however, is that the legitimizing practice must include participatory democracy—only this process recognizes both people's right to choose (autonomy) and people's equality as to this right.

People inevitably interact within humanly created frameworks that create opportunities for and impose constraints on people. Two factors lead inexorably to a normative requirement that these frameworks and environments be subject to law and that the law be ultimately subject to formulation by a participatory democracy. First, people's important projects often require binding rules—for example, property rules against theft or trespassing or contract rules that allow for the creation of binding obligations—or require the dedication of resources to particular uses. As compared to some alternatives, any particular set of rules or dedications will, however, disfavor or burden or conflict with some people's preferred projects. The conflict suggests the need for an authoritative way to determine the rules or the use of the resources—that is, people's individual flourishing depends on the possibility of government decision making and on the existence of a legal order. Second, only people's abilities to participate in that government will respect their claim to engage in self-determination on a basis of equality. The first point requires government, the second requires that the government be democratic. Thus, the claim is that a participatory democracy is necessary for (normative) legitimacy of the framework on which people's flourishing depends.

Up to this point, liberal pluralists and republicans might agree.²⁴ Both emphasize the opportunity for participation. Many also tie the right of par-

²⁴ In this discussion, I offer a normative account of liberal pluralist democracy. Nevertheless, many of the scholars who are most identified with pluralist democracy, such as Truman or Dahl, had little explicit interest in these normative justifications. See *supra* note 3. Moreover, many pluralists emphasized the interaction of interest groups while finding it most functional to have relatively limited citizen involvement. In the normative account offered

ticipation to the legitimacy of government. They differ most overtly in their understanding of the point and nature of participation. Here I will describe a liberal pluralist view, returning to a republican view in the next section.

The liberal pluralist recognizes that each person has her own interest and each group has its own interest, each with a conception of the good life. These interests and values are largely exogenous to the political order. They often conflict with those of other persons or groups. This plurality, the liberal pluralist emphasizes, is a fact. The liberal pluralist observes that a telling aspect of many elite theories (and often republican theories as well) lies in their silence. Elite theorists seldom discuss class. Other potential lines of fundamental conflict, like race or ethnicity, usually are identified only as problems to be managed in a process of teaching groups about their true commonality of interest. Since religious disagreement cannot be rationally overcome, elite democrats de-emphasize the extent that religious conflict matters, or should matter, for and in public practices. Religion is discursively and institutionally segregated. Elitists and republicans accept religious freedom but largely ignore the religious world-view. In contrast, liberal pluralism recognizes intractable diversity. Conflict among world-views, among both values and interests, is seen as incorrigible.

Liberals' theoretical response to this pluralism varies. Some versions of liberal pluralism back away from conflict. They argue that the state has no business advancing any particular vision of the good.²⁵ In contrast, the empirical political scientist typically observes how the system manages conflicts to produce relative stability, or, to the extent that the commentator turns normative, she considers how interests ought to influence results. Treating people as equals and as autonomous means that the properly functioning democracy should respond fairly to the different concerns of each.²⁶

here, however, people's actual or potential participation provides the theoretical basis to enable the different groups to get their due.

²⁵ Early on, Dworkin offered a version of this view. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 274 (1977) (stating that "the liberal conception of equality . . . prohibits a government from relying on the claim that certain forms of life are inherently more valuable than others"). This view also seems implicit in Ackerman's conception of neutrality. See BRUCE ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 11, 43 (1980). Rawls's emphasis on the priority of the right over the good and his emphasis on organizing society based on principles that are primarily distributive—equal basic liberties and other primary goods allocated by institutions designed to embody the difference principle—could be seen to endorse the view that society should not favor one view of the good over another, except for its appropriate disfavoring of views inconsistent with justice. See JOHN RAWLS, *A THEORY OF JUSTICE* 504-11 (1971). But see C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 949-59 (1983) (critiquing Rawls's interpretation of justice as irrational partly because of its discounting of political expression of people's conceptions of the good).

²⁶ Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 80-82 (1980).

Laws and policies should respond equally to each person's interests. In any event, since values are exogenous, liberal pluralists uniformly treat the key political issues as essentially distributional.

Liberal pluralists plausibly argue that, if properly structured, democracy provides the mechanism most likely to take into account and properly weigh all interests. Interests are detectable and influence government policy primarily due to interest group pressures or representation. Political mobilization by each group creates political capital and gives each group leverage in the political bargaining that generates a democratic regime's laws and policies. Popular political participation provides a currency which assures that a group's interests are taken into account, hopefully in rough proportion to the group's size and the intensity of its interests. Participation protects people's rights and interests—it is “preservative of all rights.”²⁷ This method of properly accounting for interests provides the normative significance, the legitimizing contribution, of democracy.

According to liberal pluralist theory, the design of institutions (including the media) should be guided by the end of creating fair compromises or bargains between groups. When possible, constitutional provisions should be interpreted to protect such institutions, to mandate their maintenance, and to facilitate their creation. Of course, various conditions could undermine the pluralist democratic bargaining process, including “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon . . .”²⁸ In this circumstance, pluralist democratic theory tries to devise approaches or structural devices, possibly including interpretations of constitutional provisions such as the Equal Protection Clause,²⁹ that either help to repair the process or to mandate the fair outcome which a properly working process would have achieved. In this Article, however, the relevant inquiry is to determine how the press can contribute to this pluralist democracy and to identify the media policies or Press Clause interpretations that best enhance these contributions. I will momentarily postpone this inquiry because it can be explored best in contrast to the implications of another version of participatory democracy.

²⁷ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). For a view that this statement can be better read as supportive of a constitutive discourse rather than a liberal bargaining, see C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491, 506-07 (1989) and Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 480-85 (1989).

²⁸ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

²⁹ See ELY, *supra* note 26, at 82, 151-53.

C. *Republican Democracy*

Critics argue that liberal pluralism's purportedly unsentimental realism is actually not so realistic. Interest group pluralism neglects two basic attributes of most people and these attributes are central to a sounder democratic theory. First, people are not, certainly not always, narrowly self-interested. People are social, communal, and caring, not purely selfish and atomistic. They formulate their aims as not being merely the advancement of their personal interests. People are often motivated by conceptions of a common good and by a concern with others' welfare. Second, people's interests do not spring up full blown from some inner source or even from their group identity. Rather, people expend considerable effort to formulate and choose interests and values to which they then give allegiance. This task requires self-reflection, discourse, or sometimes both, and normally takes place at least partly in interaction with others.

Republican democracy treats as basic these two attributes that pluralists ignore. Whether naturally or by socialization, most people in the real world are, to varying degrees, oriented toward a good that involves a concern for others, what can be called a common good. Furthermore, most people engage in practices—discussion, reading, and reflection—partly in order to understand or to formulate their own notions of the right and the good. Both attributes affect action within all spheres of life, but they arguably have special relevance to action oriented towards the collective order, the political realm. A person *might* focus on others' welfare when she goes shopping or when she decides what to do with her time in the evening after a long day at work and after taking care of the children. A concern with other people is especially likely, however, at more discrete points in time—when a person sees herself acting in, or thinking about, the “public sphere.”

People's political concerns are often much more public spirited than much of their private economic and consumptive behavior. Many people see their interests in politics as predominantly related to a concern for justice or for a better world for everyone, even if these concerns are only occasionally central to their nonpolitical practices. Economist friends often tell me that even the mere fact of voting is hardly rational for most people, in terms of a calculation of personal advantage gained compared to effort spent on voting.³⁰ Nevertheless, voting can be valued and rational in itself as a self-definitional expression of being a part of a community, as a perform-

³⁰ See HABERMAS, *supra* note 2, at 333-34 (discussing the difficulty of economic theories of democracy in accounting for the phenomenon of voting, and arguing that “the empirical evidence sp[eaks] against all models [of voting] that were premised on egocentric decision making”).

ance of a responsibility, as an act of selfless service to the community, and as a means of being a participant in the collective project of choosing between contested notions of the public good. Even if, in practice, people's voting usually corresponds to their narrow economic or group interests, this observation would not necessarily discredit the republican view of democracy. First, a political scientist's report of people's votes tracking self-interest is at best a statistical observation that leaves huge numbers of votes to be explained in terms of something else—possibly ignorance, but alternatively, a public orientation. Moreover, the characterization of the votes as self-interested reflects the political scientist's external analysis—the voter may believe that she is trying to advance the public good. Any vote's apparent correspondence to self-interest (or group interest) that conflicts with the observer's conception of public interest could easily represent limitations in the voter's understanding of the public good or her real, even if unwanted, partiality of perspective. This does not demonstrate narrowness of commitment.

The republican conception of the nature of politics is implicit in the norms about what interests are properly voiced in public political speech. The practical need for the candidate's or legislator's speech to appeal to assertedly broader, common goods demonstrates that people, in fact, believe that democracy and politics should be about common or public, not merely private, goods. Narrow self-interest purportedly observed in actual voting should not be accepted as normative but as a problem that an ideally working democracy would help alleviate. From the republican perspective, the extent to which current politics is narrowly self-interested merely indicates the degree to which it is currently corrupt.

These considerations suggest that a central feature of democracy must be a (public) realm especially dedicated to people's formulation and pursuit of their "common good." Government should be designed to institutionalize a responsiveness to a public realm in which people consider the public good. Republican democracy shares with liberal pluralism a critique of the elitist focus on merely sociological legitimacy. But where the liberal pluralist sees normative legitimacy as the result of fair distributions resulting from fair bargains, the republican sees legitimacy flowing from commitment to, and agreement on, the common good. An autonomous, moral agent ought to be self-governing. This principle rules out subordination to exogenously given interests. For self-governance, a person must be able to participate in and be able to accept the mandates of the collective process.

In this republican view, politics is most fundamentally about discussing, formulating, and understanding common ends and then pursuing them. From both the individual and group perspective, participation is not merely

or primarily an aspect of efficient or fair self-interested bargaining. Rather, it is intrinsically valuable as part of the life of a self-defining, reflective person and people. The liberal pluralist critiqued the elitist for not seeing the need to build mechanisms into the structure of government to take fair account of true differences of interest, especially those concerning distributional issues. The pluralist sees bargaining over these differences, along with the handling of collective-action problems, as the central function of politics. The republican, however, critiques the pluralist for ignoring the people's activity of formulating truly "common interests." She rebukes both the elitist and the liberal pluralist for treating values and conceptions of the good as mere empirical facts advanced either by expert administration or fair bargains.³¹ In contrast, the republican believes that a public good is found or formulated only through the deliberations of civically virtuous citizens. From this view, "the experience of democracy is not ultimately about winning but about deliberating and acting together. . . . [Democracy] is about how we equalize politically in acting together for shared purposes."³²

Further description requires a choice in how to model republicanism. So far, the account has emphasized two central themes: civic virtue and a public or common good.³³ Civic virtue is an orientation of people toward the common good. But the relation between virtue and the common good can be seen in alternative ways. First, even if all virtuous people were oriented toward the common good, their conceptions of the common good could vary and compete. Although a civically virtuous person must remain

³¹ The difference between these two critiques of elite democracy can be seen in the distinction between two critiques of a law and economics methodology. In the context of choosing legal rules or settling disputes, the economic methodology typically takes some hypothesized existing distribution of wealth and some set of preferences as given. The liberal pluralist's critique emphasizes that the distribution is precisely what cannot be taken as a given, but instead, is what is at issue; any methodology that ignores distributional disputes will be inadequate. The republican agrees with this, but also asserts that the content of the preferences is also unsettled and needs political formulation. Both critiques easily show that efficiency is a theoretically indeterminate criterion. It becomes determinative only if the analyst makes normative assumptions about what distribution and what set of preferences to identify as "existing" or as otherwise appropriate to employ. See C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 27-33 (1975); C. Edwin Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475, 493 (1978).

³² Sheldon Wolin, *Democracy & Counterrevolution*, NATION, Apr. 22, 1996, at 22, 24.

³³ An overriding concern with corruption has also been a republican theme. In the liberal pluralist account, where self-interest is accepted as the norm, corruption, or what I sometimes call "overt corruption," presumably means the improper or illegal pursuit of self-interest. This is the behavior that press theorists hope the press's "checking function" will expose or deter. Because the republican proclaims "civic virtue" as the proper norm, she will see a much larger realm of potential corruption. Under this republican conception, a "fall from virtue," in addition to the liberal idea of "overt corruption," is a feared form of corruption.

open to hearing and considering alternative conceptions of the common good,³⁴ in the end she should struggle to have her understanding prevail, even if opponents are not, and never could be, convinced. This competition can lead to “republican moments”—times of intense politics when old orders are transformed by people’s struggles to have new conceptions of the public good come to dominate politically.³⁵ Alternatively, some theorists believe (or at least theorize as if they believe) that, with sufficient deliberation, agreement on a common good would be possible among civically virtuous persons. A conception’s “commonness” relates to it really being the good for all—or, at least, for all within the relevant community. Invocations of the popular notion of an “ideal speech situation” often appear to be attempts to describe a context in which this consensus could be reached. The ethical premise that free or autonomous people must live under laws that they help to author and that they accept suggests the importance of this possibility. Freedom or autonomy purportedly exists for people only when the legal order represents a truly common good that all can accept.

As will be discussed later, these alternative conceptions of the common good lead to somewhat different notions of ideal media policy. Given the concerns of this Article, it is analytically useful to label them as involving different conceptions of democracy. The first alternative is intrinsic to what I will call “complex democracy,” the next type of democracy to be described. Here, I will call the second alternative “republican”—namely, the notion of a politics aimed at a truly common good that is or would be accepted by all within a community after appropriate discourses.

John Dewey might serve as an exemplary republican democrat. He has inspired many advocates of a more participatory democracy and of a press that better serves participatory ideals. More to the point here, he argued for broad participation as a way to find and pursue what we have or need in common. In the book most cited in this connection, *The Public and Its Problems*,³⁶ Dewey consistently stresses “common concerns.” Democracy “forces a recognition that there are common interests.”³⁷ Unlike elitists, he tells us that the many do not need investigative expertise but rather the ability to “judge of the bearing of the knowledge supplied by others upon com-

³⁴ Jim Pope takes this feature of openness to distinguish true republican politics (and republican moments) from, for example, practices of the Klan—that is, political activism designed to silence opponents. See James Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 313-15 (1990).

³⁵ See *id.* at 311-15.

³⁶ JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

³⁷ *Id.* at 207.

mon concerns.”³⁸ Unlike pluralist democrats, Dewey does not mention deep conflict within the public. Rather, the public’s “essential need . . . [is improved] debate, discussion, and persuasion.”³⁹ Conflict is only implied by the need for the public to prevail over elites. “No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few. And . . . [the public must] force the administrative specialists to take account of the needs.”⁴⁰ Clearly, democracy must be participatory. “From the standpoint of the individual, it consists in having a responsible share according to capacity in forming and directing the activities of the groups to which one belongs”⁴¹ But this “responsible share” seems deliberative and solidaristic, in a republican sense, rather than a matter of interest group bargaining or conflict. Future improvements of democracy, Dewey argues, must “make the interest of the public a more supreme guide and criterion of governmental activity, and . . . enable the public to form and manifest its purposes still more authoritatively. . . . [T]he cure for the ailments of democracy is more democracy.”⁴² A full blown republican theory would have relevance for the design of many structural features of a democratic order. Here, the point is that the press or the media constitutes a central democratic institution. Its design ought to facilitate the process of deliberating about and choosing values and conceptions of the common good.

D. *Complex Democracy*

It is difficult to deny the existence of people’s altruistic impulses. People often act selflessly to aid others and to serve varying common goods.⁴³ Social life as we know it would be impossible without these elements. Likewise, people surely need processes by which they can clarify both their individual preferences and their conception of more general common goods,

³⁸ *Id.* at 209. Dewey observes that “[t]he world has suffered more from leaders and authorities than from the masses.” *Id.* at 208.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 147.

⁴² *Id.* at 146.

⁴³ Obviously, an act done to further a common good of which the actor is also a beneficiary is not necessarily altruistic; however, it is altruistic (or an embodiment of a claim of solidarity) to the extent that the direct benefit to the actor is less than the direct cost of the act to the actor. In this circumstance, the act can be, and experientially is, justified by the benefit to the group. The claim that the act is still not altruistic because the actor’s identity is tied to the benefited group (or, if the act benefits a stranger, because the actor’s identity is tied to humanity) and, therefore, the actor benefits to the extent that the group (or stranger) does, is not—at least for my purposes—a refutation of altruism, but rather an argument that places solidarity as opposed to self-interest at the core of a person’s being.

the feature most emphasized by republican theory. It is equally difficult to deny that much of politics (and of life) involves bargaining, reflects self-interest, and often relates to real conflicts of values. A further complexity is involved in the many cases where political bargaining does not reflect people's narrow self-interest, but rather groups' conceptions of the good that their members favor. Here, a person may favor this good within the political or public arena not out of any personal desire for a benefit, but solely because of solidaristic, even altruistic, impulses to further the group's interests. A more "realistic" theory would assume that a participatory democracy would and should encompass arenas where both individuals and groups look for and create common ground, that is, common goods, but where they also advance their own individual and group values and interests.⁴⁴ Moreover, normatively, it is difficult to argue that either type of political striving is inappropriate for an ethical person or within a justifiable politics.

Individuals and groups can have both real conflicts of individual or group interests ("I or we want more country music rather than your classical 'junk.'") and unresolvable disagreements about the common good ("As a people, we would be better-off with more wilderness areas rather than the roads you want."). In relation to these conflicts, when real and unresolvable, the political structure should facilitate fair bargains or compromises. These conflicting group interests or alternative conceptions of common goods, however, have complicated histories. Republican theory as described above emphasizes that common ground or societal public goods do not spring forth preformed, but require discursive development. This same point is also true of groups' own "common goods." Groups require their own internal processes of value formulation and clarification. Processes that the republican intends to serve discursive value formation and clarification for society as a whole should be duplicated at the group level to serve each group's internal discursive needs. An adequate participatory democratic political order must provide institutional or structural support for discursive political processes at levels below society as a whole.

As noted, some liberals argue that the collective treats differences fairly only if the law does not favor any conception of the good.⁴⁵ In contrast, re-

⁴⁴ Nancy Fraser develops most elements of what I call complex democracy in her critique of Habermas's original formulation of the notion of the public sphere, although I find Habermas's position, especially as developed in his more recent discussion of democratic theory, fully consistent with Fraser's approach. See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109, 137 (Craig Calhoun ed., 1992) (arguing "against four constitutive assumptions of the bourgeois conception of the public sphere" while identifying "some corresponding elements of a new, postbourgeois conception"); cf. *infra* text accompanying note 55.

⁴⁵ See *supra* note 25 and accompanying text.

publicans sometimes claim that there is a truly “common” good to be found or formulated and then furthered. From the republican perspective, group assertion of distinct interests and maintenance of divergent perspectives is always a matter of concern—a sign of inadequate integration. “The question is how to cultivate the spirit of solidarity . . .”⁴⁶ The melting pot dream looks to the time when all people’s interests will be merely human interests. From a left republican perspective that seeks politics of equality that will embody the “essence” of “Americanism,” the “squandering of energy on identity politics . . . is an American tragedy.”⁴⁷

The choice, however, need not be between liberal pluralism and republicanism (as described above)⁴⁸—or, worse still, a “partial good” imposed by an oppressive elite. In contrast to republicanism, an adequate democracy must recognize that different groups and different interests do exist. Such differences are probably inevitable in a free society.⁴⁹ More importantly, they are desirable. Multiculturalism—the recognition and celebration of difference—could be a move towards a realistic and, most importantly, a more inclusive, nonoppressive conception of society. Even though there may be real “common goods,” significant aspects of any single group’s good will differ from that of others, just as is true for individuals. A good society will have many groups that develop divergent, potentially conflicting “common goods.” Inevitably, these differences and conflicts often will not be dissolved through discussion. As a result, many of these conflicting goods will not be realized perfectly in society. But a democratic order must encompass giving different groups—just as it gives different individuals—

⁴⁶ TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS* 217 (1995).

⁴⁷ *Id.* at 35, 44. Gitlin notes the pervasiveness of this theme on the left. In addition to citing Dewey, Carl Sandburg, Paul Robeson, Frank Capra, and Woody Guthrie, he quotes Communist Party Leader Earl Browder: “Communism is twentieth century Americanism.” *Id.* at 56.

⁴⁸ I emphasize this because some people who consider themselves liberal pluralists or republicans will think my description overly flat; some will view the conception described here as complex democracy to be closer to their self-described republican or liberal views.

⁴⁹ This conclusion helps explain, for example, the attention recently given by John Rawls to showing that certain principles of justice can be defended on the basis of an overlapping consensus of reasonable views. See JOHN RAWLS, *POLITICAL LIBERALISM* 10 (1993) (discussing how “political liberalism looks for a political conception of justice that . . . can gain the support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines”). Although many see the later book as representing a change from his earlier *A Theory of Justice* (1971), an alternative reading can see them as congruent but as engaged in different tasks. The earlier book is a philosophical argument that “justice as fairness” is the best liberal account of justice, while the later book takes up the politically or pragmatically important task of arguing to a pluralist society that the acceptability of “justice as fairness” is not dependent on its liberal pedigree.

fair scope to develop and live their differences.⁵⁰ And “fair scope” will presumably be a matter, at least partly,⁵¹ for bargaining and compromise.

A pluralist society will encompass different groups whose separate conceptions of the good will partly overlap and partly be in tension. The appropriate extent of societywide common goods and of legitimate integration should be a matter for noncoerced agreement by individuals and groups. But any search for the more inclusive “public goods” will be noncoercive only if groups first have an adequate opportunity to develop their differing perspectives, and then have their perspectives fully voiced and given their due.⁵² Purportedly “common” public spheres, especially if they claim to bracket differences, inevitably manifest particular cultural content, usually that of dominant groups.⁵³ Any majoritarian or elite denial (or bracketing)

⁵⁰ Mill treated his argument for free speech as illustrative of his argument for liberty. JOHN STUART MILL, *ON LIBERTY* (Bobbs-Merrill ed. 1956) (1859). Mill ignored a difference between his argument for freedom of expression and for liberty—with the difference being quite relevant to the argument for different theories of democracy. According to Mill’s writings on thought and discussion, people’s actions and their concepts of the good are best founded on truth, discoverable in the long run by free speech. See *id.* at 19-67. This premise seems to suggest that differences—like differences in opinion—are ultimately only instrumentally valuable as a means to arrive at truth and that truth would be the same for everyone. Mill maintained that “no belief which is contrary to truth can be really useful,” *id.* at 28, and that “the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested.” *Id.* at 53. Although Mill valued liberty, in part, for these same reasons of experimental progress, he also valued liberty because “different persons . . . require different conditions.” *Id.* at 82. In order to give “fair play to the nature of each, it is essential that different persons should be allowed to lead different lives.” *Id.* at 77. In the terminology used above, the first argument, which instrumentally values freedom of speech, aims for a melting pot, while the second argument, which values liberty (and difference) as an aspect of the good for persons, celebrates multiculturalism.

⁵¹ To the extent that the “good” conflicts with principles of justice, like the “good” of the sadist, a justifiable democracy would try to rule out or suppress, rather than bargain over, the practice of that conception of the good. See, e.g., C. Edwin Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381 (1978).

⁵² Fraser makes this point. She emphasizes that reducing the oppression of a stratified society requires flourishing public spheres of “subalternian” groups and thematizing rather than bracketing difference in such societies. She also emphasizes the contribution of a plurality of public spheres within a desirable, egalitarian, multicultural society. See Fraser, *supra* note 44, at 120-25. In other words, these partial public spheres are valuable both as a means and as an end.

⁵³ Robert Post persistently argues that attempts to structure public discourse predictably lead to this result—that is, the improper rule of dominant perspectives. Post’s observations are relevant as objections to censorship or limitations on individual autonomy. To the extent, however, that they are leveled against Cass Sunstein’s arguments for a more managerial approach to the media, see ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 268-89 (1995), Post risks ignoring the fact that media institutions are inevitably legally structured and that this legal structuring historically often has been *and should be* oriented toward conceptions of the good in general and towards serving favored conceptions of democracy in particular. See C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57. Given inadequacies and distortions of market media production, blanket

of actual or experienced differences during a purportedly impartial or “reasoned” democratic search for a public good inevitably involves ideological oppression. Greater societal integration may or may not be desirable. But integration can be nonoppressive only if historically subordinated groups first are able to develop, examine, and articulate independently their own identity and consolidate their own strength. These groups need their own discursive development, their own public spheres and media in which they can independently develop identity and strategies. Only then can a group properly agree on “common goods.” If these observations are right, a legitimate democracy properly includes a discursive search for common goods and agreement, but it also must involve recognition of goods that are not common and about which there must be fair bargaining and compromise.⁵⁴

This complex view combines elements of liberal pluralism and republican democracy. It assumes the reality and legitimacy of bargaining among groups over irreconcilable goods, but also hopes for discursive development of common conceptions of aspects of the good. This vision of complex democracy generally corresponds to the democratic theory recently developed by Jürgen Habermas. Habermas argues that democracy is not a matter of merely following appropriate principles of justice while maximizing and allocating private goods, as claimed by some interest group pluralists (the liberal view). He also contends that democracy is not solely a matter of finding, constituting, and pursuing societywide common goods (a republican account).⁵⁵ A preferable “discourse” theory of democracy encompasses republican-type discourses aimed at ethical self-understanding and self-

objections to a managerial approach are misguided; the need instead is for principles that limit managerial abuse and democratic theory that guides managerial input. Sunstein’s approach may be entirely consistent with the perspective of complex democracy described here. He emphasizes the democratic value of “disagreement and heterogeneity”—that is, “diverse perspectives, and contributions to democratic discourse made by people differently situated.” CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 242 (1993). Nevertheless, Sunstein often seems to value this diversity much as Mill seemed to value freedom of speech: as an aid to a common discourse useful in reaching appropriate conceptions of a truly common good (or, in Mill’s case, of the truth). See MILL, *supra* note 50, at 19-67. To this extent, Sunstein’s conception of democracy is more aligned with what I have labeled as republican democracy than with complex democracy.

⁵⁴ This bargaining is not only over distribution but also over conceptions of the good that will be promoted or embodied in law and public policy. Respect for difference, however, requires that losing (or possibly only temporarily losing) conceptions not be suppressed even if they are not embodied or promoted.

⁵⁵ See generally Jürgen Habermas, *Three Normative Models of Democracy*, 1 *CONSTELLATIONS* 1 (1994). This theme reoccurs at many points in Habermas’s major recent book on legal theory. See HABERMAS, *supra* note 2, at 166-67, 180, 283-86, 296-302 (discussing a “discourse theory of deliberative politics,” which combines elements from both the liberal and republican models).

constitution of specific historical communities. This ethical self-constitution, however, should be “subordinate to moral questions.”⁵⁶ Acceptable political decisions must be consistent with, although not entailed by, principles of justice that “claim universal validity.”⁵⁷ Moreover, Habermas argues that “compromises make up the bulk of political processes”—that is, politics also includes “fair” bargaining leading to compromises between groups that presumably maintain separate identities under conditions of cultural and societal pluralism.

In this account of democracy, Habermas sees politics as encompassing different types of discourses that take on different tasks. These discourses include both compromising interests and finding elements of a shared common good. Presumably, groups or communities within the inevitably pluralistic society also retain the task of defining non-societywide, more particularistic “common goods.” Thus, this account rejects republicanism’s totalizing conceptions as oppressive, but incorporates the republican idea of self-defining or public good-constituting discourses as one key aspect of politics. Given pluralism, different self-defining discourses must occur at both the societal and group level. This implicitly requires different “public spheres”—those in principle open to all and also those open to all who are members of, or who identify with, smaller, pluralistic groups. Finally, this account rejects liberal pluralism as founded on an unrealistically stunted conception of people and politics; but it incorporates the liberal pluralist’s recognition of fundamental value conflicts and the need for bargaining and compromise.

E. *Methodological Aside*

A central theme in this Article is the implicit connection between a person’s allegiance to one or another vision of democracy and her other views—a claim that this Article discusses mainly in terms of how different democratic commitments affect judgments about the role of the press. Here, however, I illustrate this claim by tentatively suggesting that these democratic allegiances can also relate to a person’s preference among differing legal methodologies.

Scholarly methodologies are tools. A tool’s usefulness varies depending on the task. Thus, although the choice of methodologies will not rigidly track political or normative commitments, my claim is that different value

⁵⁶ HABERMAS, *supra* note 2, at 97. Here, “moral” refers to purportedly more universal normative principles, while “ethical,” although also referring to normative principles, is more culturally and historically specific, more overtly open to choice and variation among societies.

⁵⁷ *Id.* at 5; *see also id.* at 452.

commitments often suggest different ways of approaching or seeing problems and should resonate most with specific methodologies. I suggest, for example, that much of law and economics scholarship fits most comfortably with elite democracy theory. Law and economics typically evaluates a legal rule's or legal institution's efficiency, taking distributions and preferences as given. An easy, though not necessary, jump goes from a scholarly focus on questions of efficiency to the view that achieving efficiency is the proper focus of government. If a distribution and a set of preferences is taken as given, as in law and economics, or is taken as not being in real or serious dispute or involving disputes that the government can and should largely ignore, as elite democrats often believe, the key governmental issues seem technical—for example, how to efficiently serve people's preferences. The task of figuring out technical solutions wisely can be turned over to experts or elites—that is, often to economists. From this perspective, political failure lies in not finding efficient solutions. Corruption can be defined in economic terms basically as “rent seeking.” It is best countered by virtue, but democratic elections provide a systematic means both to deter corruption and to replace a corrupted elite with one promising greater virtue and skill. Elite democracy makes considerable sense if society's key problems are those thematized by law and economics.⁵⁸ Or, from the reverse perspective, for an elite democrat, the most obviously useful legal methodology would lie in the type of problem-solving capacity offered by an efficiency-oriented economics.

In contrast, the main branches of positivist political science fit better with liberal pluralist understandings of democracy. The tough-minded, positivist political scientist sees politics as a struggle for advantage. To a significant extent governmental decision making is about whose interests prevail or, even more crudely, about the distribution of wealth in its many forms. Positivist theorists describe the struggle. Or, given a normative interest in fair outcomes, the positivists' inquiry can be directed at the design of institutional arrangements that will best achieve fair distributions or a fair

⁵⁸ Elite democrats are not inevitably efficiency oriented, however. The key to the correlation between elite democracy and economic efficiency analysis is that the interest of the whole is largely objective. Edmund Burke favored rule by a natural aristocracy capable of governing and saw the only role of elections as a means to pick this elite—a rationale fully consistent with his belief in restricted electorates and the complete lack of popular involvement in governing. See HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 168-89 (1967). Pitkin describes Burke's view of interests as being basically objective. Given this relatively objective concept of interests (both of the whole and of the parts), the best government will result when “with at least one able representative of every [broad, objective] interest participating, rational deliberation discloses the national interest.” *Id.* at 188. Thus, Burke emphasizes the elites' “judgment, virtue, and wisdom derived from experience,” *id.* at 169, rather than their efficiency calculations.

response to different groups' interests. These inquiries roughly equate to the pluralist conception of democracy.⁵⁹ Of course, this competitive struggle for advantage is not the only plausible vision of politics or of government as an object of study. As C.B. Macpherson pointed out, this "pluralist elitist equilibrium model" of politics makes sense only as long as (and to the extent that) market society and the market image of humans totally dominate the world.⁶⁰

Other methodologies could plausibly be associated with commitments to other theories of democracy. Neither the democratic elitist nor the liberal pluralist, for example, would see much point in "story telling" or "law and literature." These methodologies, however, could be vitally important to republicans and, for potentially different reasons, to complex democrats. These methodologies explore particular values and cultural commitments, portray alternatives, and raise normative dilemmas concerning differing ways of being. For the republican and sometimes for the complex democrat, stories can usefully contribute to a deeper and often more inclusive mutual understanding of the whole. For the complex democrat, however, stories will often (primarily) address more limited audiences. The stories (or the scholarship) will function primarily within the internal debates of a specific group, helping the group to find and to understand its own identity, commitments, and strategies.

Similar observations may be made about other interpretative methodologies such as anthropological ethnographic studies. Legal students' and scholars' commitments to different conceptions of democracy and different understandings of the nature of public issues will influence the methodolo-

⁵⁹ The law and economics and positivist political science that I contrast here are admittedly very similar in many respects. Both approaches are relatively Hobbesian. Both assume basically self-interested individuals. Both tend to take interests or preferences as a given. (I only say "basically" and "tend"—the best practitioners of any methodology often problematize an assumption usually taken for granted in the methodology.) Both then consider how economic or political orders facilitate or prevent people from efficiently or fairly advancing their interests. Most practitioners are sufficiently self-aware to see that their inquiries only engage a limited range of concerns and are aware that others, using slightly or radically different methodologies, develop interesting visions. In standard applications, however, although both treat preferences as exogenous, they differ in that the economic model usually also takes the existing distribution of wealth as a given while the political scientist sees the struggle over distribution as central. Even reinstating the analogy by suggesting that the pluralist political scientist takes the existing distribution of power as given is not quite right in that the political scientist often investigates how particular institutional arrangements distribute power while "law and economics" economists usually emphasize how different frameworks affect efficiency.

⁶⁰ See MACPHERSON, *supra* note 3, at 77-79, 91-92 (explaining that in this model, "[d]emocracy is simply a market mechanism: the voters are the consumers; the politicians are the entrepreneurs").

gies that they find useful. Of course, a methodology's utility is not objectively determined. Rather, its usefulness depends on those issues that a person's value commitments—such as her theory of democracy—indicate are the most important to explore.

F. *Participatory Theories' Ideal Media*

Each version of participatory democracy treats somewhat different attributes of the governing process as crucial. The optimal design of institutional structures depends on the functions of democracy emphasized by the favored democratic theory. Similar observations apply to the design of the press, which, though usually privately owned, is widely recognized as an institution that plays a crucial role in democratic governance.

Liberal pluralist democracy hopes to generate fair bargains as a result of groups pressing their interests. In this process, the media should perform several tasks. First, the press should provide people or organized groups with information that indicates when their interests are at stake. Second, the media must mobilize people to participate and promote their divergent interests. Note that neither function, information nor mobilization, and presumably the media structures that facilitate them, is necessary for elitist democracy. Third, for pluralist democracy to work, information about popular demands must flow properly—that is, given the practical gap between citizens and policymakers, the press should make policymakers aware of the content and strength of people's demands.

For at least the first two of these tasks, a common media serving society as a whole likely will not suffice. Most pluralist interest groups conclude that only their own media effectively identify when their interests are at stake. Often, only their own media will develop and present information relevant to their needs and interests. Groups also need their own media for the second function. Arguably, the decline of competing partisan daily newspapers contributed to the decline of voter participation in the United States.⁶¹ Pluralists rely on partisan, mobilizing media entities to help spur participation. Thus, they should be unalterably opposed to such a monopoly as it strangles democracy. Moreover, competing media entities should not compete merely for undifferentiated shares of a single, mass audience. Segmentation is necessary in the pluralist vision. The hope is for separate media entities, with each entity focused on, and preferably controlled and

⁶¹ See C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 41-43 (1994); MICHAEL E. MCGERR, *THE DECLINE OF POPULAR POLITICS* 116-35 (1986) (describing the role of the partisan press in making the political world seem accessible, exciting, and important, thus generating higher voter turnout).

maybe owned by, one of the various groups making up the polity (or controlled by individuals whose primary allegiance is to one of these groups).

Republican democracy has a very different vision. Two elements are crucial. First, the press should be discursive, supporting reflection and value or policy choice. Second, this discursive press must be inclusive. The democratic pursuit of, and hopefully agreement on, a real common good requires an inclusive public discourse. Popular involvement in democratic deliberation requires at least that "serious issues . . . be covered in a serious way" and "that a significant portion of the citizenry is actually exposed to diverse views."⁶² The press ideally should be civil, objective, balanced, and comprehensive—although some slippage might be allowed if necessary in order to not overly restrict participation. Still, the republican might be ambivalent about mobilization, certainly more so than the pluralist for whom partisan mobilization, which often lacks civility, is crucial. The republican wishes to see politics as a matter of the better argument, rather than as pressure politics. Participation by the uninformed and unreflective is hardly a gain. Nevertheless, corruption, narrow self-interest, or possibly even policy inertia can also thwart realization of the common good. Thus, a mobilizing press may be needed, but it should be directed at general civic mobilization on behalf of honesty, good procedure, and responsiveness to popular demands. The segmented, partisan media required by pluralist democracy is unnecessary and could be disruptive and thereby impede reflective discourse and agreement. Indeed, the republican can be happy with media entities that are dominant within a community as long as these dominant media are adequately inclusive and comprehensive. But, these media are only desirable *if* sufficiently responsible—which becomes a crucial republican concern.

Complex democracy seeks a political process that promotes both fair partisan bargaining and discourses aimed at agreement. Like pluralists, complex democrats require institutions, including media entities, that assist groups in recognizing when their interests are at stake and in mobilizing their members. Segmented media can help groups participate in political bargaining aimed at obtaining their fair distributional shares of social resources. Complex democrats also require institutions, presumably including inclusive, nonsegmented media entities, that support a search for general societal agreement on "common goods." Thus, complex democracy entails a media system that performs the somewhat conflicting functions respectively highlighted by liberal pluralist and republican theories. And, it requires more.

⁶² SUNSTEIN, *supra* note 53, at 20, 22; *see also id.* at 251.

According to theories of complex democracy, diverse groups sometimes can agree on a societywide "common good," but sometimes choose instead to pursue their own separate vision. Agreement on a common good, however, is real only if based on each group's own needs, projects, and commitments. A group's own pursuits, however, do not flow from obvious, objective interests or commitments. Despite the great influence of history and context, and despite a high correlation between circumstance and interest, these "objective" factors do not strictly determine a group's identity and interests or value commitments. Identity and interests, as well as the strategies for their pursuit, often result, and, if the group is self-determining ought to result, from the group's discursive reflection and potentially revisable choices or commitments. Normally, identity and commitments are best arrived at or properly affirmed through discourses largely internal to the group. Unless groups' internal needs for discourse are met, purportedly broader solidaristic or altruistic conceptions of the public good almost inevitably mask dominant groups' oppressive impositions of values. "Dissenting" or minority groups are left with the unfair choice of assimilating under oppressive conditions or appearing selfish as they deny purported common goods and pursue their own apparently narrow interests. To avoid these alternatives of oppression or marginalization of minority groups, complex democracy increases the assignments given to the media.

Complex democracy requires media entities that support groups' internal discursive and reflective needs for self-definition, cultural development, and value clarification. All functions that republican theory assumes the media should perform at the societal level, the complex democrat expects a segmented press to perform for each group at this subsocietal, group level. The centrality of these self-reflective and self-defining activities also points to media forms largely ignored in the vision of the elitist or pluralist. Fiction, art, and dance are not only valuable in themselves, but also play integral roles in individuals' and groups' reflective and definitional processes. If preferences or interests are fixed, and the only issues are technical (elitist) or distributional (pluralist), these media forms have little democratic relevance. Art and fiction, like other consumer goods, may have social value—and some lawyers with an impulse toward favoring free speech may want to provide them with some constitutional privilege. Elitist or pluralist press theories, however, can properly disregard these forms. That conclusion changes somewhat for the republican. Even then, those fictional or artistic contents that would be truly useful in republican discourse are unlikely to be in much danger of political suppression. For a complex democrat, however, these media forms not only have major significance to groups' self-defining discourses, but also may be in danger of inadequate economic nourishment or direct suppression. Dominant groups sometimes find the art or fiction of

outlying groups to be exotic, while, at other times, to be unrefined and base, perhaps even threatening. Often dominant groups see the cultural expression of outliers (or, as another example, each generation's children) as the paradigm of "unreason"—sometimes dangerous and, at best, an arousing, offensive diversion.⁶³ Nevertheless, complex democrats would expect these media forms to make significant democratic contributions to groups' internal discursive needs. The vibrancy of these media provides some evidence of the health of the complex democrat's ideal media realm.

Thus, complex democrats have the most robust hopes for the media. They seek both a societywide press called for by republican theory, and a strong, partisan, segmented press called for by pluralist theory. In addition, segmented media entities should support the same value and identity clarification tasks internally for "each" individual group that societywide media entities provide for society as a whole.

The difference between the visions of the media held by each democratic theory is further exemplified by their views towards the nature of the information that media should produce—for example, the nature of the information produced about the public itself. In a representative democracy, elections provide some, but usually quite inarticulate, information about the public. Democratic theorists would want the media to help fill the gap—providing whatever information flows out to the public or up to the government elites that the theorist believes democracy requires. For elite democrats, this may be limited to basic information about people's unmet needs. For participatory democrats, however, the expectations are greater, with the specific expectation varying with the participatory theory.

Consider two notions of public opinion: (1) a common current view that defines public opinion as the sum of polling data about any matter, gained by privately questioning people without any requirement that they engage in reflection, and (2) the classical view that public opinion is what members of the public think, after reflection or discussion, about a public issue, possibly further restricted to reflective views asserted in public.

For the liberal pluralist, the first notion may serve. The "polling" conception of public opinion could seem natural to a pluralist who takes interests as exogenous and considers only their advancement as internal to the political process. For the pluralist, a legislator engaged in political struggle, like a poker player, needs to know what cards she holds; when bargaining, she needs accurate information concerning the depth and breadth of constituents' preferences. To some extent, polling organizations supply this in-

⁶³ See Kenneth Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 109-16.

formation. The major problem is that polls typically fail to reflect the intensity of concerns. (Different attitudes about this failure are possible, however. For example, George Gallop saw this blindness as a desirable way to "neutralize the power of pressure groups."⁶⁴) For pluralists, the only doubts about polling concern the empirical question of whether polls cause more distortion by failing to measure intensities of preferences, than they eliminate by more adequately reporting those preferences of unorganized groups that are undermeasured by other means.

The republican should favor the more classical accounts of public opinion. The classical accounts understand "public opinion" as views formulated in public discussions about common interests.⁶⁵ From that perspective, polling has little to do with either identifying or measuring public opinion. Instead, polling duplicates liberal pluralism in its focus on existing private preferences, while lacking any methodological concern with reflective and discursively developed views. In the classic accounts, only the later represent politically significant public opinion.⁶⁶

Overall, pluralists are generally pleased that the press provides regular reports on polling data. Publication adds political force to people's (private and usually unreflective) opinions. The reports provide information about majoritarian attitudes. This information can have political effects both directly on government decision makers and indirectly to the extent that other members of the public often conform to apparent majoritarian attitudes. For liberal pluralists, this is as it should be. In contrast, republicans will be deeply suspicious of, if not irate about, this type of reporting by the press. Their concern is that reports of polling data give too much weight to unre-

⁶⁴ Charles T. Salmon & Theodore L. Glasser, *The Politics of Polling and the Limits of Consent*, in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT 437, 440-41 (Theodore L. Glasser & Charles T. Salmon eds., 1995). Salmon and Glasser contrast plebiscitary democracy, implicit in opinion polling, with a preferred alternative that amounts roughly to what I describe as republican democracy. See *id.* at 449.

⁶⁵ See Harry C. Boyte, *Public Opinion as Public Judgment*, in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT, *supra* note 64, at 417, 417 (discussing public opinion as "the outcome generated by a body of people . . . who come together through a process of discussion, debate, and dialogue about current affairs"); Elisabeth Noelle-Neumann, *Public Opinion and Rationality*, in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT, *supra* note 64, at 33, 34, 47-48 (describing the two main concepts of public opinion as rationality and social control, and maintaining that polling is relevant mostly to the second); John Durham Peters, *Historical Tensions in the Concept of Public Opinion*, in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT, *supra* note 64, at 3, 10-11 (discussing public opinion in the context of the press, as a "whole-scale conversation" among citizens). The classic critique of polling is Herbert Blumer, *Public Opinion and Public Opinion Polling*, 13 AM. SOC. REV. 542 (1948).

⁶⁶ Recent moves toward the use of focus groups to gather data may represent the conclusion that something closer to the classic notion is also instrumentally most efficacious.

flective, untested private views. In their view, the object of politics should be to generate and give force to the better argument—thus, any political effect of mere polling data is inappropriate. Further, republican theorists object to a media using its limited resources to focus on private preferences rather than on issues needing public attention and on the information and discussion relevant to their consideration. Complex democrats should agree with the substance of the republican objections, but recognize that the State appropriately responds in part to private needs and concerns, which are part of the data for bargaining discourses.

II. JOURNALISTIC IDEALS

Journalistic practice and journalistic ideals can reflect or be critiqued from the perspective of a particular conception of democracy. Here I examine journalism's dominant professional paradigm and the most important current alternative (or modification). These examinations first identify the conception(s) of democracy implicit in each. Then, since I consider complex democracy most appealing—an admittedly disputable judgment—I also consider each paradigm's adequacy from this democratic perspective.

A. Social Responsibility

The most influential modern American account of the goals of journalistic performance comes from the Hutchins Commission's report, *A Free and Responsible Press*.⁶⁷ Published shortly after the end of World War II, this work, especially as restated in the cold war classic, *Four Theories of the Press*,⁶⁸ describes a "social responsibility model" of the press.⁶⁹ The

⁶⁷ THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES, AND BOOKS (1947) [hereinafter HUTCHINS COMMISSION REPORT]; see also Everett E. Dennis, *Internal Examination: Self-Regulation and the American Media*, 13 CARDOZO ARTS & ENT. L.J. 697, 698-99 (1995) (stating that many media executives and critics have subscribed to the *Hutchins Commission Report*, and that it has been used as a text for journalism schools and media ethics courses). But cf. Lee C. Bollinger, *Why There Should Be an Independent Decennial Commission of the Press*, 1993 U. CHI. LEGAL F. 1, 1-2 (claiming that the Commission's report has "assumed only minor status within the history of freedom of the press in this century" but urging that it merits much wider influence).

⁶⁸ FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY, AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE AND DO (1956) [hereinafter FOUR THEORIES OF THE PRESS].

⁶⁹ See *id.* at 74-103; cf. LAST RIGHTS: REVISITING *FOUR THEORIES OF THE PRESS* I (John C. Nerone ed., 1995) (describing *Four Theories of the Press*, as "an influential classic in communications theory" that "has had a tremendous impact on teaching and thinking about freedom of the press"); Jerilyn S. McIntyre, *Repositioning a Landmark: The Hutchins Commission and Freedom of the Press*, 4 CRITICAL STUD. IN MASS COMM. 136, 137 (1987) (sug-

Hutchins Commission identified five responsibilities, the fulfillment of which could serve as a measure of press performance. The press should 1) provide "a truthful, comprehensive, and intelligent account of the day's events in a context which gives them meaning," a commitment evidenced in part by objective reporting; 2) be "a forum for the exchange of comment and criticism," meaning in part that papers should be "common carriers" of public discussion, at least in the limited sense of carrying views contrary to their own; 3) project "a representative picture of the constituent groups in the society"; 4) "present[] and clarify[] the goals and values of the society"; and 5) provide "full access to the day's intelligence," thereby serving the public's right to be informed.⁷⁰ The Commission also identified three tasks that are central to the press's political role: to provide information, to enlighten the public so that it is capable of self-government, and to serve as a watchdog on government.⁷¹ Fulfilling the five listed responsibilities would presumably accomplish these three tasks.

This conception of the press implicitly assumes that what a properly functioning democracy needs most from the media is "information." The press should present the day's events, a picture of all elements of society, and the day's intelligence—fulfilling the first, third, and fifth functions listed above. Thus, in 1953, Norman Isaacs, the president of the Associated Press Managing Editors Association explained: "The one function we have that supersedes everything is to convey information."⁷² Presumably, wise politics and wise decisions will follow. In addition to information, the Commission also recognized the obvious importance of values. Societal values need to be "presented" to, and "clarified" for, the public. Thus, the media's role is primarily as an educator. A professed commitment to performing this educational responsibility was evidenced by the media's own "codes of performance, which urge the media to respect accepted values and to portray the traditional virtues."⁷³

The Hutchins Commission's study took place in the context of an increasing concentration of the mass media. The long trend toward media

gesting that the Commission has had its "greatest circulation and influence" by way of Peterson's social responsibility theory).

⁷⁰ HUTCHINS COMMISSION REPORT, *supra* note 67, at 21, 23, 26-28; see also Theodore Peterson, *The Social Responsibility Theory of the Press*, in *FOUR THEORIES OF THE PRESS*, *supra* note 68, at 87-91.

⁷¹ See Peterson, *supra* note 70, at 74. In addition to its political role, the Commission noted the press's role as an advertising medium and an entertainment medium, and its need, as an ongoing entity, to be financially sound.

⁷² *Id.* at 90 (quoting Norman Isaacs, *A Small Town Paper Has One Supreme Ethical Duty—To Print The News*, *QUILL*, Dec. 1953, at 7, 15).

⁷³ *Id.* at 91.

monopolies, regularly in the news in the 1990s, was clearly observable in the 1940s, and the Commission advocated some government policies to promote pluralism and competition. Rather than object to the inevitable, however, the Commission treated this apparently irreversible trend primarily as evidence that the media must be responsible. "A press characterized by bigness, fewness, and costliness in effect holds freedom of the press in trust for the entire population."⁷⁴

"Responsibility" can be understood as a pragmatic response that makes the most of the fact of largeness and monopoly. A telling feature of each of the five responsibilities identified by the Commission—both those related to values and those related to information—is its compatibility with monopolistic media. With adequate professionalism and dedication, a single master of ceremonies, a monopolistic media enterprise could apparently perform them all. Echoing declarations commonly made by owners of modern monopoly newspapers,⁷⁵ the Commission asserted that power and monopoly impose obligations on media entities to present all sides of an issue and to provide the public with sufficient information.⁷⁶ Journalists' professionalism arguably qualifies them to identify the societal issues requiring attention and to gather the relevant information. Media critics should and do exist to point out lapses. The public should demand quality performance. Even then, a constant danger exists that a monopoly press will not be responsible. However, as long as journalists' professionalism, critics' watchfulness, and the public's demands lead the press to meet their responsibilities, a monopoly press poses no serious problems.

Much about the Commission's vision is praiseworthy. Providing information, performing the watchdog function, and maybe teaching people proper values are all that elitist democracy requires of the press, and all democratic theories demand at least the first two functions. To varying degrees, however, those who support participatory conceptions of democracy should be troubled by what the Commission leaves out (as well as the arguable naiveté of aspects of its vision). Republicans should have the fewest complaints. Like republican democracy, the social responsibility theory indicates a concern that "partially insulated groups come to understand one another."⁷⁷ Still, the top-down implication of the fourth function—present-

⁷⁴ *Id.* at 101.

⁷⁵ *See id.* at 83 (pointing out that during the twentieth century publishers began to speak "not merely of their right to exercise their freedom but also of the responsibilities attached to its exercise").

⁷⁶ *See Introduction* to FOUR THEORIES OF THE PRESS, *supra* note 68, at 5 (explaining that the basis of the social responsibility theory was the belief that "the power and near monopoly position of the press impose on them an obligation to be socially responsible").

⁷⁷ HUTCHINS COMMISSION REPORT, *supra* note 67, at 25.

ing and clarifying society's goals and values—sounds inadequately discursive. Similarly, the emphasis generally seems to be more on providing information than on promoting discussion, even though the second function (being a “forum”) may address this need. Finally, the republican may find the Commission's vision inadequate in failing to call for a media that supports civic mobilization. Admittedly, some references suggest an interest in participatory democracy. Still, the Commission explicitly does “not assume that all citizens . . . will actually use all the material” but rather, more in line with elitist democracy, assumes that many will “voluntarily delegate analysis and decision to leaders whom they trust.”⁷⁸

Social responsibility pales from other perspectives. It gives little structure or support to the social conflict emphasized and valued by the liberal pluralist. The Commission's list does not satisfy the pluralist's demand for media that aids groups in pursuing their agendas and mobilizing for struggle and bargaining.⁷⁹ Likewise, it does not satisfy complex democracy's additional demand for media that assist groups' own internal discursive development of identity and values. The Report does wish, ideally, to have “specialized media of advocacy” in addition to general media. The reason for the wish, however, is more elitist or, maybe, republican: partisan media could serve as checks on the fairness of the general media and provide “partial safeguards against ignoring important matters.”⁸⁰

Thus, the Commission's vision embodies an elitist, or, in some respects, a republican rather than a complex conception of democracy. Like republican or elitist conceptions, the Commission's socially responsible press must assume that society contains few deep divergences in interests and perspectives. Deep divergences cause different “facts” to be relevant for different groups—“responsible” presentation must make choices based on particular perspectives.⁸¹ Given deep divergences, even the same facts will have different meanings. The media simply cannot report the “context which gives them meaning” because that context will vary for different groups. In contrast, in the absence of deep social divisions, the same information and context could serve all. Reporting and contextualizing only require that reporters act professionally and that the press act “responsibly.” Thus, only the lack of deep divisions (or the failure to recognize these divisions) can make notions like objective reporting, “a comprehensive . . . account of the

⁷⁸ *Id.* at 28.

⁷⁹ The Commission does note that the republic involves “conflict and conscious compromise among organized groups.” *Id.* at 20. I see no evidence, however, that the Commission relies on this observation in its assignment of tasks to the media.

⁸⁰ *Id.* at 25.

⁸¹ *Id.* at 21, 28.

day's events," and "the day's intelligence" appear unproblematic as ideals.⁸² Only then could values be primarily a matter of "presentation" or "clarification," not debate and conflict. Without these deep divisions, by "rais[ing] social conflict 'from the plane of violence . . . to the plane of discussion,'" free expression can "promote[] the *harmonious*, fruitful society."⁸³ Apparently, a responsible press not only defangs conflict, but in the end exposes conflict as irrational.

Without deep divisions of interest and value, or with only divisions that do not profoundly color perceptions of facts and values, government decisions might be primarily a matter of problem solving, possibly best performed by experts. Although people's individual, private preferences may differ, significant societal issues and relevant information are largely an objective matter. Only this assumption allows the monopolist press to identify (as well as present) "all ideas deserving a public hearing."⁸⁴ Politics, if any, would be a matter of republican citizens coming together.

Of course, even in an elitist or republican democracy, society needs a watchdog. The public needs to accept the results of government. For this, they should be "enlightened." And whether the government is by elites or by a republican people, decision making requires information. Remember, the requirements of elitist democracy—a watchdog, enlightenment, and information—are the press's three politically relevant tasks emphasized by the Commission.

In contrast, if ideology (or experience) deeply colors perceptions of facts and values, even a "responsible" media entity is likely to effectively or primarily present issues and information relevant to the society's dominant ideological perspective. If conflict and divergent ideological perspectives are and should be central to politics, a monopoly media is likely to be able, at best, to *report* the differences. More likely, a monopoly public-affairs media will suppress differences—claiming objectivity for what is really a partisan vision. For example, outside a moderate to moderate-liberal, development-oriented stratum, *The New York Times*, perhaps the country's best paper, seems like a wildly biased and censorious apologist for established elites.⁸⁵ Democracy needs competing media to develop and promote alternatives. While this does not rule out the need for some socially respon-

⁸² *Id.*

⁸³ Peterson, *supra* note 70, at 102-03 (quoting HUTCHINS COMMISSION REPORT, *supra* note 67, at 113) (emphasis added).

⁸⁴ *Id.* at 101. The press does not need to present "preposterous" ideas. *Id.*

⁸⁵ For example, for several years, a progressive magazine, *Lies of Our Time* (or "LOOT") was devoted to exposing the distortions, errors, and "lies" of *The New York Times*. *LOOT* was published monthly from 1989 to 1994 by the Institute for Media Analysis (N.Y.).

sible media entities that try to be inclusive, informative, and clarifying, both pluralist and complex democracy also requires a segmented, partisan, mobilizing press. Furthermore, complex democracy requires these pluralistic media not merely to interpret groups to each other and to mobilize, but also to satisfy each group's legitimate internal discursive needs.

B. *Public Journalism*

The social responsibility model aligned itself more with elitist than with participatory democracy primarily in relation to what it left out. It emphasized providing information and being a watchdog—or, paternalistically, clarifying societal values. Performance of these functions should help elites in governing and aid the public in identifying and, hopefully, in throwing out corrupt officials. However, this vision of a socially responsible press placed no emphasis on mobilization or truly effective encouragement of popular participation.

The ethos of a socially responsible press is to provide merely the facts—or maybe the facts supplemented by context—that is, “the truth about the fact[s].”⁸⁶ Critics, however, recognize that values inevitably determine the choice of facts. This ethos of responsibility is itself not neutral. Its practice and content inevitably amount to a value-laden conception of the press's role—values that are further involved in adopting more specific interpretive frames. The socially responsible press uncovers wrongdoing. It avoids being tricked; instead, it identifies officials' hidden agendas, resolutely exposing public persons' inevitably hidden, self-interested concerns. It provides information that a moralistic public would consider discrediting. By making these choices, the press necessarily participates in and helps create, rather than merely reports on, the public order. The choices recommended by social responsibility—acceptance of an ethos of objectivity and of the informational and watchdog roles—align the press with the needs of elitist, rather than participatory, democracy. The press facilitates elites' rational decision making while deterring and exposing violations of the largely unproblematic norms of public office.

In the 1990s, many within the profession found neither democracy nor the press in good health. These critics observed that journalism's established routines provoked popular cynicism.⁸⁷ Detached objectivity encour-

⁸⁶ HUTCHINS COMMISSION REPORT, *supra* note 67, at 22.

⁸⁷ See, e.g., JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* 209-28 (1997) (“The thesis of our research [is] that the structures of the news about politics have direct effects on the public's cynicism.”); JAMES FALLOWS, *BREAKING THE NEWS* 7 (1996) (“Deep forces in America's political, social, and

aged a sense of powerlessness about civic processes. With considerable academic and foundation support, some editors and journalists spoke of "civic" or "public journalism" as an alternative to the existing journalistic orthodoxy.⁸⁸ Central to civic journalism is a view of the relation of journalism to democracy. More specifically relevant to the point that I want to assert here, civic journalism relates not just to democracy, but also embodies a conception of republican, rather than elite, liberal pluralist, or complex democracy.

Public journalism's leading academic champion, Jay Rosen, repeatedly emphasizes that public journalism is oriented toward "citizens as participants, politics as problem solving, democracy as thoughtful deliberation."⁸⁹ The image is that through "deliberation" the "public" can find its "common interests." In place of narrow self-interest, public life is about *common* problems, the *common* good, *common* work, *common* ground. "Common" seems to be the key—the word is used continuously within civic journalism circles. We are all in this together. In this picture, ours is a world where there are real issues, real problems, and real choices to be made, but where there is little fundamental conflict of basic values or identifications. The people—not the politicians or journalists—know their common problems and the people ought to be involved in applying their intelligence to solving them. Thus, Frank Enton, editor of *The Wisconsin State Journal*, defines civic journalism as "helping the public find the solutions to problems" as if politics was a matter of consensual problem solving rather than conflict.⁹⁰ Journalism, according to Rosen, quoting Davis Merritt of *The Wichita Eagle*, should be based on "'broad, shared values.'"⁹¹ Public life needs deliberation, but apparently neither class nor identity-based struggle. "The most basic form of politics is conversation about . . . choices and about what is really in the public's interest."⁹²

economic structures account for most of the frustration of today's politics, but the media's attitudes have played a surprisingly important and destructive role.").

⁸⁸ See, e.g., ARTHUR CHARITY, *DOING PUBLIC JOURNALISM* (1995); DAVIS MERRITT, *PUBLIC JOURNALISM AND PUBLIC LIFE* (1995).

⁸⁹ JAY ROSEN, *GETTING THE CONNECTIONS RIGHT: PUBLIC JOURNALISM AND THE TROUBLES IN THE PRESS* 16 (1996); cf. *id.* at 13, 50, 69 (asserting that the press should aim at "civic participation, deliberative dialogue, politics as problem solving, and the cultivation of 'democratic dispositions'").

⁹⁰ Robert M. Steele, *The Ethics of Civic Journalism: Independence as the Guide*, in JAY BLACK, *MIXED NEWS: THE PUBLIC/CIVIC/COMMUNITARIAN JOURNALISM DEBATE* 162, 162 (1997).

⁹¹ ROSEN, *supra* note 89, at 74 (quoting Davis Merritt, *Public Journalism: Defining a Democratic Art*, MEDIA. STUD. J., Summer 1995, at 131).

⁹² *Id.* at 50 (quoting DAVID MATHEWS, *POLITICS FOR PEOPLE: FINDING A RESPONSIBLE PUBLIC VOICE* 40 (1994)). David Mathews is president of the Kettering Foundation.

This civic vision calls for new journalistic practices. Journalism should self-consciously intervene in public affairs—not on behalf of particular viewpoints, but on behalf of invigorating public involvement. By sponsoring open community meetings, for example, a newspaper or broadcaster literally convenes the public for deliberation about public issues, and then reports on those deliberations. At present, public journalists insist that they are experimental, still trying to find ways to involve the public. Rather than try to catalog and evaluate its experimental practices, however, I want to first note the movement's justifiable appeal. Then, I will describe some of the vision's most troublesome limitations.

The distance of public journalism from the Hutchins Commission's elitist democracy is implicit in its characterization of the press's watchdog role as important but too limited.⁹³ Public journalism continually indicates that journalism's special role is to actively serve democracy—or, more specifically, “to promote and indeed improve . . . the quality of public or civic life [and to] foster[] public participation.”⁹⁴ Unlike the view of some versions of pluralistic democracy, public journalism properly rejects treating people and politicians as merely self-interested. It favors asserting and reporting on solidarity between people and on their common, civic interests. Its leaders recognize that a useful vision of journalistic practices must be tied to a conception of journalism's function. They see that function, to a significant degree, (without excluding making money for owners and employees and providing amusement and information for audiences) serves democracy. Public journalism tries to fulfill the democratic roles that the early Habermas saw performed by the people, although unfortunately, only the new bourgeoisie within a public sphere or public space.⁹⁵

Like the Hutchins Commission's model, however, civic journalism is consistent with the economic interests of a monopolistic press. If a single public interest exists, and if the political task is problem solving, then a single responsible convener of the public discussion could be ideal. Also, conveniently, civic journalism could help secure the press's financial viability, a point that its advocates do not ignore. Only if people are oriented towards civic problem solving, only if they participate in a public deliberative proc-

⁹³ See *id.* at 2, 82.

⁹⁴ Theodore L. Glasser & Stephanie Craft, *Public Journalism and the Prospects for Press Accountability*, in BLACK, *supra* note 90, at 120, 121.

⁹⁵ See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (1989); James W. Carey, *The Mass Media and Democracy: Between the Modern and Postmodern*, 47 J. INT'L AFF. 1 (1993).

ess, will they need the "news," the press's "value-added" product.⁹⁶ Still, critics of public journalism are wrong to see "convening the public" as merely a marketing ploy. Given the assumptions of republican democracy, professional journalists responsibly can find out what the public thinks and wants as a part of a participatory democratic process.⁹⁷

Still, civic journalism's slide into republican democracy may reflect less a considered judgment about democratic needs than an implicit acceptance of existing economic constraints. Today, monopolistic daily newspapers are the norm. These papers are unlikely to allow any journalism that threatens their extraordinary profitability.⁹⁸ As early as the late nineteenth century, an industry trade journal warned that newspaper partisanship could be suicide in a small town because it invites the opposing party to establish its own paper.⁹⁹ Arguably, the erosion of the economic basis of partisanship and the corresponding economic advantages of objectivity result from advertising. Advertising makes the ability to attract the largest audience the key to profitability. Hence, as the role of advertising in newspaper finances increased, it should be no surprise that avoidance of partisanship, except mildly on the editorial page,¹⁰⁰ increasingly became the norm.¹⁰¹ Whatever its merits, any democratic theory that recommends partisanship is unavailable to civic journalists, who largely accept the existing structure of the industry. In-

⁹⁶ See ROSEN, *supra* note 89, at 83 ("People have to participate, so that they'll want and need to become informed."); see also *id.* at 20; cf. MICHAEL SCHUDSON, *THE POWER OF NEWS* 27 (1995) ("Political activity leads people to follow the news. News does not ordinarily lead people to political activity.")

⁹⁷ Of course, there can be tension between serving democratic ideals and serving profit. Arguably, public (taxpayer) support for public journalism could improve its performance. See Theodore L. Glasser & Stephanie Craft, *Public Journalism and the Search for Democratic Ideals*, in *MEDIA, RITUAL, AND IDENTITY* 203, 215-16 (Tamar Liebes & James Curran eds., 1998) (suggesting that like libraries, museums, and schools, public journalism serves the public good and may deserve public support).

⁹⁸ See BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 119, 265-66 (4th ed. 1992) (describing an average 17.1% return on equity for publicly traded newspaper companies in 1980 and a five year average profit margin of 18.3%).

⁹⁹ See Gerald J. Baldasty & Jeffrey B. Rutenbeck, *Money, Politics and Newspapers: The Business Environment of Press Partisanship in the Late 19th Century*, 15 *JOURNALISM HIST.* 60, 66 (1988).

¹⁰⁰ The development of a ghettoized editorial page that purportedly separates opinion from news may have been a response to market advantages of emphasizing objective news, a consideration that even led *The New York Times* and *The New York Herald* to consider dropping their editorial pages. See MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 98 (1978).

¹⁰¹ See GERALD J. BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* 127-34 (1994) (describing the de-emphasis of politics in newspapers in accordance with market demands); see also C. EDWIN BAKER, *supra* note 61, at 28-29 (analyzing historical evidence and commentary to demonstrate that advertising played a significant role in the decline of partisanship in American newspapers).

stead, civic journalism champions participation, involves activism, but does not “cross the line.” Even as civic journalism’s proponents expose absurdities in the traditional notions of value-neutral objectivity, they continue to proclaim abstention from partisanship except for a partisan commitment to democracy and other broadly shared values.¹⁰² They claim to “function as ‘fair-minded’ participants in community life whose participation focuses on non-partisan processes and procedures.”¹⁰³ Journalists are to participate by “helping the public gain confidence in its own ability to reach consensus and solve problems.”¹⁰⁴

More sinisterly, a radical critic might charge that civic journalism amounts to ideological boosterism—a refined technique for legitimizing the existing order without challenging major injustices or structures of domination. A central motif in arguments for civic journalism is the need to respond to the current democratic distemper, the loss of faith in both the press and the political order.¹⁰⁵ Civic journalism seeks participation. Thus, *The Charlotte Observer* asks readers what should be done about rowdies taking over a neighborhood park. If this “journalism” successfully involves people more in civic life, it should count as a clear gain despite plausible worries that the paper would censor any radical views—the paper “said it would only print constructive suggestions.”¹⁰⁶ The more serious question is whether civic journalists also identify as problems and raise questions about the class structure of the city or the need for material redistributions of power. Christopher Conte notes that after *The San Jose Mercury News* encouraged readers to respond to the problem of special interests’ influence on the legislature, the paper then blocked the “convened” citizens’ impulses to lobby for limits on campaign spending. It viewed that response as too political. Instead, the paper encouraged its convened citizen readers to formulate a statement, which legislators could sign, concerning accountability.¹⁰⁷

A few examples prove little. Still, civic journalists’ emphases on deliberation and on problem solving easily connects with their consistent empha-

¹⁰² See ROSEN, *supra* note 89, at 70, 72-73.

¹⁰³ Glasser & Craft, *supra* note 94, at 123 (quoting CHARITY, *supra* note 88, at 11).

¹⁰⁴ ROSEN, *supra* note 89, at 72 (quoting Osborn Elliott, former editor of *Newsweek* and former Dean of Columbia University’s journalism school).

¹⁰⁵ See *id.* at 21-22 (discussing how the media coverage of politics has contributed to a drop in public confidence in the press); see also CAPPELLA & JAMIESON, *supra* note 87, at 209-28; FALLOWS, *supra* note 87.

¹⁰⁶ Christopher Conte, *Angels in the Newsroom*, GOVERNING, Aug. 1996, at 22; cf. CHARITY, *supra* note 88, at 86-87 (noting that twenty-two thousand people responded to Akron papers’ question of what can be done about racism in the city).

¹⁰⁷ See Conte, *supra* note 106, at 23.

sis on common ground and common interests. As a journalism of conversation, it "favors a publicly tested consensus over the spectacle of conflict."¹⁰⁸ Richard Harwood, a public journalism advocate, argues that "reporters should pay attention to areas of agreement, as well as conflict."¹⁰⁹ As professionals, civic journalists recognize that false reporting of harmony is improper; still, the repeated emphasis is on the importance of finding common ground and a real public interest. For example, in October 1994, a newspaper committed to civic journalism called a meeting between contending sides in a community dispute. The reporter originally assigned to cover the story first described the meeting as filled with conflict. The published version, however, was much brighter, describing how the meeting helped participants "find some common ground."¹¹⁰

From the perspective of complex (or pluralist) democracy, the pictures of both democracy and press activism offered by civic journalism are at best inadequate and at worst naïve and apologetic. Admittedly, civic journalism merits considerable praise for favoring participatory over elite democracy and for recognizing that journalism inevitably participates in, rather than merely objectively reports on, politics. These well-founded developments are revolutionary in many traditional journalistic circles. But civic journalism's emphasis on commonality distorts reality and at least stunts and arguably misdirects journalism's participatory role. Values and interests are often in real conflict. Some groups benefit and others suffer from existing oppression. Greater involvement in a "nonpartisan" pursuit of important but uncontroversial goals—safer parks or honest legislators—or in problem-solving agendas largely defined by and consistently acceptable to community elites, could substitute for popular struggles around issues involving real societal division and could divert popular challenges to inequality.

If democracy is, in part, about bargaining between segments of society with conflicting interests and about the struggle of the disadvantaged and their allies against the injustice of privilege, then a democratic order needs more partisan journalism. Particular groups, especially oppressed groups, also need more segmented or partial dialogues in which to develop their self-conception and their understanding of their own interests. Oppression may consist, in part, of the impoverishment of these partial discourses. At best, from the perspective of complex democracy, civic journalism's republicanism is inadequate. Common ground is valuable. Groups do need to talk with each other about collective problems. But these are not the only,

¹⁰⁸ Glasser & Craft, *supra* note 94, at 124.

¹⁰⁹ Conte, *supra* note 106, at 24.

¹¹⁰ Mike Hoyt, *Are You Now, or Will You Ever Be, a Civic Journalist?*, COLUM. JOURNALISM REV., Sept.-Oct. 1995, at 27, 27.

and sometimes not the most pressing, needs. At worst, civic journalism could be a technique of co-optation or legitimization that creates a false sense of participatory involvement without challenging entrenched elite interests. If so, it unwittingly serves the ideological needs as well as the economic interests of its owners. In any event, complex democracy would recommend going far beyond civic journalism and assigning additional partisan roles to the press.

III. FEARS AND POLICIES

Each theory of democracy, with its thematic assignment of duties to the press, generates its own set of fears about how the media might fail. Policy typically attempts to allay fears and serves the hopes of an operative normative theory. Not surprisingly, each normative democratic theory has different implications for media policy. Of course, since some theories do not repudiate but rather add to other theories' assignments, neither fears nor policies will always be unique to a specific theory. For example, although participatory democratic theories add citizen mobilization to the media's assignments, these theories share elitist democracy's fear that the press will be prevented from checking or otherwise unable to check government malfeasance or misfeasance. Here, I will describe each democratic theory's fears about media performance and suggest potential policy responses.

First, a preliminary matter should be noted. Do democratic media have any reason to seriously fear anything other than government? If not, maybe media policy itself is the only real threat. Proper media policy might be simply: "Government, hands off!" Fears necessarily reflect both values and factual assumptions. Factually, the market may create the press that democracy needs. For example, if democratic institutions ought to be what people want them to be and if markets automatically respond to (or, better, reflect) people's wishes, then a "hands off" conclusion could follow. An alternative route to the "hands off" principle might look to history and ask: has not government intervention, always loudly defended as furthering desirable societal interests, usually been found in retrospect to have improperly interfered with press freedoms and the press's democratic roles?¹¹¹

In this broad form, the abstract argument must be rejected.¹¹² The media contributes to democracy in ways not captured by the purchasers of the

¹¹¹ See generally LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 216-47 (1987) (making this type of argument with respect to broadcasting and cable television).

¹¹² See C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311 (1997).

media product. The quality of the media contributes substantially to public opinion and political activity and thereby to consequent governmental decisions. Thus, democratic discourse (and struggle) may determine whether a person gets good medical care or a clean environment or safe streets. These personal benefits, or their absence, are affected not merely by the media that the person buys for herself but even more so by the media content that other citizens consume. But this person has no adequate economic incentive to bring these benefits to bear in her purchase decisions, and hence, they normally play no role in the economic transactions that lead media producers to provide a better or worse product. Some of the media's major contributions, such as deterring corruption, do not even produce a product for it to sell. When the media's negative and positive contributions are external to market exchanges, market-oriented media enterprises will not, or at least not fully, take account of the value that people place on the media's contribution to what each person considers a well-functioning democratic order.

People also may be committed to a democratic theory that requires media practices that a market order does not even claim to provide. For example, just as with basic educational opportunities, people might be committed to an equality of opportunities to consume and maybe even to participate in the creation of media products; they may value media products designed for, or tailored to, the interests of all people equally. But these egalitarian commitments are not realized by a market that designedly responds to unequally distributed dollars. Moreover, markets do not provide reliable evidence of the extent of people's commitments to (or preferences for) this sort of equality.¹¹³ Operationally, the evaluation of markets avoids this circularity only by relying on the discursive elaboration (and political embodiments) of these commitments.

An ideal account of media policy might determine the democratic theory and then the corresponding conception of the press to which people are committed or would be committed after discursive reflection. This Part takes on a more modest task. It identifies each of the democratic theories' primary fears concerning the failures of or inadequate performances by the press and then examines their policy implications. For example, all democratic perspectives fear that the lure of profits or the competitive forces of the market could cause the press to short change its democratic role. Dif-

¹¹³ Public good and collective-action problems prevent markets from properly taking into account these preferences for equality even as weighted by the market's criterion of willingness and ability to pay. See Harold M. Hochman & James D. Rodgers, *Pareto Optimal Redistribution*, 59 AM. ECON. REV. 542, 542-43 (1969). Markets are even more inappropriate to the extent that the preferences should be democratically weighted. See Baker, *supra* note 112, at 388-97.

ferent democratic theories, however, vary in their view of when and where the short-changing occurs. Consequently, different democratic theorists vary in the policy responses, if any, that they would find congenial.

A. *Perspective of Elite Democracy*

Elitist democrats' primary media-related fear is governmental censorship that will undermine the media's checking function. Even benign governmental interventions threaten eventual censorship. Worse, the mere possibility of interventions can lead to media self-censorship as a means to avoid unfavorable regulation or to ensure favorable regulation. Any sacrifice of independence is dangerous. The press must keep government at arms length—which it cannot do once it is subject to regulation. Thus, some commentators interpret the First Amendment's Press Clause to mandate that government keep its hands off. Others add that the Press Clause protects the press's institutional integrity.

Elite democrats might develop a more complex view. While the danger of government undermining the checking function is real and constant, it is not the sole threat to the effective performance of the media's watchdog role. That role could be threatened from at least two additional directions. First, journalists and editors could abandon adequate performance due to laziness, incompetence, coziness with government officials, or conflicting professional ideals. Not surprisingly, a major worry about "civic journalists" is that, in order to find "common ground" and to engage all segments of the community in solving community problems, they will sacrifice their drive to expose and willingness to offend and, instead, will get into bed with local elites.¹¹⁴ Likewise, critics of traditional journalist routines, many of which reflect economic "realities," observe that these routines create incentives and dependencies that threaten the press's ability to be an effective watchdog. Journalists' relationships with government sources and their reliance on news beats focused on the most regular and productive sources of information can breed the dangerous dependencies and coziness that Hertsgaard calls "palace court" journalism.¹¹⁵

¹¹⁴ See Hoyt, *supra* note 110, at 32 (noting fears that public journalism leads to a "softness" of newspapers and the avoidance of controversy, out of fear of offending readers); Carl Sessions Stepp, *Public Journalism: Balancing the Scales*, AM. JOURNALISM REV., May 1996, at 38, 40 (describing the danger of the press losing its outsider status); Mike Tharp, *The Media's New Fix*, U.S. NEWS & WORLD REP., Mar. 18, 1996, at 72, 74 (noting the fears that papers will become too cozy with a community's elite). *But cf.* ROSEN, *supra* note 89, at 2, 82 (arguing that the criticism is misguided).

¹¹⁵ HERTSGAARD, ON BENDED KNEE, *supra* note 20, at 54.

Second, and possibly more relevant to constitutional issues, private centers of power can generate pressures that impede press performance. These pressures can be either internal or external to the media. Critics regularly blame the recent decimation of many papers' investigative journalism units on an increased bottom-line mentality within media enterprises. Printing news clipped from wire services is much cheaper than hiring investigative reporters.¹¹⁶ Either increasingly competitive conditions or greater assertions of control by bottom-line oriented chains and conglomerates can trigger newsroom budget cuts that leave the press without the resources to be an effective watchdog. Conglomerate ownership can also create pressures for the media units not to interfere with the economic interests of the nonmedia parts of the organization. The result can be that media entities become less watchful of the problematic corporate or government activities that intertwine with corporate interests. Outside the press itself, institutionalized critics, sometimes derogatorily called "flak producers," can undermine press performance by making the press worry about appearing biased or inadequately patriotic.¹¹⁷ Dependency on advertising can also undermine performance. Journalists (or publishers) who fear offending valuable advertisers may, for example, avoid reporting a local tax authority's (corrupt?) failure to fairly assess and tax a downtown department store's property. The media owner's other economic interests can blunt the reporting of problems generated by the city building a new stadium or convention center.

The press depends on both private and governmental power centers as the locational or content source for its routine news-producing activities. Some observers argue that this dependence causes today's press to be not a watchdog but rather a "guard dog" for groups with power and influence.¹¹⁸ To the extent that they share this view, elite democrats, though settling simply for the press's watchdog role, might favor government interventions that

¹¹⁶ Editors identify a high proportion of staff-written content to wire service or feature material as a major criterion of a good paper. See LEO BOGART, *PRESS AND PUBLIC*, 253-65 (2d ed. 1989).

¹¹⁷ See EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* 26-28 (1988). A press that exposes periodic abuses of power could appear on casual observation to be "biased" against the powerful even if that press leaves routine use of power unexamined. This view will likely be nurtured by the powerful, especially wealthy corporations and individuals, who have the easiest access to the resources needed to advance this view of press bias. Thus, performance of its essentially mainstream watchdog role can cause inaccurate portrayals of the press as having a leftist tilt.

¹¹⁸ See Clarice N. Olien et al., *Conflict, Consensus, and Public Opinion, in PUBLIC OPINION AND THE COMMUNICATION OF CONSENT*, *supra* note 64, at 301, 305 (suggesting that the media serve not as watchdogs for the community as a whole, but as guard dogs for groups with power and influence).

increase the media's capacity and readiness to perform that role. Still, the checking function is most overtly threatened by government censorship. For whatever reason, elite democrats seldom develop much passion for media policies other than those protecting the press from government.¹¹⁹

More than other democrats, elite democrats center their focus on the Constitution. Policy interventions seem inherently dangerous—more dangerous than they are worth. In order to ensure that the watchdog is not muzzled by those watched, the Constitution forbids governmental meddling. The extreme formulation of this view rules out any intervention that has the effect of “distorting” the press's communication. It requires a “wall of separation” between the press and the government.¹²⁰ Even favorable specialized treatment by the government can create a dependence and a willingness to bend to gain favor, thereby undermining the press's watchdog role. The Newspaper Preservation Act,¹²¹ usually seen as a benefit to the press,¹²² illustrates the problem. Apparently, both Knight-Ridder's *Miami Herald* and its *Detroit Free Press* ordered their cartoonists not to lampoon Attorney General Edwin Meese at the time when he had discretionary authority to decide whether to allow *The Free Press* to enter into a joint operating agreement with another Detroit paper.¹²³

Justice Potter Stewart has been the premier judicial advocate of protecting the structural integrity of the press. He argued that “[t]he primary

¹¹⁹ Cf. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 685 (1994) (O'Connor, J., concurring in part and dissenting in part) (“[T]he First Amendment . . . rests on the premise that it is government power, rather than private power, that is the main threat to free expression . . .”).

¹²⁰ See Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 732 (1977) (making an analogy to the Establishment Clause). On that basis, Bezanson concluded that the Constitution created a presumptive principle that the press could not be singled out for either benefits or burdens. *Id.* at 733-34.

¹²¹ This statute is codified at 15 U.S.C. §§ 1801-04 (1994).

¹²² *But see* *Committee for an Indep. P-I v. Hearst Corp.*, 704 F.2d 467, 481-82 (9th Cir. 1983) (noting Congress's realization that the Act actually benefits some of the press at a cost to others).

¹²³ See JAMES D. SQUIRES, *READ ALL ABOUT IT!* 123 (1993); see also LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 219-20 (1991). The Newspaper Preservation Act gives the Attorney General broad discretionary power to confer a major benefit—approval of a joint operating agreement—on individual papers. In contrast, media regulations that apply broadly and do not create discretionary official power to provide benefits or exemptions create much less of a problem. A legislative body is unlikely to strike at the press as a whole in response to the behavior of an individual entity. And, even if it would, an offending media entity is less likely to be deterred since it would itself bear only a fraction of the cost of such a response. No individual public television station, for example, should worry that its actions will cause reduced funding to the system as a whole. By structurally externalizing a “cost” (government wrath) on outsiders (other media entities), governance by mediawide rules should encourage individual media entities to act appropriately aggressive. Of course, increasing concentration of the media (or cross-ownership by enterprises dependent on government favor) reduces this safeguard.

purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."¹²⁴ He argues, for example, that the Constitution bars the government from "attempting to annex the journalistic profession as an investigative arm of government."¹²⁵ To prevent a government's appropriation of journalists' work products, Stewart would restrict government's power to force journalists to disclose the names of their confidential sources or to search newsrooms.¹²⁶ The loss of confidential sources and secure newsrooms increases the danger that the press will become little more than a mouthpiece for official statements and press releases.

Although the elite democrat sees merit in the press both explaining government policies to the public and providing elites information about the public's concerns and needs, only the press's watchdog role justifies constitutional protection. Government control and manipulation arguably presents the most serious threat to performance of this checking function. Therefore, the elite democrat likely is to be uninterested in media policy and opposed to most interventions. Instead, she is likely to favor a constitutional doctrine that is strong enough and clear enough that it will block suppression of the press even during pathological times—times when the checking role may be most vital, but when even judges may be inclined to approve purportedly justified interventions.¹²⁷

B. *Perspective of Republican Democracy*

Republican democrats recognize two primary dangers that can be exacerbated or lessened by the press, in addition to the concern with the press's watchdog role that republican and other democratic theorists share with elite democrats. First, republican democrats fear inadequate popular political

¹²⁴ Stewart, *supra* note 14, at 634; *see also generally* William J. Brennan, Jr., Address at the Dedication of the S.I. Newhouse Center for Law and Justice in Newark, New Jersey (Oct. 17, 1979), in 32 RUTGERS L. REV. 173 (1979).

¹²⁵ *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J. dissenting).

¹²⁶ *See id.* at 731 ("[W]hen governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from publishing it . . ."); *see also* *Zurcher v. Stanford Daily*, 436 U.S. 547, 573 (1978) (Stewart, J. dissenting) (explaining that unannounced raids by police on a newsroom will inevitably have a deterrent effect on the availability of news sources). I have described (and defended) Stewart's approach to protecting the institutional integrity of the press as justifying constitutional "defensive" but not "offensive" rights on behalf of newsgathering. This explains Stewart's rejection of special press constitutional rights of access to information or rights to violate normal criminal laws such as trespass, speeding, or wire-tapping laws in order to get a story. *See* BAKER, *supra* note 14, at 234-40.

¹²⁷ *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-50 (1985).

participation. Rather than talking with the public to “engage us in solving . . . shared problems,” the republican fears that the press will “con-tribut[e] to a mood of fatalistic disengagement.”¹²⁸ Although the press ought to stimulate citizen involvement,¹²⁹ republican critics worry that the media’s “relentless emphasis on the cynical game of politics threatens public life itself.”¹³⁰ Ironically, the ideals of detachment and objectivity, implicit in the *Hutchins Commission Report* and in the emphasis on the press’s “outsider” watchdog role, may contribute to this disengagement.¹³¹

The second republican fear is social disintegration.¹³² Society cannot exist as a babble of voices. A bleak vision foresees one family member watching only hours of MTV (music videos), another watching only old movies, and a third watching only public television. New media will follow magazines in dividing and subdividing targeted audiences into smaller and smaller ethnic, age, gender, occupational, and recreational groups. Each individual will receive over the Internet a customized newspaper that she designs in accordance with her individual interests or that her “intelligent computer agent” shapes in accord with her prior reading habits or personalized directives. The advertising industry’s new “relationship” marketing, made both feasible and cost effective by new computer technology, increases the economic base for this radical disintegration.¹³³ As this media segmentation advances, people will not develop any common fund of knowledge. They will become unable to engage in civic talk; they will have nothing to say to each other. Any common public sphere will wither and die.

This fear of disintegration envisions either popular habits or economic forces, causing the breakdown of a central, dominant media. The nightmare

¹²⁸ FALLOWS, *supra* note 87, at 240, 243.

¹²⁹ Fallows is quite explicit about seeing the tension as between what I have called republican democracy and elitist democracy—or as he describes it, between the views of John Dewey, whom he prefers, and those of the early Walter Lippman, whom Fallows characterizes as believing that the “only hope for effective modern government lay in cultivating a group of well-trained experts, who would manage the country’s journalism as well as its governmental affairs.” *Id.* at 236.

¹³⁰ *Id.* at 31.

¹³¹ See ROSEN, *supra* note 89, at 2, 5, 13-15, 82; see also, BAKER, *supra* note 61, at 41-43.

¹³² See Todd Gitlin, *Public Spheres or Public Sphericules?*, in MEDIA, RITUAL & IDENTITY, *supra* note 97, at 168. See generally Elihu Katz, *And Deliver Us from Segmentation*, in ROGER G. NOLL & MONROE PRICE, A COMMUNICATIONS CORNUCOPIA 99 (1998).

¹³³ See generally OSCAR H. GANDY, JR., THE PANOPTIC SORT (1993) (discussing the economics and complex technology involved in the collecting, processing, and sharing of information about individuals and groups that is used to control their access to life-defining goods and services); JOSEPH TUROW, BREAKING UP AMERICA: ADVERTISERS AND THE NEW MEDIA WORLD (1997) (describing advertisers’ contributions to social fragmentation).

intensifies as technological options and price structures change in the new world of broadband communications, including the Internet. Each separate community (or worse, each individual) will develop its own unique interpretation of the world, its own agenda, its own basis for action. Tribal segregation within self-enclosed media worlds will contribute to an unraveling of civil society. This radical pluralism threatens not just stability but the very possibility of legitimate authority. Of course, a public that is split between 500 cable channels and that reads personalized newspapers is a far step from the national or ethnic segmentation in portions of Eastern Europe or Africa, with the apparently consequential violence and governmental collapse. Still, the Yugoslav example purportedly stands as a warning.¹³⁴ The republican sees a dominant, nonsegmented media providing the necessary foundation for an effective public sphere and a truly common discourse. Society should avoid any media-driven "balkanization" of the public.

As noted, public journalism tries to respond to these dangers from within the profession. It is possible that republican media can only be created by struggles within the press, with thoughtful journalists taking the lead. Regulatory intervention may be too blunt a tool to induce appropriate performance of the media's republican discourse role. "[L]ike many other virtues . . . [press responsibility] cannot be legislated."¹³⁵ Still, structural legislation is often motivated by the hope that it will lead to better content and more responsible performance.¹³⁶ As a radical illustration, law could require that owners permit journalists to elect their managing editors,¹³⁷

¹³⁴ Ironically, one interpretation argues that the recent Yugoslav violence resulted, in part, as a rebound against the former Communist state's manipulative and authoritarian attempt to suppress segmented discourse. Cf. Thomas I. Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 11-14 (1966) (noting, as one of four values of the system, the maintenance of a balance between stability and change). Certainly, nationalistic political entrepreneurs during the breakup of Yugoslavia have manipulated the press to promote the Yugoslav ethnic animosity and conflict. See Warren Zimmermann, *The Captive Mind*, NEW YORK REV. OF BOOKS, Feb. 2, 1995, at 3, 3. Zimmerman, however, implicitly adopts a social responsibility perspective and rejects pluralistic media, twice mentioning with undisguised horror proposals to create politically opposing or ethnically separate broadcast services in Serbia. See *id.* at 6. Interestingly, he noted that a survey found nine out of ten viewers opposed to this segmentation. See *id.*

¹³⁵ *Miami Herald Publ'g Co. v Tornillo*, 418 U.S. 241, 256 (1974).

¹³⁶ See BAKER, *supra* note 61, at 61 (history).

¹³⁷ The Court in *Miami Herald* did not describe itself as protecting owners but rather as protecting editors. The law failed, the Court said, "because of its intrusion into the function of editors." 418 U.S. at 258. The Court said that it was protecting "the exercise of editorial control and judgment." *Id.* The proposal in the text would seem to embody the Court's concern to protect editors—in this case from owners. In fact, restrictions on the decisions of editors by corporate owners could be seen as the "non-governmental combinations" that do

thereby arguably restricting owners' abilities to enforce a bottom-line orientation. Such a law would be premised on the assumption that, like most workers, journalists take pride in their work.¹³⁸ Editors rooted in journalism and empowered by law are likely to resist attempts by bottom-line oriented publishers to erase the line between advertising and editorial efforts. Editors could also engage in republican discourse. Many less radical legal policies, however, can also help create the inclusive discourse that republicans favor. This Subpart considers a few of these.

Given the fear that legal interventions inherently threaten the press's watchdog role, one republican policy response might be to divide the press—leaving a “watchdog” realm untouched while creating a second realm where regulation affirmatively promotes a common democratic discourse.¹³⁹ Historically, much broadcast regulation fits the solidaristic specifications of republican democracy.¹⁴⁰ Regulatory policy could direct local broadcasters toward promoting republican political involvement. One strategy is to promote localism as the locus of actual popular participatory involvement.¹⁴¹ This was, in fact, the policy of the FCC. Although the fast fading dominance of the networks makes it easy to forget, the FCC's chain broadcasting rules tried to maintain local station control over programming.¹⁴² Other FCC policies explicitly designed to promote localism included limits on the geographical reach of stations' signals, licensing that favored locating television stations in each community rather than creating regional stations (which would have encouraged an earlier introduction of a fourth network), and licensing preferences that rewarded an integration of ownership and control.

not receive First Amendment protection “if they impose restraints upon [the] constitutionally guaranteed freedom.” *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹³⁸ Much evidence for the proposition could be found. For example, when investigative reporters were asked in a survey to rank, in order of importance, “the rewards that sometimes result from doing ‘successful’ investigative pieces,” out of five choices, 56.1% said that the “reformer in you was satisfied” was the most important element; 2.6% listed “monetary rewards” as most important. Some market! See DAVID L. PROTESS ET AL., *THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BUILDING IN AMERICA 276-77* (1991).

¹³⁹ Cf. Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Press*, 75 MICH. L. REV. 1 (1976).

¹⁴⁰ See Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993).

¹⁴¹ Although seldom noted, with the exception of some concern for presidential elections, virtually all of the projects associated with the political activism of civic journalism have concerned local, or at most state, problems or issues. Rarely are national, and never are international, issues addressed.

¹⁴² See *NBC v. United States*, 319 U.S. 190, 224-27 (1943) (sustaining various FCC regulations concerning the relations between broadcasters and networks).

Broadcasting policy added regulatory inclusiveness to regulatory localism. Congress and the FCC took steps to promote a common discourse in which many voices could be heard, not each on its own station, but all on a single media entity.¹⁴³ Early on, Congress required that broadcasters give candidates equal access, presumably fearing the power of broadcasters to shut out disfavored candidates. In response to the danger that broadcasters would shun all candidates, Congress later added the mandate that broadcasters grant candidates reasonable access to the airwaves.¹⁴⁴ The currently defunct fairness doctrine required broadcasters (1) to cover important issues and (2) to present alternative views on controversial matters of public importance.¹⁴⁵ These regulatory policy initiatives follow directly from the demands of republican democracy: important issues should be discussed in the public sphere and the discussion should be inclusive.¹⁴⁶ "Balance" is hardly ideologically neutral, but its purported inclusiveness is the heart of republicanism. Of course, the licensee is still the gatekeeper. The licensee decides which issues are important, whether any particular perspective or particular speaker gains access, and how the various sides are presented. In contrast with the possibility of a wide open common carriage system in which self-appointed representatives could receive time for whatever they choose to say,¹⁴⁷ the licensee's role as an inclusive but "responsible" gatekeeper tracks the republican concern that discussion be rational and civil.

Some republican democrats might favor limited censorship to further this concern with civility. Racist or sexist speech adds little to reasoned discourse. If this speech "silences" speech by some portions of the commu-

¹⁴³ See *Carroll Broad. Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958) (approving the notion that the government could choose to create additional scarcity if the fragmentation caused by a new station would operate against the public interest in having broadcasters be economically viable). In the recent deregulatory environment, the *Carroll* doctrine has been largely abandoned. See *In re Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 F.C.C.R. 638 (1988) (formally abolishing the *Carroll* doctrine).

¹⁴⁴ See 47 U.S.C. § 312(a)(7) (1994) (granting reasonable access); *id.* § 315 (requiring equal opportunity). The "equal opportunity" requirement was in the 1934 Act, but "reasonable access" was added to § 312 in 1972.

¹⁴⁵ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the fairness doctrine); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (upholding the FCC's repudiation of the fairness doctrine on statutory grounds).

¹⁴⁶ *Cf. Stewart*, *supra* note 14, at 636 ("[I]f there were no guarantee of a free press, government could convert the communications media into a neutral 'market place of ideas.'").

¹⁴⁷ See *Red Lion*, 395 U.S. at 382-86 (noting that Congress surely could have chosen this alternative if it wished); *cf. CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 121-32 (1973) (holding that neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements).

nity, restrictions arguably serve compelling democratic concerns.¹⁴⁸ A democracy must allow forceful advocacy of any policy—even criticisms of republican democracy’s inclusiveness. But speech that in the very act of its expression narrows republican discourse, as opposed to the speech that attempts to persuade, is hardly a part of a democratic dialogue. If republican discourse is to be inclusive then speech that denigrates other potential participants in the debate is not helpful. Just as the Fourteenth Amendment prohibits governmental denigration of people on the basis of race,¹⁴⁹ such expression when voiced by private individuals or media remains inconsistent with and could impede republican discourse.

Other media policies have special prominence for republican democracy. Elite democrats can be content as long as an alert press watches for problems. However, the elite democrat could be skeptical about the helpfulness of a freedom of information act.¹⁵⁰ Would officials, to the extent that they are corrupt, obey an act’s requirements to disclose documents showing their corruption? On balance, the elite democrat might rely on the strength of a strong press to confront and embarrass reticent government officials. She would recognize that the spotlight of publicity can politicize difficult governmental decision making, causing it to be more difficult to proceed rationally. Liberal pluralists may even join elite democrats here. Both might conclude that often the most effective bargaining, or governing, is negotiated behind closed doors. Disclosures on demand will be at best burdensome and costly and could make arriving at needed decisions more difficult.

In contrast, the republican democrat would question whether the loss of behind doors bargaining is a cost or a gain. The availability of information about government is absolutely crucial for popular republican discourse. “A popular Government, without popular information, or the means of acquir-

¹⁴⁸ MacKinnon argues that pornography both silences women and makes their speech inaudible to others. See Catherine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 63 (1985); see also Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291 (1989); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

¹⁴⁹ Arguably the constitutional evil of racial segregation struck down in *Brown v. Board of Education*, 347 U.S. 483 (1954), if one can grant the assumption of materially equal facilities, is the meaning or purpose expressed by segregation as a practice and the impermissibility of the state making the assertion implicit in segregation. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-44 (discussing the fact that *Brown* treats segregation as unconstitutional government speech).

¹⁵⁰ See Stewart, *supra* note 14, at 636 (“The Constitution . . . establishes the contest, not its resolution.”).

ing it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”¹⁵¹ Thus, republican democrats must support extensive freedom of information acts, open meeting laws, and, perhaps, constitutional rights of access to information.¹⁵²

While no one advocates inefficient monopolies, republican democrats have little per se fear of monopoly. A “socially responsible” monopoly press could be ideal in providing a common dialogue. Competition could even be detrimental if it encouraged uncivil partisanship or undermined participation in a common discourse. To the extent that a monopoly press is willing to make the expenditures, the existence of monopoly profits makes it more possible for the press to act responsibly in providing service to the community. These monopoly profits could be spent on robustly fulfilling public service obligations that the FCC could, and partly did, impose on oligopolistic broadcasters.¹⁵³ One advantage of cable franchise monopolies is that local governments can then force the monopolist to use some monopoly profits to provide “republican public goods”—for example, public access, educational, and governmental channels (“PEG channels”), as well as the resources, facilities, and support that these channels need to be meaningful. Despite cynics who cannot imagine business people being anything but profit maximizing, the primary assumption implicit in the ubiquitous criticism of chain purchases of formerly independent (monopoly) papers is that different types of owners tend to act differently. The belief is that the previously independent, often family-owned, papers often put more resources into providing a better paper than the mere economic considerations required, but that publicly traded corporations will put MBAs and cereal executives in charge and normally allow bottom-line considerations to rule.¹⁵⁴ In other words, monopoly media can, and sometimes does, use monopoly profits to serve republican concerns, while competition dissipates these profits, thus eliminating the possibility of their beneficial use.

Republican democrats’ appropriate concern is not monopoly but the possible (or likely) “corruption” of monopoly, whether by market forces or socially irresponsible owners. Republicans should favor any policies that realistically promise to limit this “corruption.” They should approve re-

¹⁵¹ Letter from James Madison to W.T. Barry, *supra* note 1.

¹⁵² On constitutional rights, see *infra* text accompanying notes 239-47.

¹⁵³ See FINAL REPORT OF THE ADVISORY COMMITTEE ON PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS: CHARTING THE DIGITAL BROADCASTING FUTURE 17-33 (1998).

¹⁵⁴ See DOUG UNDERWOOD, WHEN MBAS RULE THE NEWSROOM: HOW THE MARKETERS AND MANAGERS ARE RESHAPING TODAY’S MEDIA 14-25 (1993); Iver Peterson, *The Bottom-Line Publisher of The Los Angeles Times Faces the Hard-Line Skeptics*, N.Y. TIMES, Mar. 9, 1998, at D7.

quirements imposed on both newspapers and broadcasters to identify "paid for" inclusions as advertisements, even though these requirements regulate speech on the basis of "content."¹⁵⁵ Various access provisions should generally have appeal. Their goal of greater inclusiveness is a clear plus for republicans, but the quality and pertinence of the discourse resulting from self-nominated speakers is a worry. Still, cable systems should be required to maintain public access channels.¹⁵⁶ Arguably, media entities that accept advertising should be open to all public issue advertising on a nondiscriminatory basis.¹⁵⁷ Right of reply laws also have presumptive appeal, although in the end their merit depends on whether these laws are more likely to deter valuable speech or to add balance to discourse.

Finally, government could fund or subsidize particular institutional structures or realms of inclusive republican discourse. Of course, all participatory democratic theories could agree on the need for subsidies or funding for public discourse, but different theories are likely to be at odds about the design of publicly supported institutions. Consider public broadcasting. Should the government fund several public systems, each representing a different ideological viewpoint,¹⁵⁸ or, if only a single public entity is created, should the government mandate time-sharing so as to allow pluralist groups to separately pursue their own agenda? Alternatively, should public media offer more inclusive and integrative discourse—striving for balance in each program? Although complex democrats might favor either

¹⁵⁵ See 47 U.S.C. § 317 (1994) (requiring radio station broadcasters to identify sponsors); *Lewis Publ'g Co. v. Morgan*, 229 U.S. 288 (1913) (upholding against a First Amendment challenge a law requiring newspapers receiving second class mail rates to identify advertising materials); 47 C.F.R. § 76.221 (1998) (requiring cable origination programming to identify sponsorship); 47 C.F.R. § 73.1212 (1998) (requiring broadcasters to identify sponsors). Despite merely requiring information, these rules will predictably cause some potential advertisers not to purchase some ads and others to change the content of their advertisement.

¹⁵⁶ See *Time Warner Cable v. Bloomberg*, 118 F.3d 917, 927-28 (2d Cir. 1997) (upholding an injunction preventing a city from placing commercially produced business and news services on public access cable channels).

¹⁵⁷ Cf. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 123-24 (1973) (noting that a system which allocates media access on the basis of financial resources would not necessarily serve the public interest). An alternative possibility, which might also appeal to complex democrats, is to require each media entity to announce publicly its policies concerning ads and then be legally obligated to accept any ad not ruled out by the policy. This approach increases access and openness while permitting a media entity to identify itself either as a partisan voice or as an inclusive medium, but an inclusive medium that continues to conform to express standards of civil discourse.

¹⁵⁸ See Robert Cirino, *An Alternative American Communications System*, in *AMERICAN MEDIA AND MASS CULTURE: LEFT PERSPECTIVES* 568, 574-75 (Donald Lazere ed., 1987) (proposing four independent publicly supported networks, one for each perspective: socialist, liberal, conservative, and libertarian).

approach depending on the context, liberal pluralists are likely to prefer the first approach, republican democrats the second.¹⁵⁹

C. *Perspective of Liberal Pluralist Democracy*

In addition to any danger to the watchdog role, liberal pluralists identify two primary threats to a desirable media order: inadequate pluralism and corrupted pluralism (or, as I will often describe them, inadequate and corrupted media segmentation).

1. Inadequate Pluralism

Objections to monopoly media are not hard to come by. A self-satisfied, comfortable monopolist could become a lazy and unaggressive watchdog. Or, as republican democrats fear, an irresponsible, monopolized media could be either improperly ideological and biased or inadequately comprehensive in coverage and inadequately inclusive in perspectives. These complaints, however, do not assert that monopoly is intrinsically bad. Rather, they describe specific sorts of "corrupted" monopolization. In theory, a sufficient remedy is "social responsibility." Of course, competition might better promote responsibility (or, alternatively, it might lead to aggressive cost-cutting that causes inadequate or irresponsible performance). If she is too worried that economic forces or ideological motives will undermine responsibility, the republican democrat could support the legal interventions described in the last Subpart. For example, the FCC could require coverage and mandate balanced treatment of controversial issues.¹⁶⁰

For the liberal pluralist, however, monopoly is intrinsically objectionable. Monopoly overtly threatens pluralism. John Stuart Mill once remarked on the decided advantages of hearing a message from a partisan.¹⁶¹ The pluralist emphasizes that each segment of society needs its own media for internal mobilization, for external advocacy, and for recruitment. The complex democrat would agree but also would suggest that each group needs its own media for internal discourses aimed at developing, affirming, and revising the group's own identity and commitments. A single monopo-

¹⁵⁹ Note how this disagreement repeats, in many respects, the debate about multiculturalism and core curricula in the university setting.

¹⁶⁰ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the fairness doctrine which required coverage and balance). *But cf.* *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (upholding on statutory grounds the FCC's rejection of the fairness doctrine because it does not serve the public interest).

¹⁶¹ See MILL, *supra* note 50, at 45 (arguing that to arrive at the truth a person "must be able to hear [arguments] from persons who actually believe them, who defend them in earnest and do their very utmost for them").

listic media outlet cannot suffice to meet these needs of varying, often opposed, groups. Committed belief, sometimes stridency, particularistic standards of relevancy, often unique interests, and discussion within the community—not balance—are hallmarks of pluralism. Only partisan, pluralistic media entities are likely to be effective at political mobilization or at many other tasks that liberal pluralists assign to the press. Thus, even if a local daily newspaper monopoly, possibly because of its paper's stronger financial base, could provide a paper that would be "better" than would be any of several competing partisan papers, the liberal pluralist would object. She predictably favors partisan competition.

Still, the extent of liberal pluralists' devotion to competition requires further explanation. Typically, pluralists object not only to a monopoly entity within a market but also to media concentration at the national or global level even if this concentration still allows local competition between a few multinational conglomerates. Ben Bagdikian generates grave concern with his description of the "five media corporations [that] dominate the fight for the hundreds of millions of minds in the global village."¹⁶² Unlike the obvious reasons to object to local monopolies, it is intuitive, but less obvious, why liberal pluralists (or anyone else) consider national or global concentration of media ownership to be bad. Certainly, it is less obvious to Wall Street, which runs up the stock price of these companies, or to government lawyers who approve the mergers, or to the Department of Commerce, which concluded that the current legal order is defective in being too restrictive of media concentration.¹⁶³ Pluralism within a local arena could be served by competing local entities owned by different, or even the same, media conglomerate. In fact, these conglomerates may be especially likely to promote some types of local pluralism. A profit maximization goal should induce a monopolist, and maybe a conglomerate, to offer diverse media products that serve various segmented markets. A single conglomerate often supports separate media entities or titles espousing radically differ-

¹⁶² Ben H. Bagdikian, *Conquering Hearts and Minds: The Lords of the Global Village*, NATION, June 12, 1989, at 805, 807. Bagdikian reports at one point that most of the major media were owned by 50 corporations when the first edition of *The Media Monopoly* (1982) was published, but that this number had declined to 20 when the fourth edition was published in 1992. See BAGDIKIAN, *supra* note 98, at ix; *cf. id.* at 21 (listing the change as being from 46 to 23). Mark Crispin Miller recently created a stir with similar information presented as a *Nation* centerfold. See Mark Crispin Miller, *The National Entertainment State*, NATION, June 3, 1996, at 22, 23-26 (graphically displaying the concentration of media power). The handful of media giants may be more of a family than oppositional competitors as is illustrated by the extensive joint ventures that link each giant with most of its competitors. See generally EDWARD S. HERMAN & ROBERT W. MCCHESENEY, *THE GLOBAL MEDIA* (1997).

¹⁶³ National Telecomm. & Info. Admin., U.S. Dep't of Commerce, *Globalization of the Mass Media* (Jan. 1993).

ent views and serving very different groups. This diversity expands the corporation's overall market coverage without forcing it to compete against itself.

In contrast, the existence of many owners may not translate into pluralistic diversity. If a media entity's "voice" reflects the owner's attitudes, and if most owners come from the same social class and hold similar views, pluralistic diversity is unlikely. Moreover, market forces can push even diverse owners toward providing similar content. Economists offer hypotheticals, many modeling the broadcast system, to illustrate this effect.¹⁶⁴ For example, assume that 66% of the audience only like programming of type X, 20% only like type Y, and 14% only like type Z. In a three-firm market, three competing owners can each expect to obtain, on average, a 22% audience share by offering programming of type X, which is more than any firm could obtain by offering either type Y or Z. In contrast, a monopolist owner of the three stations, rather than compete against herself, could offer a different type of programming on each station, hoping to capture 100% of the audience rather than leaving 34% with their sets turned off. Here, monopoly could produce more diversity of programming and more total audience satisfaction.

Given this predictable behavior, the democratic theorist must either explain why national- or global-ownership concentration fails to provide pluralistic diversity, or must identify other problems with concentration.¹⁶⁵ That is, the liberal pluralist has more work to do to identify the circumstances that provide or prevent true diversity. Still, the difference between republican democracy and liberal pluralism is clear. The republican fears segmentation that destroys a common discourse. The pluralist fears lack of segmentation and diversity, because this lack could suppress constructive conflict and undermine pluralist politics.

2. Corrupt Segmentation

Lack of segmentation is not the pluralist's only fear. Equally objectionable is a corrupted diversity. The notion of "corruption" here implies unreal

¹⁶⁴ See Baker, *supra* note 112, at 337-44. See generally BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 99-100 (1992) (emphasizing that the welfare-maximizing choice between monopoly and competition and between advertising and viewer support depends on complex relations between the distribution of viewer preferences and the number of channels available); Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 304-17 (1991).

¹⁶⁵ To raise this challenge does not mean it cannot be met. For the beginning of a reply, see C. EDWIN BAKER, OWNERSHIP OF NEWSPAPERS: THE VIEW FROM POSITIVIST SOCIAL SCIENCE 15-20 (1994).

or inauthentic interests or identities. For the media to perform its democratic role, segmentation ought to reflect audiences' "authentic" characters. Of course, "authentic" need not mean essentialist. Nor does an ability to identify some cases of corrupted or inauthentic segmentation necessarily imply the converse, an ability to identify authentic segmentation. Despite borderline cases, some governmental administrations or regimes can be identified as unjust and some personal interactions as nonconsensual. An observer unsure whether justice requires actual material equality still may be able to conclude that a society which leaves its people to starve through no fault of their own is unjust. Whether or not consent exists in the absence of overt coercion, overt coercion typically negates consent. The meaning of these normative conceptions is disputed and subject to change, facts implicit in the assumption that the concepts are not essentialist. Likewise, it only may be possible to describe very roughly what is meant by proper segmentation. Nevertheless, the content of common usage and the manner of treatment of the concept's normative importance could still justify a conclusion that some features' presence or absence indicates that the system is not just or the behavior not consensual. Likewise, it may be possible to identify factors that indicate that a segmentation is corrupt—that the diversity is not properly responsive to authentic differences.

Uncorrupt or "uncolonized" segmentation would reflect, using Habermas's suggestive language, the logic and needs of the "lifeworld," not the "systems world."¹⁶⁶ Both markets and bureaucratic organizations, especially the State, are functional subsystems that modern society presumably needs to flourish. They provide tremendous benefits. By managing complexity, these functional systems greatly expand society's problem-solving and productive capacities.

People's everyday lives and interactions (which amount to the lifeworld) are routinely "steered" by interpersonal "discourses" aimed at agreement. For example, such discourses are used to respond to questions such as where to meet for supper, or whether to invite Pat to join us, whether to participate in the city's voluntary recycling program, or whether an integrated school system is best. In contrast, the effectiveness of the market and the state bureaucracies in responding to complexity depends on their own steering mechanisms—money and power, respectively. These "currencies" direct the functional subsystems according to the subsystem's internal criteria—maximizing profits, efficiently maintaining control and order, or advancing externally given ends. But the human value of these

¹⁶⁶ I take these terms and much of the discussion in the next few paragraphs from 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 113-52 (Thomas McCarthy trans., Beacon Press 1987).

autonomously steered subsystems lies only in their ability to serve people in the "lifeworld." Moreover, their operations necessarily grow out of a "lifeworld." They must feed upon culturally developed values and motivations. The functional systems respond, to some degree, to the demands of the lifeworld—that is, they fulfill needs that exist and that often are generated within the lifeworld. But they also treat the lifeworld as an environment to be managed in order to further system ends—an effect that can be described as "colonization." If, however, people are to be self-determinative, these subsystems must be subordinate to, not controlling and colonizing of, the lifeworld and its cultural and discursive development.

These distinctions between the lifeworld and the autonomously operating system realms, and the importance of the lifeworld's priority, explain my claim that media segmentation, as well as social pluralism, should grow out of and serve people's discursive needs in the lifeworld. These observations also point to colonization by system realms as an overt threat to that possibility; this amounts to a theory of corruption. If people are to be self-governing, their choices, their identities, and likewise, their media segmentation, should not be anonymously determined by bureaucratic or market logic. Segmentation that responds to the lifeworld would produce a plurality of public spheres that reflect different groups' self-understandings of their experiences and needs. Each authentic or lifeworld-grounded group would use the media (1) to construct itself and to provide a locus of internal debate, value choice, and value clarification (points emphasized by complex democracy); (2) as a source of information relevant to the group; and (3) as an instrument for mobilization, advocacy, and recruitment.¹⁶⁷ Segmentation ideally represents each group's discursive development within the lifeworld in response to each group's identification of its needs and values.

Corruption occurs when segmentation reflects the steering mechanisms of bureaucratic power or money rather than the group's needs and values.¹⁶⁸ For example, bureaucratic steering occurred during World War I to the extent that the State, acting appropriately according to bureaucratic logic, concluded that various German, anarchist, or communist publications helped to

¹⁶⁷ The first use is specifically called for only by complex democracy, while both liberal pluralism and complex democracy emphasize the second and third possible uses. One theoretical weakness of liberal pluralism arises from its need for a notion of corrupt segmentation. Because it takes interests or preferences or values as given, and sees politics as mere bargaining between groups furthering these interests or values, it lacks the theoretical resources necessary to explain the notion of "corruption" of groups' identities.

¹⁶⁸ Corruption of communication also occurs, especially in connection with new computer technologies, when the operators of the system sort and divide people in order to serve either economic enterprises' or governments' interests in manipulation or exploitation of difference. See GANDY, *supra* note 133, at 15-25.

sustain groups that impeded the government's overriding interests. Therefore, the government proceeded to deny them mail privileges or to prosecute the publishers.¹⁶⁹ The First Amendment can be understood as the final line of defense against such state corruption or suppression of lifeworld segmentation.¹⁷⁰

Market steering can equally corrupt segmentation. The market neither necessarily nor uniformly reflects or responds to individuals' or groups' diverse concerns or interests.¹⁷¹ When it does not, any corresponding segmentation amounts to the mechanisms of system maintenance colonizing the lifeworld. This corrupt segmentation undermines both common discourse and self-governing group life.

To illustrate, imagine five possible women's magazines.¹⁷² Each offers a combination of news, features, information, and fictional content. Assume, however, that each emphasizes a particular theme: (1) upscale fashion and cosmetics, (2) women's health issues, (3) middle-class family life and raising children, (4) progressive women's political agenda, and (5) the problems, needs, and interests of relatively poor, single mothers. Which of these serves authentic interests such that, if written and produced with adequate skill and appropriately priced, it would predictably secure an appreciative audience? Probably all five. Still, if magazine purchases primarily respond to people's self-examination of their needs and interests, it is very possible that the last, the magazine designed for poor single mothers, would attract the largest following. Audience size may increase as one goes down the list (although arguably I unduly de-emphasize the third). But consider the existing reality. In the world as it is, a format's success and comparative circulation size is more likely to correspond to the list's present order, with the upscale fashion and cosmetics magazine doing best. This rank ordering and, more generally, the domination of system criteria, may influence the formulation of women's identities and the nature of the groups that arise and affect women's interests and their perceptions of need.

Why the divergence between the two orderings? The second ordering could reflect market forces rather than people's "real" interests—real in the sense of what they would be if developed independently of the system-based need for the press to be profitable. Even if the potential audience for the

¹⁶⁹ See ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 38-51 (7th prtg. 1967) (discussing the Espionage Acts of 1917 and 1918).

¹⁷⁰ Of course, the First Amendment has not always been an effective safeguard. See *Masses Publ'g Co. v. Patten*, 246 F. 2d, 38-39 (2d Cir. 1917) (rejecting a First Amendment challenge to the exclusion of left-wing literature from the U.S. mail).

¹⁷¹ See Baker, *supra* note 112.

¹⁷² This hypothetical draws on Baker, *supra* note 61, at 66-70.

magazine directed toward poor, single women is larger, and their interest in such a magazine is more intense than the audience for and interest in the upscale fashion magazine, their numbers and interest are unlikely to translate into equivalent sales, revenue, or profits for the magazine's publisher. In fact, the poverty of the magazine's potential readers doubly disadvantages the magazine. The readers' lack of disposable income (and possibly their comparative lack of free time) will reduce their purchases of the magazine. In addition, advertising is likely to cover much less of the magazine's cost. Advertisers do not want an audience that merely desires the advertised products. They want an audience that will buy. Poor, single mothers' comparative lack of disposable income makes their preferred magazine comparably less attractive to advertisers, thereby reducing the advertising outlays that could help pay for quality content and help keep the cover price down. This lack of advertising support means that the magazine, if it exists at all, will achieve a much smaller circulation than if advertisers valued all readers equally.¹⁷³ Thus, the audience's poverty leads to a comparatively smaller circulation than would be appropriate using the lifeworld criterion of "authentic" audience interest.

Advertisers' financial involvement has further implications for segmentation. Advertisers construct groups. The criteria they use in doing so have systemic, not discursive, bases. The first three magazines concentrate on readers likely to purchase particular consumer goods, making each magazine especially attractive to the sellers of those goods.¹⁷⁴ In contrast, the diversity of consumption interests and the comparative lack of common-denominator product interests (except, maybe, for certain books, etc.) among potential readers of the progressive, political-agenda magazine cause

¹⁷³ As a comparison, *The Daily Herald*, the one major labor-oriented newspaper in England during much of the twentieth century, failed because of a lack of advertising revenue, reflecting the poverty of its mostly working-class readers, even though

on its death bed [it] was read by 4.7 million people—nearly twice as many as the readership of *The Times*, *Financial Times*, and *Guardian* added together . . . [and research showed that its readers] constituted the most committed and the most intensive readers, with the most favourable image of their paper, of any national paper audience in the country.

James Curran, *Capitalism and Control of the Press, 1800-1975*, in *MASS COMMUNICATION AND SOCIETY* 195, 225 (James Curran et al. eds., 1977).

¹⁷⁴ My objections here and in the previous paragraph assume a static model—a given distribution of income and a given set of preferences. A dynamic perspective sees even more corruption of segmentation. Advertising tries, in part, to exploit any latent possibility of creating or stimulating demand for certain types of goods. For example, advertising helps to create the demand for upscale fashion and cosmetics. These created preferences then increase the likelihood of a media segment catering to consumers of that type of good. That is, advertising not only assembles only certain groups (static distortion), but also creates particular preferences and hence the possibility of a corresponding group (dynamic distortion).

it (and, hence, this possible segment) to be poorly designed for marketing. Even if its readers' disposable income and their money-backed demand for the magazine are comparable to those of the audiences for fashion, health, and family-oriented magazines, these factors are less likely to support publication. That is, even putting aside income differences of potential readers, some potential segments are more likely to flourish merely because they better serve marketing needs.

Assume that each magazine would have survived in a world without advertising. In a world with advertising, however, given comparative shopping, fewer people will buy the fourth or fifth magazine once the revenue received from advertising allows the first three magazines to reduce their price and improve their quality. As the last two lose their audience, they also lose revenue needed to pay for good writing and production. This leads to a weaker product, a further spiraling decline in audience, and possible financial collapse.

Uncorrupt segmentation should respond equally to each person's interests as experienced by the person, not as valued by the market. If it did, the fourth and fifth hypothesized magazines *might* be most prominent. People's unequal incomes and advertisers' influence predictably prevent this from happening. Of course, the real world offers a much richer subsegmentation than my hypothetical. Many slightly different fashion magazines compete, partly for the same general audience but partly by subsegmenting the fashion market. The fault lines, however, correspond to advertising potential. Media segmentation selectively responds to interests that map onto efficient advertising strategies.¹⁷⁵

Segments thrive wherever media entities can construct an audience that marketers desire. As a result, any interest or identity group whose members are not disproportionately heavy consumers of one or more product categories is comparatively undeveloped and underserved by the media. Even very large groups may be ignored. Welfare recipients, unskilled workers, union members, blacks, or partisans of a particular political ideology may either be comparatively poor consumers or, equally objectionable from a marketing perspective, have product interests that do not diverge much from those of the general population. If so, advertising would predictably steer segmentation away from these groups. In contrast, subsets of these under-

¹⁷⁵ Control over segmentation is not the only objectionable consequence of the advertiser-based system. Competition for advertising revenue also creates market incentives to ignore particular types of content—content offensive to those members of the audience valued by advertisers or content that provides information or promotes policies contrary to advertisers' interests. Thus, advertising corrupts not only segmentation but also discourse within segments.

served groups hold identities and interests in common with subsets of other groups—interests in sports, computing, travel, sex, fashion, marriage, masculinity, or household management. To exploit the connection between these interests and particular consumer goods, the market rewards media entities that assemble these groups. Again, constructing these segments comparatively disadvantages the larger categories noted above. Even without advertising, however, segmentation fails to represent true democratic or cultural cleavages to the extent that it more strongly reflects a group's affluence than its size.¹⁷⁶

Of course, modern America does not lack diverse media. Within the proliferation of newsletters and smaller publications, virtually any interest can find itself addressed. The liberal pluralist concern, however, is about the comparative nurture or support of different segments. The advertising and wealth-influenced market largely determines the effort, both creative and repertorial, lavished on assembling and serving each segment. Many "natural" cultural cleavages are not ignored—often marketers find them cheap to exploit. Support for "natural" or lifeworld-based segments is not automatic, though. Market-determined segmentation predictably disfavors, for example, media focusing on political ideology, nonmarket-valued ethnic and cultural divisions, economically poorer groups, or any lifestyle needs and interests not easily exploitable for marketing purposes. There is no reason to expect media-favored segments to correspond to the communities, interests, or identifications that people would choose after reflection and discussion. Corruption exists to the extent that the segmentation springs from the needs of the "systems world" rather than the pluralism of the "lifeworld."

3. Policy

Liberal pluralists should favor any policy (1) that supports more robust media conduits for pluralist groups not adequately nurtured by the market, or (2) that reduces systemic corruption of segmentation. They should applaud, for example, Arkansas's rationale for its sales-tax exemption—to promote "fledgling publications," especially if the fledgling publications provide content for otherwise underserved segments of society.¹⁷⁷ Of

¹⁷⁶ A targeted audience's ability to treat particular media consumption as a deductible business expense also distorts segmentation. The government partially subsidizes that segment while the targeted groups' customers or clients pay the rest. Here again, the market and the government, not the lifeworld, develop and reinforce segmentation.

¹⁷⁷ See *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987) (noting that such a purpose might justify differential grants of tax exemptions, but finding no evidence that this purpose lay behind the challenged law).

course, the Court was clearly right that this rationale did not fit the law. It did not explain the broad sales-tax exemption for all magazines except *The Arkansas Times* and, at most, two other Arkansas magazines. Still, liberal pluralists should be pleased that the Court accepted the possibility that such a rationale might save an appropriate content-based tax preference from First Amendment attack.

There are numerous governmental interventions that could promote the liberal pluralist demand that the pluralist media serve the various groups of the lifeworld. Advertising tends to corrupt segmentation in some media, such as magazines, and to encourage homogeneity in others, like newspapers. Subsidies for nonadvertising-supported media could increase the availability of diverse media and reduce some of the negative structural consequences of advertising support. For example, by the middle of the nineteenth century, Congress had adopted postal rate policies that disfavored advertising and that presumably reduced its influence. Publications identified as primarily advertising vehicles were denied subsidized newspaper rates and, later, were also denied subsidized periodical rates.¹⁷⁸ Even more directly, the Post Office charged more for the portion of a publication's weight devoted to advertising than for the portion devoted to other communications, thereby reducing the economic power of advertising within the newspaper.¹⁷⁹

Segmentation serving groups arising within the lifeworld could also be supported more directly. Lower postal rates have subsidized communications of some nonprofit groups.¹⁸⁰ Other countries have promoted diversity by funneling media subsidies to secondary competitive papers¹⁸¹ or directly

¹⁷⁸ See Richard Burket Kielbowicz, *Origins of the Second-Class Mail Category and the Business of Policymaking, 1863-1879*, JOURNALISM MONOGRAPHS, April 1986, at 6, 14, 20.

¹⁷⁹ See Richard B. Kielbowicz & Linda Lawson, *Reduced-Rate Postage for Nonprofit Organizations: A Policy History, Critique, and Proposal*, 11 HARV. J.L. & PUB. POL'Y 347, 352 (1988). For a set of proposals to reduce the corrupting effects of advertising, see BAKER, *supra* note 61, at 83-117.

¹⁸⁰ The Postal Reorganization Act, adopted in 1970, was premised on the notion that, after an adjustment period, each class of mail would bear its full costs. Nevertheless, postal subsidies never died out, a result aided by having regular rates include a portion of all postal service costs while reduced rate categories pay only the costs attributable to carrying that category. See 39 U.S.C. § 3622(b)(2)-(3) (1994); see RANDALL P. BEZANSON, TAXES ON KNOWLEDGE IN AMERICA 234-36 (1994) ("To this day, Congress continues to appropriate funds annually in the form of subsidies for reduced rates charged newspaper and magazine publishers and nonprofit groups.").

¹⁸¹ Sweden has extensive subsidy programs that are designed to maintain a competitive, partisan press, which the Swedes have treated as essential for democracy. See BAKER, *supra* note 61, at 94-96; PETER J. HUMPHREYS, MASS MEDIA AND MEDIA POLICY IN WESTERN EUROPE 106 (1996).

through political parties.¹⁸² Governmental policies could specifically aim at increasing media outlets owned by minority group members as a plausible means of promoting media that voice these groups' concerns.¹⁸³ The Supreme Court rejected an equal protection challenge to FCC policies designed for this purpose, holding that the racial preferences were justified by the "content-based" goal of increasing the diversity of voices.¹⁸⁴ More radical group empowerment plans are possible, such as a Netherlands-like allocation of broadcast time and resources based on citizen sign-ups that amount to voting for a particular programmer.¹⁸⁵

A different pluralist strategy simply favors dispersal of ownership. Having more owners will hopefully increase instances of supporters of different groups owning media entities and orienting content toward their groups' interests. The danger is that more owners merely will compete for the center, in contrast to monopolists, who have an incentive to provide different goods for each niche. Empirical evidence of these divergent possibilities could be gathered.¹⁸⁶ But irrespective of such evidence, a pluralist is likely to have considerable hesitations about relying on any pluralism provided by outside monopolists. Her reasonable fear is that the monopolist, even if providing diverse, segmented fare, will blunt or corrupt partisanship. Thus, a liberal pluralist might support the (predictably ineffective)¹⁸⁷ attempt of the Newspaper Preservation Act to keep competing local daily

¹⁸² See HUMPHREYS, *supra* note 181, at 105 (Italy); *id.* at 106 (Finland). Humphreys notes that the aim to assure readers access to diverse sources of information was "an aim of (direct and indirect) state press subsidies across Europe." *Id.* at 104.

¹⁸³ See Spitzer, *supra* note 164, at 334-46 (arguing that both theory and empirical data suggest that minority ownership may increase minority-oriented programming).

¹⁸⁴ See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 552 (1990) (holding that minority preferences in licensing and sales do not "violate equal protection principles"). The Court later rejected *Metro Broadcasting's* conclusion concerning the appropriate standard of review for congressionally approved racial preferences. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-37 (1995) (stating that the government interest must be "compelling" and not merely "substantial"). Still, the specific holding of *Metro Broadcasting* currently stands. The case exhibits the anomaly of apparently using the importance of supporting particular media content (content reflecting minority interests) to justify violating the equal protection principle against race-based discrimination, while using the importance of serving minority interests to justify violating the First Amendment principle against content discrimination. See Baker, *supra* note 53, at 125.

¹⁸⁵ See HUMPHREYS, *supra* note 181, at 139-43.

¹⁸⁶ Cf. Spitzer, *supra* note 164, at 304-46 (suggesting that empirical evidence supports the claim that more minority ownership of broadcast facilities would increase minority-oriented programming).

¹⁸⁷ Cf. Thomas E. Humphrey, *The Newspaper Preservation Act: An Ineffective Step in the Right Direction*, 12 B.C. INDUS. & COM. L. REV. 937, 954 (1971) (arguing that the Newspaper Preservation Act, which "provid[es a] limited antitrust exemption, can only slow down the anti-competitive trend; it cannot eliminate it").

newspapers' independent voices alive. Strengthened enforcement of anti-trust laws is a similar pluralist theme, with the caveat that vigorous antitrust enforcement may not eliminate local monopoly, and, even if it did, competition may not suffice to create real diversity in the competitors' perspectives or content. More radically, reduced capital gains taxes or other economic incentives could be given for sales of media properties that increase deconcentration. For example, advantages could be given for sales to entities whose assets after the purchase are still less than half of those of the selling entity. Such policies could begin a spiral of spin-offs leading to ever greater deconcentration.

Finally, in addition to affirmative policies, liberal pluralists could reasonably balk at some policies recommended by other democratic theories. For example, if effective,¹⁸⁸ balance requirements appear designed to support republican dialogue, but they could undermine a media entity's partisanship and its service to discrete groups.

D. *Perspective of Complex Democracy*

Complex democracy is at least neurotic, and maybe schizoid. It exhibits all the fears held by the other democratic theories and more. Like elite democracy (and all other theories), complex democracy fears that the watchdog will be muzzled, whether by government or private power. Like republican democracy, it fears that segmentation or corrupted monopolization will undermine effective, societywide discourse. Like liberal pluralism, it fears that monopolization or corrupted segmentation will suppress or disfigure media pluralism. Finally, complex democracy additionally fears that pluralist media will be so oriented toward mobilization and propaganda that it will not aid pluralist groups in thoughtful internal discussion and debate about identity and interests. This failure most likely would reflect inadequate market support, but it could relate to an overriding instrumentalism, especially of a group's leadership.

It is necessary to provide some explanation of a theory that holds apparently contradictory fears. Probably, no one would argue that there should be only specialized media or only media oriented towards the public as a whole. And surely neither is absent in today's actual media world. Of course, the market may fail to support adequately—or to corrupt—both types of media, justifying both the complex democrat's republican and pluralist fears. Even if the total amount of media provision is adequate and uncorrupt, however, the complex democrat should ask whether the market and

¹⁸⁸ *But cf.* Syracuse Peace Council v. FCC, 867 F.2d 654, 659-64 (D.C. Cir. 1989) (noting evidence that the balance requirement deterred the initial airing of controversial matters).

legal structure unduly favor one while providing inadequate support for the other. Since the issue is partly empirical, the complex democrat must recognize that the type of media that is corrupted or inadequately supported may change, for example, because new technologies inevitably introduce opportunities. The impact of new, electronic, interactive media obviously needs to be taken into account.¹⁸⁹ Nevertheless, I will leave for another time a pursuit of theoretical expectations and practical issues involving the growth of these new media, despite the fact that these concerns affect the key issue here: what democratic tasks are most slighted by the market or by existing arrangements.

A key insight from the perspective of complex democracy is Lee Bollinger's suggestion that different portions of the media might serve differing functions. Bollinger argues that this justifies different regulatory regimes for different media.¹⁹⁰ James Curran adds that not only will different sectors of the media realm serve somewhat different functions but that they should differ in their internal organizational principle and possibly their economic base.¹⁹¹ Diversity of organizational structures reflects the need to perform different democratic functions. Given the danger of corruption by either the government or the market, it is also important to have a diversity of structures and economic foundations, because they can strengthen the overall system. This diversity strengthens the system by reducing the threat of corruption of a particular media sector by forces originating in either the political or economic system.

Programmatically, Curran identifies five sectors. The "core sector" should allow "different classes and groups to take part in the *same* public dialogue" and "promote a culture of mutuality that facilitates agreement or compromise."¹⁹² Possibly reflecting his British heritage, he suggests that this sector could be institutionally centered around a revitalized public-service broadcasting system.¹⁹³ Second, a very important and, Curran ar-

¹⁸⁹ The rosy view that this new technology will eliminate all the old inadequacies of the media seems distinctly implausible. See, e.g., SCHUDSON, *supra* note 96, at 1-2; C. Edwin Baker, *New Media Technologies, the First Amendment, and Public Policy*, 1 COMM. REV. 315, 326-27 (1996).

¹⁹⁰ See LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 116-20 (1991); Bollinger, *supra* note 139, at 26-37, 42.

¹⁹¹ James Curran, *Mass Media and Democracy Revisited*, in *MASS MEDIA AND SOCIETY* 81, 105-06 (James Curran & Michael Gurevitch eds., 2d ed. 1996).

¹⁹² *Id.* at 105.

¹⁹³ Cf. R. Randall Rainey & William Rehg, *The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy*, 69 S. CAL. L. REV. 1923 (1996). In elaborating a Habermasian conception of democracy (which closely resembles "complex democracy" as used here), Rainey and Rehg observe that Habermas rejects the republican's exclusive interest in consensus, provides a

gues, currently troubled "civic media" sector would be a major locus of group pluralism. Among its elements could be media entities aimed at winning wider support for particular groups. These could include party-controlled, general-interest newspapers; identity-oriented media entities such as gay magazines; and organizational-oriented media such as newsletters that provide for groups' internal communication needs. Various policies could promote this diversity. For example, different political or identity groups could be given control over their own broadcast facilities. A public agency, like a modified Swedish Press Subsidies Board,¹⁹⁴ could provide assistance to new or marginal, group-based communications media. Third, Curran calls for a "professional sector," controlled by media professionals, presumably organized democratically, which would be free of any obligations to serve any ideal other than internal professional standards. Independence from both the State and market-oriented firms would contribute to this professional sector's capacity to serve the media's watchdog function.¹⁹⁵ A "private enterprise" sector, Curran suggests, would be responsive to audience demand¹⁹⁶ and could add diversity (especially given the market's inherent right-wing tilt). Even here, however, Curran suggests that

place for pluralist bargaining, recognizes value pluralism, and places central importance on diverse associations and other groups in civil society. *See id.* at 1949-72. However, their proposal of a Corporation for Public Interest Speech and Debate seems more republican than complex democratic in inspiration. The proposed institution is much like the existing public broadcasting except for its exclusive emphasis on public-affairs programming, presumably greater insulation from distortion by corporate underwriting, and some more explicit attempts to keep it in contact with grassroots civic associations. Their republicanism and lack of structural recognition of the pluralistic needs of groups, including groups' needs for partisan mobilization and internal self-definitional discourses, is evident in their emphasis on developing mechanisms to exclude bias and ideology. *See id.* at 1982. Their republican-like, rational "common discourse" aspect is illustrated by the mandate, which they would impose on commercial, as well as their noncommercial, public interest corporations, to require all broadcasters to explore issues "in a balanced and non-partisan manner" and to provide "a reasonable opportunity for the discussion of conflicting views." *Id.* at 1983 n.138. Although like Curran's core sector, such an institution would undoubtedly be very valuable, its republican-like emphasis on a common and nonpartisan discourse seems very inadequate as compared to the pluralistic needs of complex democracy. Think of the types of things it would exclude. Michael Moore's "angry yet hilarious" (according to Roger Ebert) documentary, *Roger and Me*, was an attack on the greed at General Motors that, according to Vincent Canby of *The New York Times*, "makes no attempt to be fair. Playing fair is for college football. In social criticism, anything goes." B.J. BULLERT, PUBLIC TELEVISION: POLITICS AND THE BATTLE OVER DOCUMENTARY FILM 153 (1997) (quoting Canby and Ebert). Although Canby described the film as a "triumph," it hardly meets Rainey and Rehg's standards of balance and nonpartisanship. *See id.*

¹⁹⁴ *See* Curran, *supra* note 191, at 109 (citing O. HULTEN, MASS MEDIA AND STATE SUPPORT IN SWEDEN (1984)).

¹⁹⁵ *See id.* at 109-10.

¹⁹⁶ *But see generally* Baker, *supra* note 112 (arguing that the market's media output diverges radically from consumer desires).

separating ownership from editorial control would improve performance. Finally, a "social market" sector would "incubate new forms of competition, rooted in social forces underrepresented in the market, as a way of extending real consumer choice and power."¹⁹⁷ This sector should try to cure some market distortions in the "private enterprise" sector. For example, as a response to market failures, subsidies should be provided for entities and ownership forms whose mission is to serve public demands to which the market does not adequately respond. Stringent application of antitrust rules could help prevent destruction of these entities by media conglomerates and help provide the pluralism of entities from which social market sector participants could be recruited.

Curran's proposal concerning differing media sectors has a number of merits, but from the perspective of complex democracy the proposal's most insightful quality is its recognition of different functions that a democratic media should serve. Especially important is his recognition of the need for both the republican common discourse (embodied most directly in the core sector) and the pluralist mobilization and group-centered media (the civic sector). He is also right to see the need to provide for a structural basis for media sectors that are less distorted by the market and right to observe that this combination is likely to perform the checking function better than the structurally simpler, pure free market system.

Curran's schema suggests the following key premises that a complex democrat should recognize for policy purposes: 1) the strongest media order will not rely on any single form of organization; 2) this order must perform diverse functions, and differing media entities, possibly organized on different structural principles or economic bases, will best perform different functions; 3) although this order should not dispense with the market, government policy should nurture other structures and nonmarket entities in a variety of ways—for example, with subsidies and by making alternative organizational forms legally available and economically attractive; 4) the extent of government involvement and support should vary depending on how underdeveloped or distorted a particular sector is; and 5) the form or nature of governmental involvement or support should reflect the particular functions of the media (or, in Curran's terms, the particular sector) being aided.

Two other points should be emphasized. First, there is every reason to expect that market forces, especially advertising, corrupt both common discourse and pluralist segmentation and, moreover, that the market provides inadequately, whether in amount or quality, for both. Observation should convince most people of this conclusion, but economic theory also predicts

¹⁹⁷ Curran, *supra* note 191, at 112.

it. When properly performing these various democratic functions, the media has significant positive externalities—that is, benefits to people other than the immediate consumer of the product.¹⁹⁸ The economic meaning of a product having positive externalities is that from the point of view of total social welfare, free markets will underproduce the product.

This observation leads to the second point. A central principle for the complex democrat is: Be opportunistic! Complex democrats should embrace virtually any opportunity to develop or support differing media organizations or any of Curran's sectors, except the inevitably supported private-enterprise sector. In this respect, complex democracy differs from republican or pluralist democracy, each of which has a narrow policy agenda that sees the agenda of the other as a threat. In contrast, complex democracy can easily justify supporting the affirmative goals of both.

Ideally, a policy analysis should address questions such as whether, under existing circumstances, more partisanship and segmented media or more common discourse and societywide media are the greater need. The answer would suggest where to concentrate reformist energies. Often republican, common-discourse, or majoritarian-oriented products, whose "first copy" costs can be spread over many people, will have a competitive advantage over products favored by smaller groups, so-called outliers. If so, the market may disfavor pluralistic media more. Moreover, if society should distribute politically and culturally salient media products in a relatively egalitarian manner, like it distributes public education or the vote, special emphasis should be placed on supporting media products designed for the poor. Here is not the place for a comprehensive development of these points. Both economic and democratic theory, however, predict that pluralistic media, especially those designed for comparatively impoverished groups, are likely to be especially underdeveloped and ought to receive special public support. Still, as a practical matter, the key principle for complex democracy is to pursue any opportunity to further government support for new, noncommercial forms of media discourse. Secondarily, it should support policies that reduce advertising's "corrupting" effects.

IV. CONSTITUTIONAL IMPLICATIONS

Different theories of democracy not only recommend different normative visions of the press but also may lead to different interpretations of the

¹⁹⁸ See Baker, *supra* note 112, at 346-66. In addition to the underproduction related to positive externalities, the public good aspect of media products and the egalitarian claim for political opportunities suggest that the market will selectively fail to provide adequately for various democratic functions.

Press Clause. Still, possibly the most important implications of complex democracy, my preferred democratic theory, may appear modest. This does not mean, however, that the theory is unimportant. Rather, its conclusions are anticlimactic in the way that interpreting due process as not justifying *Lochner*-style interventions was anticlimactic. For the complex democrat, the Press Clause mandates very little. Here, I wish to explore those implications and consider why they are so limited.

Any actual constitutional interpretation relies at least implicitly on some interpretive theory. In my view, "authoritative" constitutional interpretation should be, and often is, "motivated conversation"—a conversation in which the point is to understand the text(s) as part of an attempt to provide for a legitimate and workable legal order.¹⁹⁹ Past court decisions, historical institutional practice, and the original textual language constitute key conversational "participants." Current interpreters treat these materials as opened (that is, requiring interpretation or elaboration) and presumptively (although never conclusively) correct—that is, as the reflective views of intelligent, earlier interlocutors. These historical, authoritative, conversational contributions, however, do not control, but current conversationalists must take them seriously and respond to their implicit claims. Additional constraints also apply to this conversation. Interpretations intended to be legally authoritative should be strongly influenced by a conception of the role of constitutions. They should also be influenced by a conception of the judicial role. Justices and commentators usually understand these considerations to require that constitutional interpretation be principled. Those engaged in making legally binding interpretations, not only as compared to those engaged in literary, historical, or psychological interpretations, but also as compared to those engaged in adopting legally binding legislation, should be responsive to a particular, narrow set of concerns.

As for the Press Clause, interpretations depend heavily on answers given to two questions. First is the question of the purpose of the Press Clause. I will assume that the constitutional order protects the press because of its crucial contribution to democracy and democratic legitimacy. Freedom of "speech" might be protected as a vital element of individual liberty.²⁰⁰ The reference to the "press," however, presumably refers to institu-

¹⁹⁹ BAKER, *supra* note 14, at 272-83. "Authoritative"—leading potentially to the application of force or limiting power—is especially relevant to the motivation of legal interpretation and distinguishes it, for example, from literary, historical, psychological, or political interpretations where the motivations for and, hence, the content of, the interpretation are much more variable and open.

²⁰⁰ Unlike merely hearing others' speech, which like many opportunities and resources can instrumentally aid more intelligent or meaningful uses of autonomy, speech itself as an

tionalized structures or legal entities. A discriminatory tax on a newspaper business, for example, raises a constitutional issue even if the law does not specifically tax or target any specific printed "speech." Moreover, unlike individuals, institutions must find their value in their social contribution. The only obvious reason to think that the press merits special protection from democratic processes is to provide for its role in that democratic arrangement. Thus, in order to know what specifically to protect, the interpretation of the Press Clause must, at least implicitly, embody some theory of democracy. Exploration of this variable has been central to this Article.

Second is the question of the democratic adequacy of the market. Can the market (and centers of private power) be trusted to provide us with the press that democracy requires or, instead, should the market be expected to fail to perform (or even at times to undermine proper performance of) the tasks assigned by (the favored) democratic theory? If a sufficiently favorable view of the market is justified, prohibiting all media-oriented governmental interventions might best serve democracy. Even a less favorable evaluation of the market might not imply that private power would undermine the press's crucial democratic tasks. The conclusion depends on the nature of those tasks. The market might undermine some aspects of the press's performance but not its crucial democratic roles. If so, the constitutional guarantee of a free press could be understood to block all media-specific governmental interventions, even if generic welfare considerations would justify some interventions. The argument here would be that the constitutional decision is to prohibit intervention because allowing the press to remain untouched best protects its vital democratic role.

Persuasive critiques of the market's unfortunate effects on the media are legion, but this is not the place to restate the evidence and arguments. Critics sometimes emphasize an individual owner's or the ownership class's manipulative and ideological control. More often, critics point to predictable distortions resulting from the normal functioning of economic markets. Sometimes it is unclear which is the problem. Did Murdoch cancel the publication of a book on Hong Kong by the conservative Chris Patten for personal or political reasons? Murdoch says it was not commercially motivated. Or, like his 1994 decision to take the BBC off the Chinese broadcasts of his satellite television service, was this a profit-maximizing decision based on not offending the Chinese leadership on which his media expan-

sions in China depended?²⁰¹ If the cancellation was a profit-maximizing decision, it is little different than the bottom-line mentality that leads corporate newspapers to eliminate five percent of the newsroom jobs in six years.²⁰² Elsewhere I have argued that economic theory predicts that unregulated, market-based production and distribution of media content will diverge so radically from what audiences want that the goal of providing for audience desires provides no basis for a presumption against intervention.²⁰³ There remains a potentially powerful reason to oppose intervention, however. The country might decide that the press's democratic role should take precedence over merely serving consumer preferences.²⁰⁴ And intervention might threaten the independence that best serves democracy. Of course, the reverse could be true instead. Even if predicted to best serve consumer desires, the unregulated market might fail to perform crucial democratic tasks. If so, democracy might require intervention. Obviously, these alternative assessments depend not only on predictions about the market, but also on the content of the press's democratic tasks. The perceived merits of permitting intervention necessarily reflect an understanding of what democracy requires, an evaluation of the dangers of misguided intervention, and an assessment of the market.

Market forces could conceivably cripple the press's performance of the checking function. Competitive, profit-oriented pressures could lead media entities to abandon expensive, investigative journalism and replace it with cheaper, routine beat reporting, or even cheaper "press-release" or wire service journalism. The market could tilt journalism towards stories that are the easiest (that is, the cheapest) to uncover and, even more troubling, the easiest to explain or the most titillating. An effective watchdog would have reported early on about the massive savings and loan scandal, which predictably resulted from deregulation of these financial institutions. The media, however, found that early reporting was simply too difficult or boring.²⁰⁵

²⁰¹ See Warren Hoge, *Murdoch Halts a Book Critical of China*, N.Y. TIMES, Feb. 28, 1998, at A5 (discussing Harper Collins's decision not to publish the memoirs of Chris Patten, the last British Governor of Hong Kong).

²⁰² See Richard Harwood, *When Downsizing Hits the Newsroom*, WASH. POST, Apr. 2, 1996, at A13 (discussing the elimination of 3,100 daily newsroom jobs from a peak of 56,900 between 1990 and 1996).

²⁰³ See Baker, *supra* note 112.

²⁰⁴ This supplanting of market-expressed preferences is not necessarily or even presumptively paternalistic. People might politically express a preference for a press that serves a vital democracy rather than their unreflective consumer choices. It would be paternalistic to automatically privilege their market expressions over their political expressions.

²⁰⁵ In contrast, the faces of welfare recipients make welfare fraud an interesting and easily comprehended story. But compare. Estimates of the cost to the taxpayer of the savings

Nevertheless, the watchdog role is arguably the democratic function least likely to require or benefit from government support.²⁰⁶ It is arguably best guaranteed by a sense of professionalism that exists among journalists.²⁰⁷ The watchdog role requires mostly skill, courage, and freedom. Exposés generally make good, profitable news. News entities will have an incentive to devote at least some resources to performing this role. Arguably, there is little that the government could do to add to either the press's willingness or its ability to perform this role.

Not only is intervention needed least, it can be very dangerous. Arguably, the watchdog role is the democratic function most subject to inappropriate, censorious, or "chilling" interventions. The government can unintentionally undermine the capacity for performance by, for example, requiring testimony that identifies a reporter's publicity-shy informants. The watchdog role may be even more vulnerable to purposeful attack. The government can attempt to block performance, as it tried to do by seeking an injunction against publication of the Pentagon Papers. Censorial manipulation of privileges are probably more dangerous because they are less easily combated. Consider a local government's withdrawal of advertising from a critical newspaper,²⁰⁸ or the Nixon administration's plans to obstruct

and loan scandal vary widely, although \$500 billion is a figure commonly cited. See David E. Rosenbaum, *A Financial Disaster with Many Culprits*, N.Y. TIMES, June 6, 1990, at A1 (citing General Accounting Office figures). A former *Washington Post* reporter, Kathleen Day, in her book on the scandal, came up with a \$1 trillion figure. See Ken Bode, *Where the Streets Are Paved with Depositors*, N.Y. TIMES, May 16, 1993, at 7 (reviewing KATHLEEN DAY, *S&L HELL: THE PEOPLE AND THE POLITICS BEHIND THE \$1 TRILLION SAVINGS AND LOAN SCANDAL* (1993)). The Inspector General of the Department of Health and Human Services during the Bush administration, presumably wanting to come up with a high figure, stated that fraud (including the costs of unintentional mistakes!) in the country's major welfare program, Aid to Families with Dependent Children ("AFDC"), could be costing \$1 billion a year. See *Fraud in Welfare Put at \$1 Billion*, N.Y. TIMES, Dec. 7, 1987, at A25 (citing a report by the Inspector General of the Department of Health and Human Services about fraud in the AFDC program). From the level of press attention, a reader would hardly guess that it would take over 500 years of welfare fraud to cost the public as much as did the savings and loan debacle.

²⁰⁶ *But cf.* Curran, *supra* note 191, at 89 (noting that despite some loss of autonomy due to an onslaught by the Thatcher government, the state-created and -supported British Broadcasting Corporation "continued to expose [the] government to more sustained, critical scrutiny" than did the newspapers).

²⁰⁷ In response to the survey question of the "importance to you [of] the rewards that sometimes result from doing 'successful' investigative pieces," investigative journalists listed the following as either most or second most important: A reformer in you satisfied (78%), increased freedom over time or assignments (54%), personal recognition (36%), journalism awards (17%), monetary benefits (8%). See PROTESS ET AL., *supra* note 138, at 276-77. Because the market operates at the enterprise level, however, these responses implicitly claim that the economic marketplace did not dominate journalists' orientations.

²⁰⁸ See *North Miss. Communications, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986); *Newspaper Is Suing Puerto Rico's Governor*, N.Y. TIMES, Dec. 10, 1997, at A26 (reporting

a broadcast license renewal after *The Washington Post* exposed alleged Watergate-related misconduct.²⁰⁹ Government leaders can also attempt to “discipline” reporters by means such as denying them prized interviews,²¹⁰ and lower level officials exercise similar power by picking recipients of leaks and background information.

As the history of totalitarian regimes illustrates, the watchdog role is the democratic function with which government leaders have the most overt, systemic, self-interested inclination to undermine. A corrupt or incompetent administration or individual governmental leader has little interest in exposure. In contrast, although they vary in their views of republican issue discussion, pluralist bargaining, or social groups’ self-development, they seldom perceive any of these as an overt threat to their status. Of course, even media provision of this content is not safe. Any political group may wish to suppress oppositional media. Suppression could help a dominant political group to retain power or to improve its position in pluralist bargaining. It could also reflect the group’s ideological objections to outsiders’ values. Still, the watchdog role is most overtly and directly in tension with incumbents’ interests, and thus might most require protection. If political branches must be watched, wisdom counsels against granting them power to control the watchdog.

Anyone with confidence in the market’s benign effects—and many with less confidence but with a healthy fear of government abuse—will view government intervention as *the* major danger to the performance of the checking function. This suggests sharply limiting governmental authority. A wall of virtually total separation between the government and the press may seem desirable.²¹¹ Thus, elite democrats often interpret the Press Clause to prohibit or strongly disfavor any media-specific regulation, even

that the Puerto Rican government withdrew \$4.5 million a year of advertising after the paper published a negative evaluation of the first 100 days of the Governor’s second term).

²⁰⁹ See Monroe E. Price, *The Market for Loyalties: Electronic Media and the Global Competition for Allegiances*, 104 YALE L.J. 667, 689 (1994); Matthew L. Spitzer, *The Constitutionalality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 1050-51 (1989).

²¹⁰ In contrast to the denial of interviews, courts may be able to monitor the reasons for denial of access to press facilities or press conferences. See, e.g., *Borreca v. Fasi*, 369 F. Supp. 906, 911 (D. Haw. 1974) (giving a disliked reporter the right to attend press conferences on the same basis as other reporters).

²¹¹ Although some writers appear to suggest such a wall, see, e.g., Bezanson, *supra* note 120, at 732, it is, in fact, quite implausible and has never been historically approached. As interpretations of the Establishment Clause suggest, the wall can be breached by manipulating “carrots” as well as by employing “sticks.” However, a government that did not offer the press “carrots” in the form of interviews with public officials, press releases, access to some records, maybe press galleries and press facilities, hardly seems plausible. Other privileges, ranging from the mail subsidies that began with the beginning of the country to reporter shield laws have been historically routine and seem desirable.

structural regulation. This partly reflects treating the watchdog role as the press's only really important democratic function. In addition, I suspect that as an empirical matter, many elite democrats, as compared to more participatory democrats, have greater confidence in the market, as well as comparatively greater worries about government.

Participatory democratic theories all place more comprehensive demands on the press. For these more extensive purposes, faith in the market, although still possible, quickly seems naïve. As noted, there are overwhelming reasons to predict that markets will fail to provide the media that people want. Markets are even less likely to provide the media that participatory theories identify citizens as needing. Depending on the theory, these needs may include more educational, societal discourse-oriented, advocacy-oriented, mobilizing, or group-constitutive media than people would fully support through their purchases in the market. These media have significant positive externalities from the perspective of one or another participatory theory of democracy. An individual's consumption of such media content is good for the people as a whole or, at least, for others within the particular consumer's "group." Since the consumer receives only a portion of the benefit, she is unlikely to spend the full value (to her and others combined) of her having the product. Because of this under-served need for these media, participatory democrats are likely to oppose constitutional interpretations that block all media-specific governmental regulations or interventions.²¹²

Participatory theorists, however, seldom interpret the Constitution as itself mandating the needed interventions. Doctrinally, inadequate press performance is not normally seen as "state action."²¹³ Although one could see failure of the government to act (or its property and licensing laws that empower some but not other private actors) as the objectionable state action,²¹⁴

²¹² Although they have long been allowed by Supreme Court case law, some commentators have viewed media-specific laws or any special treatment of the media as presumptively objectionable. See, e.g., Bezanson, *supra* note 120, at 733-34 ("[T]he press may be subject to general restrictions The government may not, however, single out the press for either conferral of a benefit or imposition of a burden."); cf. Lahav, *supra* note 1, at 346 (noting the tendency to hold this view in the United States but arguing "that a special press law in itself constitutes a threat to press freedom" only under an authoritarian press regime, and observing that the Swedes see a "specialized press regime as both a manifestation and a guarantee of press freedom").

²¹³ *But cf.* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 118 (1973) (Brennan & Marshall, JJ., dissenting).

²¹⁴ See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (rejecting this approach, in both the majority and the dissent, in the particular case where the state failed to intervene to protect a child from a violent parent; the dissent emphasized affirmative state actions that created *DeShaney's* dependence on the Social Service agency); Sunstein, *supra* note 53, at 36-37, 45 (noting that "broadcasters are given property rights in

various considerations counsel against easy reliance on this interpretative strategy. Constitutional adjudication is poorly designed for crafting appropriate structural rules and media subsidies. Participatory theorists can more reasonably argue that the Constitution does not block discretionary legislative authority to intervene with subsidies and nonensorious structural rules—even content-motivated or content-based structural rules²¹⁵—aimed at supporting the press's performance of its democratic roles. This conclusion may be the central constitutional implication of these democratic theories. The conclusion, however, is mostly a nonmandate—restricting the constitutional reach of the Press Clause. Thus, in order to allow needed and appropriate governmental interventions, participatory democratic theories recommend interpreting the Press Clause much more narrowly (in this context) than elitist democratic theory suggests.

Of course, participatory theories do not ignore the press's performance of the checking function. To allow for interventions and to protect against censorious restraints, constitutional doctrine should block government action that has a censorious purpose as either its end or means.²¹⁶ In addition, to be consistent with checking function concerns, these theories should favor invalidating government actions that undermine the integrity of the press as an institution,²¹⁷ or that burden media entities without a convincing benign explanation.²¹⁸

their licenses by government, and their exercise of these rights is a function of law," and could therefore be viewed as state action).

²¹⁵ See Baker, *supra* note 53, at 93-114 (describing historical examples and theoretical justifications for content-motivated interventions).

²¹⁶ All rules favor some speech over other speech. Thus, a doctrine focused on censorious "effect" provides no standard, and thereby calls for rank judicial policymaking. Ruling out an intention to suppress should generally provide sufficient judicial protection.

²¹⁷ See BAKER, *supra* note 14, at 225-49 (arguing that the Press Clause should protect "defensive rights" such as a "press privilege" from mandated disclosure of its sources or work product).

²¹⁸ For example, "[s]tanding alone," the legitimate interest in raising revenue "cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available," *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 (1983); namely, a more general tax not focused on the media. In contrast, sometimes the government can offer a benign explanation for media-specific measures that rearrange the allocation of resources within the media. For example, it might justify media-specific taxes whose revenue is dedicated to those media needed by democracy but underdeveloped by the market. Even then, a tax directed at particular protected content should sometimes be seen as suppressive. But if directed at, say, advertising or spectrum usage, then the reallocation should be seen as a non-censorious structural rule promoting, rather than undermining, democratic media. The revenue, however, must be retained within the communications order. Most dramatically, by analogy to the tax cases, at least to the extent that radio waves are only valuable for communication purposes (of all sorts), selling spectrum rights is a communications-specific governmental practice that takes resources away from the communications order. These sales could

Thus, my initial claim is that markets and private power are much more likely to frustrate the more ambitious democratic assignments called for by participatory theories than they are to undermine performance of the checking function. If so, the preferred interpretation of the Press Clause would shift depending on the democratic theory adopted. This can be illustrated by a simple matrix:

Press Clause Doctrinal Interpretations

Theory of Democracy	Assessment of Market	
	<i>Faith in Market</i>	<i>Serious Doubts About Market</i>
Elite Democracy (less demands on market)	Hands off	Still maybe hands off (interventions too dangerous; gain too small)
Participatory Theories (greater demands on market)	Hands off	Allow intervention; prohibit censorship or objectionable purposes

** shading indicates the more probable cell from the perspective of a particular democratic theory*

This analysis, however, moves too quickly. Consideration of several additional issues suggests that different participatory theories may support somewhat different constitutional interpretations.

Can the government provide people other than owners a right to publish in, or broadcast over, privately owned media, especially as to media that are monopolistic or at least limited in number within most communities? Should it do so? Must it? The issue of nonmedia, private speakers' right of access has been controversial. From the perspective of elite democracy, such a right may have little significance.²¹⁹ Public access is unlikely to be

be seen as unconstitutional unless the proceeds of the sale are kept within the system and unless the net effect of the sale could plausibly be seen as improving the communications order.

²¹⁹ In what follows, I claim to describe the most plausible (not the only possible) view from the perspective of a particular democratic theory. Admittedly, such views are contestable even within the particular perspective. For example, an elite democrat might favor access rights if she believed that marginalized groups would occasionally have evidence of governmental misfeasance, that the evidence would have significant political effects if effectively exposed; that a right of access would be necessary to and would be effective at achieving this exposure, and that creating the right does not unduly risk undermining press performance of the checking function.

simultaneously accurate, effective, and necessary for exposing wrongdoing. In cases where the report would be accurate and effective,²²⁰ media entities are likely to make the report on their own if given the information by the group seeking access. The elitist could conclude that the main effect of such laws is to undermine the integrity of the professional watchdog—"editing is what editors are for."²²¹ Thus, legislation creating such a right should be unconstitutional.

Access rights are even worse from the perspective of the liberal pluralist. These rights can threaten media entities' capacity for partisan mobilization. Balance is a centrist ideology. Except for occasional strategic or rhetorical purposes, it is often the last thing that a mobilizing media needs. A militant black newspaper should not be required to carry the Klan's rebuttal—or vice versa. Thus, the pluralist should join the elite democrat in praising the decision to strike down a law that provides candidates a right to reply to criticism by newspapers.²²²

In contrast, republican democrats most fear lack of inclusiveness (and, maybe, lack of civility). Mandated balance and well-crafted access rights could further inclusive dialogue, which is helpful to a society that needs to reason together about potentially common conceptions of the good. Going beyond support for the fairness doctrine,²²³ republicans might even strain to find state action in broadcasting, and then find a station's refusal to accept public issue or editorial advertising to be unconstitutional.²²⁴ Their only worry is whether a lack of editorial management will cause unmoderated dialogue to become too unfocused or unbalanced.

Complex democrats should find merit in the opposing views of both the pluralists and the republicans. Society needs partisan media that are constitutive of groups and that promote group mobilization—and rights of

²²⁰ At least in the United States, potentially damaging reports are often made with little effect unless they are developed and endorsed by the major media. Even a report made by the major media is often sufficiently buried so that it has no effect.

²²¹ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973). *But see* Blasi, *supra* note 6, at 623-31 (using the checking function as a basis for arguing for particular access rights).

²²² *See* *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). If, however, monopoly status is embedded deeply enough in the economic context, then the pluralist democrat might give up on the ideal of each group having its own media and accept pluralism within a single forum as the only partisan possibility available.

²²³ *See* *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969) (describing the fairness doctrine as a requirement imposed on radio and television broadcasters that "discussion of public issues be presented on broadcast stations, and that each side of these issues must be given fair coverage").

²²⁴ *See* *CBS*, 412 U.S. at 172 (Brennan & Marshall, JJ., dissenting) (claiming that a restrictive broadcaster policy is subject to, and violative of, the First Amendment).

access can undermine such media. Society, however, also needs inclusive collective discourses, a need served by access rights. What society needs most is an empirical question. No abstract answer or even analytic metric on which to base constitutional mandates is available. Hence, the complex democrat should incline toward upholding rights of access created by legislation, especially legislation that leaves some media unaffected, but not incline toward imposing the rights constitutionally.²²⁵ Or, following Curran's distinction between different media sectors, the complex democrat might favor something like a balance or diversity requirement in legislatively identified core media, which perform a societywide discourse role, but not in media serving pluralist groups.²²⁶

Thus, on first impression, both the elite democrat and the pluralist democrat, although for different reasons, are likely to oppose mandated access. They would agree with *Miami Herald* and *CBS v. DNC*, but not *Red Lion*. In contrast, the republican democrat would favor mandated access. She would agree with *Red Lion*, but not *Miami Herald* or *CBS v. DNC*. The pluralist and republican find opposite constitutional constraints—one approves what the other would strike down. The complex democrat alone would accept the government's decision concerning access, whatever it is. She would agree with both *Red Lion* and *CBS v. DNC*, but may reject *Miami Herald*.²²⁷ To modify the earlier matrix, and assuming at least some skepticism about the market, this suggests the following formulation:

²²⁵ This approach obviously fits what has happened in the broadcasting context. It even suggests a basis for the view held by White, Blackmun, and Powell in *CBS v. Democratic National Committee* ("*CBS v. DNC*") that the government could choose not to provide access even if state action were found, although there are other possible routes to this conclusion.

²²⁶ See *supra* text accompanying note 192.

²²⁷ But see *infra* text accompanying notes 230-33 (discussing a rationale for the *Miami Herald* decision which might lead supporters of all theories of democracy to accept the decision).

Tentative Formulation

Theories of Democracy	Press Clause Interpretation
Elite Democracy	Hands-off
Pluralist Democracy	Prohibit access rights; allow structural regulations that promote partisan media
Republican Democracy	Allow or mandate access rights; disfavor laws that promote more partisan media ²²⁸
Complex Democracy	Allow, but not mandate, access rights and legislation that promotes partisan media or that makes some media more inclusive
All Democratic Theories	Rule out censorship and legislation or practices aimed at suppressing media

Although this analysis is more fine grained and precise, it still oversimplifies. The analysis ignores both factual contexts and attitudes towards the judicial role. For example, the Court in *Miami Herald* reasoned that the “choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment,” and that the First Amendment does not tolerate “intrusion into the function of editors.”²²⁹ The liberal pluralist could

²²⁸ Some theorists draw other constitutional implications from republican democracy. For example, racist or sexist speech hardly contributes to discourse aimed at consensus about a common good. Republicans might be tempted to uphold laws suppressing this speech, especially if the consequences of the speech make meaningful participation in a collective discourse by members of the disparaged group unlikely. See, e.g., SUNSTEIN, *supra* note 53, at 186-87, 192, 225-26. But see POST, *supra* note 53, at 268-331 (1995) (describing and rejecting such republican arguments for control); SUNSTEIN, *supra* note 53, at 219-20. I find Post’s reliance on autonomy and his critique of arguments for suppression to be persuasive, both theoretically, see C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181 (1994) (reviewing KATHERINE MACKINNON, *ONLY WORDS* (1993)), and pragmatically, see Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, although Post here does not grapple with the propriety of a government’s proper role in structuring media enterprises. However, my conclusion might be shaped by a preference for complex democracy, which argues that fair and appropriate collective discourse can only occur when all groups are first empowered to develop their own views. The only meaningful remedy for the groups silenced by other’s speech is self-empowerment—support of their own voices. Suppression, even of denigrating, silencing speech, in the end does not empower the victim but does limit full inclusiveness, especially of those restricted.

²²⁹ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

approve of the premise, but the republican might reject it. However, the premise that the First Amendment does not allow an intrusion into editorial control was only one of two rationales for the decision. The Court also objected to the fact that the law made access turn on the paper's earlier criticism of the candidate. The Florida statute "exact[ed] a penalty on the basis of the content of the newspaper,"²³⁰ which could result in "blunted or reduced" coverage.²³¹ This deterrence operates like censorship. Recently, the Court faced the argument that *Miami Herald* required invalidating rules which compelled cable systems to carry content (local broadcast stations) that they would prefer to reject. Since these must-carry rules applied regardless of whatever other speech the cable system provided, the Court found that the rules could not have the deterrent effect that was fatal in *Miami Herald*.²³² The intrusion into the "editorial" role apparently did not matter.²³³ This sheds a different light on *Miami Herald*. If convinced of the empirical basis of its penalty/deterrence rationale, and this is a big "if,"²³⁴ supporters of all theories of democracy should accept the decision.

The analysis of *CBS v. DNC* was also oversimplified. Brennan and Marshall would recognize issue-oriented speakers' constitutional right of nondiscriminatory access to broadcasters' advertising slots.²³⁵ I suggest that only republican democrats would agree with this proposition. Liberal plu-

²³⁰ *Id.* at 256.

²³¹ *Id.* at 257.

²³² See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 656 (1994) ("Moreover, in contrast to *Tornillo*, no aspect of the must-carry provisions would cause a cable operator or cable programmer to conclude that 'the safe course is to avoid controversy,' and by so doing diminish the free flow of information and ideas." (citation omitted)); Baker, *supra* note 53, at 113-14. An additional ground for distinguishing *Miami Herald* was the difference between cable systems and newspapers. Although hardly necessary for its holding, the Court in *Buckley v. Valeo*, 424 U.S. 1 (1972), also characterized the flaw of the law in *Miami Herald* as a "legislative restraint" on the newspaper's freedom to criticize a candidate. *Buckley*, 424 U.S. at 51.

²³³ Reasons internal to the decision also suggest that the penalty/deterrence rationale in *Miami Herald* was primary. Only this primacy would explain Brennan's concurrence (joined by Rehnquist), suggesting that the majority's decision did not imply a view about a statute giving a libeled plaintiff a right to require a retraction. See *Miami Herald*, 418 U.S. at 258 (Brennan & Marshall, JJ., concurring). Such a statute would intrude into editorial control. It would not, however, impose a penalty or deter "protected" speech (since the libel is not protected).

²³⁴ Experience in countries like Germany, where the right to reply has a constitutional basis, hardly supports the empirical basis of this objection. Arguably, deterrence is a greater problem in relation to completely commercial and timid broadcasters—the FCC during its repeal of the fairness doctrine produced considerable antidotal evidence of this effect, see *Syracuse Peace Council v. FCC*, 867 F.2d 654, 659-64 (D.C. Cir. 1989)—than in relation to more journalistically committed newspaper publishers. Based on these "facts," it is possible that the outcomes in *Red Lion* and *Miami Herald* should be switched.

²³⁵ *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 172 (1973) (Brennan & Marshall, JJ., dissenting).

ralists would object because access rights could damage the media's partisan role. Without an abstract principle to determine whether the country was most in need of more partisan pluralist politics or more societywide discourse, complex democrats would leave this choice for legislative (or, alternatively, market) determination.

The liberal pluralist and complex democrat's response rings hollow in at least three situations: first, if the specific media at issue are, and predictably will continue to be, monopolistic within their community; second, if advertisers or other commercial interests effectively impose a nonpartisan, audience-maximizing orientation on these media so that any realistic hope or expectation that these media will become partisan advocates is naïve;²³⁶ and third, if legal regulations, such as the fairness doctrine, already preclude this pure partisan role. Under each scenario, the pluralist can conclude that the access right best empowers diverse groups to pursue their aims. The complex democrat can conclude that since these conditions have already made these media entities part of the societywide discourse, they should perform this role as inclusively (and as intelligently) as possible. Thus, given plausible empirical observations, all three participatory democratic theories can accept Brennan and Marshall's conclusion that issue-oriented speakers' constitutional rights of nondiscriminatory access should be recognized.²³⁷

On the other hand, a liberal pluralist or complex democrat judge might demur. Doctrinally, Brennan and Marshall must identify state action—the asserted absence of which is the determinative factor for several Justices.²³⁸ Even given state action, the judge might refuse to create intricate positive rights based on arguable empirical premises. This refusal might reflect less her theory of democracy or her appraisal of the market than her view of the judicial role—a rejection of a type of judicial activism. As these complexities illustrate, even though different democratic theories lead to different programmatic objectives in interpreting the Press Clause, democratic theory will not by itself determine doctrine or specific results.

The capacity of democratic theory to orient, but not determine, interpretations of the Press Clause is seen elsewhere. Media entities have repeatedly invoked the First Amendment in asking courts to grant them access to government facilities or government documents. These requests, typi-

²³⁶ Although this factual characterization may be persuasive as applied to network TV (as involved in this case), it is less applicable to cable and other portions of broadcasting, such as community radio, which presumably is also covered by the ruling.

²³⁷ See *supra* note 235 and accompanying text (discussing Brennan and Marshall's conclusion).

²³⁸ See *CBS*, 412 U.S. at 121 (Burger, C.J., Stewart, J., & Rehnquist, J.).

cally denied, are usually founded on a claimed right of the people to be informed. The standard view, however, is that the First Amendment provides a right to speak, not a right to the resources that would make speech informed or effective.²³⁹ The argument has fared no better by relying on some special media status under the Press Clause. Even if the press's institutional autonomy requires certain, special constitutional (defensive) rights, these rights do not include affirmative grants of particular resources.²⁴⁰ As Justice Stewart argued, "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act. The Constitution . . . establishes the contest, not its resolution."²⁴¹ Over vigorous dissents, the Court has denied requests for constitutionally based access to documents or facilities except in the context of judicial proceedings. Even here, the Court's initial analysis of courtrooms' openness was based less on a right of access to information and more on a tradition of courtroom trials as places where people could gather information about their government. For First Amendment purposes, this led the Court to analogize the courtroom and trial to streets and parks, rather than to governmentally held informational resources.²⁴²

Despite these results, the issue divided the Court. It is appropriate to ask whether the disagreements reflect different conceptions of democracy. Arguments for access to information often are based overtly on the importance of information for democracy.²⁴³ Before considering the implications

²³⁹ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973) ("Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."). On the other hand, the government must allow people to use certain public resources, such as the streets and parks, for purposes of speaking. The Court continually says that the validity of a limitation on the time, place, or manner of expression depends on "leav[ing] open ample alternative channels of communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (same); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (same). Predictably, this precept has had little payoff. But see *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994) (finding no ample alternatives to displaying a sign on one's private residence, in part because such a display carries a distinct and significant message about the identity of the speaker).

²⁴⁰ I have argued that the press has the same speech rights as individuals and that, in addition, the Constitution protects the press as an institution. Following Justice Potter Stewart, see Stewart, *supra* note 14, I conclude that this protection requires "defensive rights," such as reporters' testimonial privileges, that protect their work product, but not "offensive rights" that would give the press special constitutionally founded rights of access or rights to violate otherwise applicable laws. See BAKER, *supra* note 14, at 225-49.

²⁴¹ Stewart, *supra* note 14, at 636.

²⁴² See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 (1980) (finding a First Amendment right of access to a criminal trial); cf. *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974) (upholding a restriction on access to prisons); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (same).

²⁴³ See Letter from James Madison to W.T. Barry, *supra* note 1 (noting the importance of information access to democracy).

of the different democratic theories, however, I want to make two general observations.

Virtually everyone agrees that sometimes government should restrict access to information. Restrictions often serve individuals' interests in their own privacy, society's interest in military security, the effectiveness of the Federal Reserve Board's actions or law enforcement investigations, and possibly, the quality and frankness of courts' in-chamber discussions.²⁴⁴ It is also widely agreed that some governmentally generated information should be publicly available. Modern sensibilities find it incredible that reporting on debates held in legislative sessions at one time amounted to contempt of the legislative body.²⁴⁵ Given the value and legitimacy of both secrecy and information availability—the modern term is “transparency”—line-drawing problems abound. The diverse policy considerations relevant to the lines' placement suggest the possible wisdom of viewing access to information as a legislative issue. Such a legislative issue would be resolved by statutory freedom of information acts, privacy acts, and open meeting laws, or by intelligent executive or agency decisions, rather than as a constitutional matter.

On the other hand, bureaucratic bodies instinctually seem to desire secrecy (except on occasions where their own agenda or their members' egotism favors publicity). They may perceive secrecy as advancing their flexibility, whether or not these gains in flexibility are legitimate. Information could expose their misbehavior, failures, or incompetence. It could also lead to “misguided” criticisms. It forces public officials to defend their actions. For whatever reasons, including partial information or distortions, members of the public often react negatively to information about government actions even though the official believes her action was legitimate, maybe even wise. In any event, deference to the political branches on this issue is often not deference to careful policymaking, but to the self-protective instinct for secrecy. Such deference is problematic. The combination of the occasional real need for secrecy and an organization's systematic tendency to seek excessive secrecy could lead an activist court to for-

²⁴⁴ Cf. Aviam Soifer, *Freedom of the Press in the United States*, in *PRESS LAW IN MODERN DEMOCRACIES*, *supra* note 1, at 79, 105 (noting that the U.S. has at least 100 federal statutes and countless agency rules either prohibiting or limiting disclosure or authorizing nondisclosure of specified information).

²⁴⁵ In colonial America, printers were jailed for printing the laws and for publishing the votes or proceedings of colonial assemblies without a license. See LEONARD W. LEVY, *LEGACY OF SUPPRESSION* 24, 44-46, 76 (1960) (noting various cases in which printers were charged in criminal proceedings for printing the laws of the colonies); see also THOMAS C. LEONARD, *THE POWER OF THE PRESS: THE BIRTH OF AMERICAN POLITICAL REPORTING* 63-65 (1986); SCHUDSON, *supra* note 96, at 46-47.

ulate constitutional principles to guide a modest degree of judicial supervision over, and serve to restrict, executive and agency discretion. A less activist court, in contrast, might rely on the ability of the press and others seeking access to “coerce” openness by generating negative publicity about those maintaining unwarranted secrecy, or to obtain legislation requiring openness. Even for the more activist court, however, democratic theory could influence the decision to intervene constitutionally—the issue to which I now turn.

Although all democratic theories see value in popular access to information, they vary somewhat in the particular type of information to which they demand access, in the reason for seeking access, and in the centrality of broad access for their conception of democracy. Access to certain information obviously serves the checking function. For instance, I.F. Stone reportedly found plenty of dirt merely by using an informed and careful eye to read publicly available reports and documents.²⁴⁶ My guess is that the most explosive information will either be made available without the need for a special constitutional right, as I.F. Stone found, or will be information that, absent statutory directives, even an activist judge would not force the government to reveal.²⁴⁷ Presumptively persuasive arguments will usually support confidentiality. Of course, my empirical guess may be wrong—and is more likely to be wrong as more courts are willing to engage in *in camera* inspections and discover that secrecy is not justified. But, if I am correct, then a constitutional right of access to information may do little to serve the checking function. Moreover, the elite democrat could fear that mandated access will often interfere with and negatively “politicize” expert deliberation. Thus, an elite democrat should find a constitutional right of access to be quite problematic.

All participatory democrats should place greater emphasis on routine access to information. They value access to a much broader range of information than do elite democrats. Each of these participatory theories, how-

²⁴⁶ See ROBERT C. COTTRELL, *IZZY: A BIOGRAPHY OF I.F. STONE* 5 (1992); see also Michaela Jarvis, *Sunday Interview*, S.F. CHRON., Sept. 3, 1995, at 3/Z3 (quoting Ben Bagdikian, who said he “read I.F. Stone, whose chief impact was in saying ‘Look, here are these documents that exist in government that are very important, and nobody’s reporting on them’”).

²⁴⁷ Consider an example relevant to the checking function. In a dramatic decision, the Court did enforce a grand jury subpoena applying to portions of Nixon’s Watergate tapes, see *United States v. Nixon*, 418 U.S. 683, 713 (1974). But, would even an activist Court have overridden a President’s claim to secrecy and ordered access to the tapes on the basis of a request by an individual or news agency? Cf. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc) (holding that the President’s defeasible, constitutionally based privilege prevails even over the Senate Committee’s subpoena).

ever, has a somewhat different interest in the constitutional right. For pluralist democrats, information has largely instrumental or strategic relevance. Interest groups need to know when and where their preformed interests are most at stake and need assertion. Still, the liberal pluralist may conclude that sometimes secrecy will support the bargaining that all sides must rely upon. Arguably normal information disclosure provides most of what the public needs, in which case the pluralist could conclude that a constitutional right is not crucial.

In contrast, a democracy that involves wisely and collectively formulating attitudes, values, and conceptions of a common good—as republicans believe—or conceptions of a subgroup identity—as complex democrats maintain—calls for a broader range of information. Of course, given the centrality of identity and value formation, factual information may be less important for the republican than the pluralist. The republican or complex democrat could agree with Christopher Lasch, who argued that democracy depends on argument and discussion, not information (except to the extent that it is made relevant by, and is the product of, debate). This conclusion led Lasch to argue “that the job of the press is to encourage debate, not to supply the public with information.”²⁴⁸ Still, the republican will be unimpressed with the need for secrecy to promote bargaining. The republican is likely to argue not only that government actions should presumptively be public but also that decisions about these actions should be made only on the basis of publicly available information. The complex democrat is likely to share these views. Even if bargaining is an important part of governing, its legitimacy may depend on its transparency as well as its results, the main concern of the pluralist.

Despite some differences in their concern with access to information, it is less clear how, or even whether, these various democratic theories will differ in their view of a constitutional right. Attitudes about judicial activism may dominate all other considerations. Cutting one way are doubts about the propriety of courts engaging in essentially legislative policymaking under the rubric of constitutional law. Cutting in the other direction is a context in which trust in the judgment of policy-making branches, especially executive agencies, is particularly problematic. These considerations, rather than one’s choice among democratic theories, may be the key variable in determining a judge or scholar’s attitude toward the legitimacy (and scope) of a constitutional right to information.

²⁴⁸ Christopher Lasch, *Journalism, Publicity and the Lost Art of Argument*, GANNETT CENTER J. 1, 1 (1990).

The differences among democratic theories have potential constitutional ramifications in other areas. Consider copyright. Copyright overtly limits a later communicator's freedom of speech (or writing).²⁴⁹ There is, nevertheless, widespread agreement that copyright serves the public by increasing "the harvest of knowledge,"²⁵⁰ as well as furthering various private interests.²⁵¹ Likewise, all agree that copyright should not give unlimited rights to an "author," a view reflected in the principle that "facts" and "ideas" are not copyrightable and in the "fair use" privilege. Beyond these areas of agreement, however, people vary in their readiness to find something copyrightable and to find that a subsequent use is a violation. My suggestion is that a person's "readiness" in part reflects the democratic theory to which she is committed.²⁵²

A broad conception of copyright should pose few problems for the elite democrat and may even serve her ends. As long as copyright does not restrict use of facts and ideas, as it currently does not, a broad right is unlikely to interfere with the checking function. To the extent that a broad right increases the rewards of writing and of journalism, it provides greater incentives for undertaking that work.²⁵³ Likewise, a pluralist democratic theory has little objection to extensive rights. A broad right is unlikely to restrict a group's capacity either to present or to pursue its own exogenously formed interests. In contrast, republican democracy thematizes the salience and

²⁴⁹ This Article and the following textual paragraphs focus only on democratic theory, especially as it relates to the interpretation of the Press Clause. Freedom of speech, particularly if identified with individual liberty, might constitutionally require quite extensive "fair use" exemptions, especially for noncommercial uses.

²⁵⁰ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985).

²⁵¹ Copyright obviously serves some people's pecuniary interests. It can also support a person's nonpecuniary interest in creative control or personal privacy. Even a writer interested solely in spreading her message has an interest in stopping "free" copying. Often, only her ability to transfer rights involving her work will induce a publisher to publish and promote her message.

²⁵² The most thorough and interesting examination of copyright through the lens of democratic theory is in Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283 (1996), and in Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 *VAND. L. REV.* 217 (1998). The following textual paragraphs attempt to extend Netanel's work by emphasizing that the specific content of democratic theory should have implications for the proper reach of copyright.

²⁵³ The issue here is actually more complicated, particularly with respect to providing comparatively greater or lesser incentives to engage in particular types of communicative activities. For example, lack of copyright for facts—a rule that hopefully any democrat would demand—reduces the value of investing in costly, factual investigations that may be valuable for purposes of an exposé or other democratic concerns. In contrast, to the extent that a broadcaster is the unique employer of its anchorpeople, investment in promoting the appeal of their personality-centered "chatter" becomes a better strategy than investment in news gathering.

openness of cultural dialogue. Both political and cultural dialogue affect the community's conception of itself and the public good. By providing an economic incentive for production and publication, copyright encourages such cultural discussions. But, by restricting creators' or discussants' use of previously copyrighted materials, copyright narrows cultural dialogue. Moreover, if, as Lasch contends, broad participation in discussions is more important than facts—or, to restate the claim, if the democratic value of increased, noncommercial, popular involvement in discussion is greater than the democratic value of the lost media commodities—then a narrower right should be favored. This conclusion, however, is arguable. It depends on both normative judgments (what discourse is valued) and empirical predictions (how different definitions of rights will affect the discourse). Still, a plausible conclusion is that narrowing copyright protection should facilitate diverse public discussion and cultural explorations of common interests more than it dampens commercial incentives to produce useful communications.²⁵⁴

Unlike either elite democrats or pluralists, complex democrats agree with republicans that cultural discourses are central to democracy. This may help to explain the variation between those democratic scholars who, when discussing the media, focus solely on nonfiction (with news being the paradigm concern) and those who take a more expansive view of media content that includes fiction, art,²⁵⁵ and other cultural materials.²⁵⁶ Democratic elitists and liberal pluralists are more likely to be in the first group and republicans and complex democrats in the second. Moreover, the second group is especially likely to value these discourses when participation is popular and noncommodified, although commodified forms can provide substance to popular discussion and commodification sometimes helps to pay for higher levels of participation.

²⁵⁴ Of course, the arguments in favor of narrowing copyright protection also suggest reasons that other legal practices, most importantly contract, should not be allowed free reign to again limit the use of intellectual creations. See generally Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998).

²⁵⁵ See Amy Adler, *What's Left: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1502 (1996) ("Race, gender, and sexual orientation have become the subjects of art, and art has become a central medium to activists concerned with achieving equality in these realms.")

²⁵⁶ Having this point driven home may explain the movement in Alexander Meiklejohn's work. After first arguing in 1948 that the First Amendment only protects political speech, see ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (Oxford Univ. Press 1965), his republican sentiments predictably lead him eventually to see the importance of most art and literature for political life. See Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

Beyond this area of agreement with republicanism, complex democracy is additionally concerned with the effect of copyright on a *group's* ability to (culturally) discuss, form, and maintain its identity. More than republicans, complex democrats especially value the opportunity of nondominant groups to explore, develop, and maintain their own identity—an interest that is undermined to the extent that mainstream actors control and constantly orient cultural discourse toward presumptively “common” concerns. Thus, complex democrats first note that existing (and likely future) copyright law protects individual authors (or their corporate employers) rather than collective creations of culture. The law fails to adequately protect a group’s cultural identity from commercial exploitation. This failure is evidenced by “indigenous peoples protest[ing] the stereotypical Indian caricatures used to market a sports team”²⁵⁷ or any group whose “folk” stories, wisdom, and practices are commercialized (and often degraded) without compensation or return of value to the community.²⁵⁸ More dramatically, intellectual property rights can restrict internal cultural development and discussion by marginalized groups. Mainstream owners can often stop or restrict the use of their “owned” images for cultural purposes of outside groups. Extensive intellectual property rights would aid this process. For example, they would have allowed the estate of John Wayne to ban a postcard portraying Wayne wearing lipstick and saying, “It’s such a bitch being butch.”²⁵⁹ Complex democracy’s cultural pluralists seldom find that copyright effectively protects the discursive or cultural integrity of unpopular or politically marginal groups. Rather, intellectual property rights often impede these groups’ culturally based discussions, and consequently their creation of identity. Again, the empirical points are arguable. These considerations nevertheless can lead complex democrats, even more so than republicans, to strongly favor limiting the scope of traditional copyright.²⁶⁰ In many contexts, they

²⁵⁷ Rosemary J. Coombe, *Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World*, 48 STAN. L. REV. 1357, 1357 (1996).

²⁵⁸ This point is the reference implicit in the word “shamans” in the title of JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

²⁵⁹ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 144 (1993).

²⁶⁰ Their recognition of group practices as the source of much intellectual creation suggests the possible desirability of legal innovations recognizing a group’s right to control or be compensated for its creations. Although this suggestion merits consideration, it seems to go more to distributive notions of fairness than to democratic practice. Likewise, the observation, sometimes offered as an attack on the very notion of individual authorship, namely, that all individual authors and their works piggyback on (in property terms, “steal” from) a host of earlier creators—a host that created language and all other elements of existing culture—might discredit any notion of the normative necessity of recognizing rights in an individual

should favor expressive claims inspired by the First Amendment over expansive copyright protections.

CONCLUSION

As commentators repeatedly assert, democracy depends on a free press. But different conceptions of democracy are served by different free presses. This insight has direct significance for the practice of journalism. Even the most intelligent and democratically committed journalists, however, write and report within a communications order structured both by law and by the market. Both law and the market can reward but often also can impede desirable journalistic practices. Even more troublesome are the market forces that bankrupt certain types of media entities, sometimes the very media that democracy most needs. The obvious response, even if politically difficult to enact, is legislation favoring, protecting, subsidizing, or even creating the type of media entities or communication practices required by democracy. Because identifying these requirements depends on the specifics of democratic theory, the foregoing analysis should have significant policy relevance for media law and legislative reform.

Finally, there is constitutional law. The press's democratic functions provide the best perspective for understanding the First Amendment guarantee. Elitist democracy and its checking function (a value shared with all other democratic theories) have been most influential in giving the Press Clause doctrinal content that restricts government power. To the extent another theory of democracy is favored—I have implicitly claimed that complex democracy is the soundest theory—that theory may provide further content to the Press Clause. Nevertheless, the primary implication of complex democracy for constitutional interpretation is probably that the Press Clause should be read narrowly. Complex democracy requires a constitutional reading tolerant of structural regulation of the press by government. At any given time, democracy's primary communicative needs inevitably will be disputed. Complex democracy recognizes that the market could be failing, either by providing a media too homogeneous or too pluralistic, or by corrupting the available versions of either or both. These possibilities suggest that the Press Clause should be read to allow the government to promote a press that, in its best judgment, democracy needs but that the market fails to provide.

author. This observation, however, does not show whether to do so is desirable and certainly does not show that it is illogical, romantic, or illegitimate to do so.