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Imagining a Free Press

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No thoughtful person can be satisfied with the current state of our political process. Effective political communication is too expensive. Money and incumbency play too large a role in the process. Citizens have little or no access to unorthodox or radical points of view. Political debate is superficial; we are mired in an era of politics — and government — by sound bite. The press self-indulges in the virtually unrestrained disclosure of gossip and innuendo about the private lives of political candidates and routinely treats political campaigns as sporting events, denigrating the candidates and the process alike.

Although the causes of these problems are complex, there can be little doubt that at least some share of the responsibility belongs to the press. What can we do to improve its performance? To what extent does the Constitution, and particularly the freedom of the press guarantee of the First Amendment, preclude government regulation designed to redress the press' failures? The First Amendment was adopted at least in part to ensure a well-functioning democratic process. Does the First Amendment today promote or hinder that goal?

In *Images of a Free Press,* Dean Lee C. Bollinger[1] aspires "to enlarge our vision of the idea of freedom of the press" (p. xii) with an eye toward enabling government to improve the quality of public debate. Revisiting themes he first explored some fifteen years ago,[2] Bollinger now adds further to our understanding of the complex relationship among the First Amendment, the Supreme Court, the public, the press and the democratic process. This is a work of insight, sensitivity, and power. Bollinger has a profound knowledge of and a deep affection for his subject, and it shows.

I

Dean Bollinger's analysis can be divided into six separate steps. I

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1. Dean, University of Michigan Law School.

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

will consider each in turn. Bollinger begins with what he describes as the "central image" of freedom of the press in the United States today. According to Bollinger, this image received its richest articulation in *New York Times Co. v. Sullivan,*[3] in which the Court identified a fundamental conflict in our constitutional scheme: The primary function of freedom of the press is to support the societal choice for a democratic form of government, but the very government that is established in this scheme will inevitably attempt to suppress speech that threatens its power. In Bollinger's view, *Sullivan* structured the "central image" of press freedom around this basic insight. The critical features of this image are that (a) "the government is untrustworthy when it regulates public debate"; (b) the citizens are "the ultimate sovereign"; (c) "open debate must be preserved for their benefit"; and (d) "the press is the public's representative . . . helping stand guard against the atavistic tendencies of the state" (p. 20). Bollinger notes that the consequence of this central image is that "whenever public regulation touches the press the alarm will be sounded. And the now conventional cry will issue that, when it comes to the press, the government must keep its hands off" (p. 21). In a long series of decisions since *Sullivan,* the Court has consistently reinforced and reaffirmed this "autonomy-based" conception of press freedom.[4]

This "central image" of freedom of the press is the book's primary target. Bollinger's core theme is that the reality of press freedom in the United States is significantly more complex than this conception indicates and that what is needed is "a more sophisticated model of quality public debate, in which there is some room for public institutions to . . . help moderate tendencies . . . that distort and bias the process of public discussion and decision making" (p. 23).

Bollinger is clearly accurate in his description of the "central image." He is on less solid ground, however, in tracing this image so emphatically to *Sullivan.* The Court's protection of press freedom did not begin with *Sullivan.* To the contrary, the Court had forcefully articulated a similar, though less complete, vision of press freedom much earlier, in cases like *Near v. Minnesota ex rel. Olson*[5] and *Grosjean v. American Press Co.*[6] Moreover, and more important, the "central image" that Bollinger ascribes to *Sullivan* really has nothing to do with freedom of the press, as such. Rather, it is essentially a restate-

3. 376 U.S. 254 (1964).

4. *See, e.g.,* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (intentional infliction of emotional distress); Minnesota Star & Tribune Co. v. Minnesota Commr. of Revenue, 460 U.S. 575 (1983) (taxation); Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976) (free press/fair trial); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (privacy); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (libel); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (right-of-reply); New York Times Co. v. United States, 403 U.S. 713 (1971) (national security).

5. 283 U.S. 697 (1931).

6. 297 U.S. 233 (1936).

ment, with minor modification, of the central image of freedom of speech. This image originates, not in *Sullivan,* but in the dissenting opinions of Justice Holmes in *Abrams*[7] and *Gitlow,*[8] in Justice Brandeis' concurring opinion in *Whitney,*[9] and in a host of other decisions involving freedom of speech, such as *Lovell v. City of Griffin,*[10] *Terminiello v. Chicago,*[11] and *Cantwell v. Connecticut.*[12]

Indeed, *Sullivan* itself was not about freedom of the press, as distinct from freedom of speech. It did not articulate a new "image" of press freedom; it drew upon and strengthened a tradition of freedom of speech and press that was already deeply rooted in our general First Amendment jurisprudence. *Sullivan's* skepticism about government regulation of expression, which is so central to Bollinger's "central image" of freedom of the press, derives from our general free speech tradition and not from any special concerns about the press. Moreover, although Bollinger sees *Sullivan* as a decision about freedom of the press, the Court both before and after *Sullivan* has consistently and with good reason resisted the invitation to embrace a separate and distinct conception of press freedom — for otherwise, the Court would have had to determine whether Abrams' flyers, Gitlow's manifesto, Lovell's leaflets, and Cantwell's phonograph constituted "speech" or "press" within the meaning of the First Amendment, and something of consequence would have had to turn on the outcome of this not very promising inquiry.

This is not a trivial point. In *Images of a Free Press,* Dean Bollinger asks us to jettison *Sullivan's* "central image" of press freedom and to replace it with "a more sophisticated model of quality public debate, in which there is some room for public institutions to . . . help moderate tendencies . . . that distort and bias the process of public discussion and decision making" (p. 23). But if this "central image" is critical, not only to freedom of the press but to freedom of speech generally, then Bollinger is asking us to reconsider the entire corpus of First Amendment jurisprudence. After all, if we can trust government to regulate the press in order to improve the "quality of public debate," we can trust it to regulate speech as well. By targeting *Sullivan* as the root of the problem, and by defining freedom of the press as a right separate and distinct from freedom of speech, Bollinger creates the impression that he is tinkering with only one corner of the First

7. Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting) (anti-war protest).

8. Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting) (subversive advocacy).

9. Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring) (subversive advocacy).

10. 303 U.S. 444 (1938) (licensing).

11. 337 U.S. 1 (1949) (hostile audience).

12. 310 U.S. 296 (1940) (hostile audience).

Amendment. But the questions Bollinger asks us to consider about the legitimacy of the "central image" cannot be so easily cabined. In fact, the stakes may be a good deal higher than Bollinger admits.

II

Dean Bollinger next considers the costs of an autonomous press, and finds two of these costs to be prohibitively high. First, Bollinger argues that the Court has purchased press autonomy at too high a price in terms of the sacrifice of competing interests and that the Court has systematically undervalued the importance of such interests in order to justify its results. As an illustration, Bollinger offers *Cox Broadcasting Corp. v. Cohn,*[13] in which the Court held that the state lacks a substantial interest in prohibiting the press from disclosing the identity of a rape victim once her identity has been made public in any way by officers of the state. Second, Bollinger argues that the Court has been inattentive to the ways in which press freedom may threaten, rather than enhance, the democratic process, the very value the autonomy model says press freedom is designed to promote. Bollinger notes that this threat can develop in many ways: the press can exclude important points of view from public debate, it can distort knowledge of public issues through misrepresentation, and it can promote simple-minded over serious discussion of ideas (pp. 26-27). Bollinger finds it "astonishing" that the Court almost never seriously addresses these concerns (p. 34). Indeed, in many cases, the Court "seems to have gone out of its way — to the brink of misrepresentation — to ignore the risk that the press can become a threat to democracy rather than its servant" (p. 34). As an illustration, Bollinger offers *Sullivan* itself, in which the Court treated the state's interest in restricting libelous utterances as deriving entirely from the individual's interest in reputation and ignored the "other strong social concerns about the quality of public discussion" (p. 35). The Court failed, for example, to consider the important public interests in preventing the distortion of political debate by false statements of fact and in preventing capable individuals from being deterred from entering political life because of a fear that they will be subjected to false statements about their character or conduct.

It is puzzling that Bollinger emphasizes these particular costs of an autonomous press, for they focus less on the actual costs of press freedom than on the failure of the Court to offer a full account of those costs. The actual costs are, of course, much broader in scope and much greater in magnitude than those Bollinger identifies. Consider, for starters, the *Pentagon Papers* case[14] and *Nebraska Press Assn. v.*

13. 420 U.S. 469 (1975).

14. New York Times Co. v. United States, 403 U.S. 713 (1971) (invalidating an injunction designed to protect the national security).

Stuart.[15] What really interests Bollinger is not the costs of an autonomous press, but what he sees as the Court's systematic undervaluation of those costs.

Moreover, although such undervaluation may exist, Bollinger overstates his case. The Court in *Cox Broadcasting* did not trivialize the harm to the victim. Rather, it argued that whether or not that harm might otherwise be sufficient to justify a restraint on publication, the state cannot carry its burden of justification unless, at the very least, it takes the harm sufficiently seriously itself to prevent its own officers from carelessly or casually disclosing the information to the public. This was a sensible way for the Court to test the depth of the state's commitment. The Court's position was not that a limited disclosure of the information by officers of the state negates the harm of a widespread dissemination by the press. It was, rather, that the state should not be allowed to punish the publication of truthful information without a very strong justification, and that the state impeaches the strength of its own case when it fails to take reasonable precautions against such disclosure. This is a familiar and a sound principle of constitutional law, and it is not in any way peculiar to *Cox Broadcasting.*

Although Bollinger is also right in noting that the Court rarely considers the potentially adverse effects of some forms of press freedom on the quality of public debate, he again overstates his point. Whether the Court should empower the government to restrict expression that arguably undermines the democratic process turns in part on how far back the Court should delve into first principles. It may be that some propositions should be taken as given. Is it acceptable under the First Amendment, for example, for the government to suppress speech that calls for government suppression of speech? Is it acceptable under the First Amendment for the government to censor *Images of a Free Press* because it advocates restrictions on press freedom?

I do not mean to suggest that Bollinger's observation is without merit. To the contrary, it is perfectly legitimate for the Court to consider the argument that certain forms of press freedom may undermine the democratic process. But in considering such claims, the Court should apply the same standards it applies to any other justification for suppressing expression. There is nothing ironic or self-contradictory in protecting speech that might at some time in the future have potentially undesirable effects on the "quality" of political discourse.

For the most part, it seems to me that what the Court does in these cases is nothing different than what it does throughout its First Amendment jurisprudence — it consistently resists the temptation to

15. 427 U.S. 539 (1976) (invalidating an order designed to protect the administration of justice).

permit speech to be suppressed or regulated because of speculative or overblown claims about its potentially deleterious consequences. As Bollinger has so eloquently observed in other contexts, that is one of the great strengths of our free speech tradition.[16]

III

The third step in Dean Bollinger's analysis consists of an effort to explain why the Court systematically understates the costs of an autonomous press. At the outset, Bollinger briefly offers two very tentative explanations. First, having made up its mind to protect the press, the Court then succumbs to the all too human tendency to " 'argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion' " to justify its results.[17] This rings true. Second, the Court may have a kind of "pathological fear . . . of confronting the possibility . . . that the problems with the press may originate with the people" (p. 39), a possibility that would require the Court to entertain a highly paternalistic view of the *public* in public debate. Bollinger suggests that it may be easier for the Court to embrace "a romantic view of the public and the press" than "to address . . . the potentially harmful impact of speech on the quality of democratic decision making" (p. 39). There may be something to this, but I suspect that this theory is dominated by Bollinger's first explanation, which applies across all areas of constitutional law, as does the underlying phenomenon that Bollinger seeks to explain — less than candid opinions.

Bollinger then offers a third explanation, one that interests him more and derives from a more subtle understanding of the Court and a more refined vision of press autonomy. Bollinger observes that the Court performs a deeply educative role in society and affects, through its opinions, the values and images citizens hold (pp. 41-42). In this way, the Court helps to develop a dominant conception of the role of the press and a consensus about the meaning of a "good" press. Bollinger asserts that the Court, beginning with *Sullivan,* has consistently articulated a powerful image of the press and its relation to the government and the public, an image in which the press "performs a vital role in helping . . . to reduce the risks of official incompetence and abuse, to convey information about the affairs of government, and to serve as a forum for citizens to communicate among themselves" (p. 44). Within this image, the Court portrays the press "as playing a noble, even heroic, social and political role" and suffuses this image "with ethical content: journalists should focus their attention on the

16. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

17. P. 38 (quoting JOHN STUART MILL, ON LIBERTY 47 (R.B. McCallum ed., Basil Blackwell 1946) (1859)).

political issues of the day, speak the truth about official conduct, expose errors and abuse, represent the opinions of different groups, and, of course, avoid lies and misrepresentations" (p. 44). The Court defines the stakes "in very high terms indeed: a good press is a necessary condition of a good democracy," for it "stands as the guardian and agent of the political rights of the people" and "determines the quality of public debate" (p. 44). Bollinger contends that the Court, by articulating and reinforcing this image, directly affects the world and creates pressure on the press to conform to certain norms of quality journalism.

Although conceding that it is difficult to measure the extent to which the Court's articulation of this image actually affects the press, Bollinger maintains that such influence exists and that it is significant (p. 47). To support this conclusion, Bollinger observes that the press depends on the Court for its rights and so remains "continuously conscious of the importance of having the Court ready to stand between it and the next mood of political repression" (p. 48). The press therefore has a "compelling self-interest in meeting the Court's expectations about its role in society" (p. 49). Moreover, because the Court influences public opinion, the press, which must attend to such opinion, is further affected by the Court's image of its role (p. 49).

In Bollinger's view, much that seems strange about the autonomy model — including what he sees as the Court's systematic undervaluation of the costs of press freedom — can be understood as part of the Court's effort to shape the press. The Court conceives of a free press as independent, unafraid, and capable of exposing society's most fundamental shortcomings. There are enormous pressures against the realization of such a vision, however, for the "costs of exposing official corruption or of communicating unpleasant truths . . . are often great; the simpler, more lucrative path is to provide simplicities and entertainment" (p. 56). It is easy, in other words, "to perform badly" (p. 56). This explains why the Court conceives of itself as an advocate for the press and why it understates the costs of press freedom. In a world in which powerful constraints threaten to stifle an aggressive and independent press, the Court's voice must be forceful and its defense of the press must be bold. Moreover, the extreme protection the Court gives the press may serve as a "metaphor for an intellectual style," for to "deny state regulation of the press, to declare it 'unaccountable' to official authority, is to emphasize its intellectual independence" (p. 57). Bollinger concludes that "the reasons for overprotection of the press are not so much the ones given by *New York Times v. Sullivan* — that it is necessary because the government cannot be trusted, because human mistakes are inevitable, or because fear of litigation leads to timidity — but the idea that the removal of a superior, supervising authority contributes to the creation of a spirit of intellectual independence" (p. 57). Thus, as the Court goes about its everyday business of

deciding cases, it is "continually creating images of . . . American journalism" (p. 61), and those images directly and indirectly shape the press and the public's expectations of what a good press should be.

The underlying structure of Bollinger's argument is now clear. He maintains that the Court systematically understates the costs of press freedom. He then explains this phenomenon by offering his image of the Court as educator. As I have already indicated, however, it is not at all clear that the Court acts any differently in the press context than it does in most others. Indeed, so far as I can tell, the Court does not systematically undervalue the costs of an autonomous press any more than it systematically undervalued the costs of the exclusionary rule in the 1960s, the right of privacy in the 1970s, or the constitutional prohibition of affirmative action in the 1980s. In these as in other contexts, Bollinger's first explanation for the Court's behavior is, for me, the clincher: the Court undervalues competing interests because it is easier to write opinions that way.

Having said this, I hasten to add that I do not think that Bollinger needs to prove that the Court acts in an unusual manner in the press context to justify putting forth his theory of the Court as educator. To the contrary, his description of the Court's dialogue with the press and the public is an insightful and even inspiring conception of the Court's role in our constitutional system, and this is so whether or not it is uniquely tied to the Court's opinions about freedom of the press. But is it sound?

Like Bollinger, I would like to believe that the Court helps shape our images of the press and the police, our teachers and our wardens, our politicians and ourselves. I would like to believe that the Court can appeal to our better instincts, lift our spirits and set fire to our aspirations. I would like to believe that it can inspire us to be more careful reporters, more responsible parents, and more tolerant citizens. Moreover, like Bollinger, I do believe it. Granted, most citizens never see, let alone read, a judicial opinion. Nonetheless, what the Court does and says seeps into the public consciousness, and it certainly affects those with a legal stake in the decisions. There are, of course, those who question whether the Court has any such effect.[18] Like Bollinger, however, I am not persuaded by their criticisms and, quite frankly, I don't wish to be.

But there is a deeper problem. For although I agree with Bollinger that the Court can educate the press and the public through the images it generates in its opinions, I fear that Bollinger credits the Court with too much vision and too much subtlety. His image of the Court may be every bit as "romantic" as the Court's image of the press. The reasons offered in *Sullivan* for its fervent protection of the

18. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (reviewed in this issue by Professor Stephen L. Carter. — Ed.).

press may not be the most exhilarating or philosophical, but they are sensible, pragmatic, and compelling. Moreover, they are the reasons that actually motivated the Court. Bollinger's problem is that he thinks the Court is as wise as he is. It is not.

IV

The fourth step in Dean Bollinger's analysis is his observation that, despite the dominance of the central image, we do not in fact have an autonomous press. To the contrary, much of this century has seen extensive government regulation of broadcasting. What Bollinger finds striking is that, despite this fact, we have clung tenaciously to the central image. "[P]sychologically," we have failed to acknowledge that "the broadcast media are highly regulated and that they are an integral part of the American 'press' " (p. 62).

Bollinger notes that the Court has provided the most forceful defense of broadcast regulation and that its decisions have both shaped and defined that experience. Moreover, in defending broadcast regulation the Court has offered nothing less "than a complete conceptual reordering of the relationships between the government, the press, and the public that was established with *New York Times v. Sullivan*" (p. 66). The pivotal decision was, of course, *Red Lion Broadcasting Co. v. FCC*,[19] which was to broadcast regulation what *Sullivan* was to the principle of journalistic autonomy.

In *Red Lion*, the Court reaffirmed the traditional scarcity rationale for broadcast regulation[20] and went on to observe that, in the broadcast context, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[21] Indeed, there "is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[22] Bollinger notes that the "most striking feature" of *Red Lion* was "the Court's virtual celebration of public regulation" (p. 71). To read *Red Lion* is "to step into another world, one that encompasses a dramatically different way of thinking about the press and about the role of public regulation" (p. 72). *Red Lion* "reads like a tract that treats the press as the most serious threat to the ultimate First Amendment goal, the creation of an intelligent and informed democratic electorate" (p. 72). In "the triumvirate of parties that inhabit this universe, the public

19. 395 U.S. 367 (1969).

20. The Court first enunciated this rationale in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

21. 395 U.S. at 390.

22. 395 U.S. at 389.

stands at the top and broadcasters at the bottom," while the government, "in the middle, executes the will of the people to insure that broadcasters provide adequate service to the realm of public debate" (p. 73). Thus, contrary to popular belief, we have never had a modern press largely free of government control. Rather, we have had, and continue to have, a dual system in which only one branch of the press is autonomous.

V

Dean Bollinger begins the fifth stage of his analysis by observing that this dual system is today undergoing extensive reevaluation (p. 86). With the abandonment of the scarcity rationale for broadcast regulation, the central question has become whether the press should be made unitary and, if so, which model should prevail. Bollinger notes that the weight of opinion seems to have moved toward adopting the autonomous press model for the press as a whole (p. 86). Conceding that this model has worked reasonably well in the dual system we have had until now, Bollinger argues that the autonomous press model would not serve as well if the electronic media were permitted to operate under its principles, too.

Bollinger observes that, for most of its history, broadcast regulation has been treated as a largely uncontroversial and isolated phenomenon, so distinct from the rest of the press that it has seemed to have little impact beyond its own borders (p. 90). Viewed in that light, the extension of the autonomous press model to broadcasting would not seem likely to have any significant consequences for the print media. Bollinger argues, however, that it is not that simple, for "[t]he relationship between the electronic media and its treatment and the print media and its treatment has been subtle, shifting, and reciprocal" (p. 93). In fact, the "broadcast experience has not been simply a marginal enterprise" (p. 85), for as broadcasting has undergone continuing experimentation with public regulation, print journalism has lived under the constant threat that such regulation will become the dominant approach for the future. As a result, the broadcast experience "has exerted a profound influence over . . . the behavior of . . . the 'autonomous' print media" (p. 85), and the values "of fairness and balance in journalism" may continually have been reinforced in the print media by their "very real — and looming — regulatory presence in the broadcast media context" (p. 96). Bollinger warns that, viewed from this perspective, a decision to eliminate broadcast regulation could indirectly but significantly undermine the commitment to such values throughout the press (pp. 96-99).

Building upon his earlier work,[23] Bollinger maintains that the ex-

23. Bollinger, *supra* note 2.

isting dual system in fact makes good sense in terms of both public policy and First Amendment theory because there are compelling reasons for being both receptive to and wary of regulation. The Court should not be forced into an "all-or-nothing" position, for we can have the "best of both worlds" (p. 110).

In defending his theory of partial regulation, Bollinger contends that access regulation, exemplified by the fairness doctrine, both responds to constitutional traditions and cuts against them (p. 110). On the one hand, such regulation helps realize First Amendment goals by neutralizing disparities that impede the proper functioning of the marketplace of ideas and by equalizing opportunities to command an audience and to mobilize public opinion. Bollinger argues that these are important goals because unrestrained private interests can hamper the free exchange of ideas as severely as government censors. Access regulation directly addresses this concern by limiting the capacity of private power centers to control — and to distort — public debate.

On the other hand, Bollinger recognizes that access regulation constitutes a significant departure from our traditional constitutional norms concerning the need to maintain a distance between the government and the press. Such regulation can have at least three adverse consequences. First, it can chill journalistic motivation to address controversial issues of public importance. Second, it can necessitate the establishment of an administrative machinery that can be abused to force the press into an official line. Third, it can open the door to ever more oppressive press restrictions (pp. 111-13).

Because he sees access regulation as both desirable and dangerous, Bollinger concludes that a dual system of partial regulation offers important advantages over either complete regulation or complete nonregulation. Bollinger thus contends that the Court, by accepting the existing system of partial regulation, "has imposed a compromise, not based on notions of expedience but on a reasoned, principled, accommodation of competing First Amendment values" (p. 116). This system permits both "experimentation and the manifestation of ambivalence," both of which are healthy (p. 117). Bollinger emphatically rejects the claim that a system manifesting such ambivalence violates the virtue of consistency or impermissibly discriminates against the broadcast media. In his view, such differential treatment is acceptable because it "reflects no animus toward broadcasters" (p. 117) and because a concern with consistency in this context is "unduly fastidious" (p. 118). Bollinger warns that we must not allow ourselves to "be intellectually crippled by the charge of inconsistency" (p. 118).

I have puzzled over Bollinger's theory of partial regulation ever since he first articulated it fifteen years ago. Quite frankly, I have never managed to persuade myself that it is persuasive. Call me "unduly fastidious" but, in my judgment, the argument is "intellectually

crippled" by its failure to come to grips with the charge of inconsistency.

Bollinger argues that broadcast regulation does not reflect any "animus towards broadcasters." It is probably true that there was no such animus when Congress first enacted broadcast regulation, for there were few if any broadcasters and, in any event, the initial regulators clearly accepted the scarcity rationale as a compelling reason for regulation. With the universal abandonment of the scarcity rationale, however, the decision to retain broadcast regulation may well be tainted by "animus," if animus is generously defined. The retention of broadcast regulation serves at least two quite suspect purposes — it protects the commercial interests of the competing media, and it renders broadcasters vulnerable to the oversight and possible manipulation of federal regulators and politicians. I do not know precisely what Bollinger means by animus in this context, but it is difficult to ignore these two problematic influences in the decision to continue broadcast regulation long after the abandonment of its initial rationale.

Moreover, and more important, the presence or absence of animus hardly ends the inquiry. Otherwise, virtually all of our equal protection and much of our First Amendment jurisprudence would go by the boards. The constitutional concern with equal treatment is about more than merely preventing government discrimination based on animus.[24] This is not to say, however, that the government can never treat different means of communication differently. To the contrary, the Court has "long recognized that each medium of expression presents special First Amendment problems."[25] It is not unconstitutional, for example, for the government to permit leafleting but not loudspeakers in an airport terminal. But such differential treatment must be based upon real differences in the methods of communication, and those differences must be directly relevant to the interests the government seeks to further. With the abandonment of the scarcity rationale for treating the electronic media differently from the print media, we are left with no relevant difference between these two means of communication that would justify subjecting one, but not the other, to regulation. This is hardly an "unduly fastidious" concern with consistency. It is rather the very essence of the fundamental precept that the government may not treat similarly situated individuals — or institutions — differently.

Bollinger's "best of both worlds" argument is superficially quite seductive. It is fundamentally incompatible, however, with the basic

24. *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions,* 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, *Content Regulation and the First Amendment,* 25 WM. & MARY L. REV. 189 (1983).

25. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

premises of our First Amendment jurisprudence. To say that there are competing approaches to a problem and that each has certain advantages and disadvantages is merely to say that competing interests are at stake. That is always the case in constitutional adjudication. To say that there is no reason to deny ourselves the best of both worlds by accommodating the competing interests is merely to say that we should engage in ad hoc, open-ended balancing, a form of analysis that has long been rejected in First Amendment doctrine. Restrictions on political expression that significantly and discriminatorily limit journalistic freedom are and should be presumptively unconstitutional. To sustain such restrictions, the government must bear a heavy burden of justification. It is no answer to say: "We'll compromise by inflicting the restrictions on only some speakers." We have never permitted such experimentation, such self-indulgence of our "ambivalence," when considering the constitutionality of significant and discriminatory restrictions on free expression. There is no reason to begin here.

In fact, Bollinger's conclusion that we should permit the government to regulate the electronic but not the print media is nothing short of arbitrary. Indeed, in his earlier work Bollinger expressly asserted that his theory of "partial regulation could be applied to any portion of the media" and that the government could decide at will "to shift from regulation of broadcasting to regulation of newspapers" (p. 120). In *Images of a Free Press,* however, Bollinger retracts that view — he now believes that it would be unconstitutional to reverse the existing situation. In other words, "partial regulation" for now and ever more means regulation only of the "newer (electronic) media" (p. 120). But why? Without the scarcity rationale, there is simply no legitimate reason to impose the burdens of regulation on broadcast rather than on print journalism.

That, however, is only the tip of the problem. Bollinger considers the regulatory choice to be between the broadcast and print media. But if we are to live in the "best" of all worlds, why isn't our choice much broader? Why can't we choose to regulate all of the press, but not speech? Why can't we choose to regulate only cable television? Only broadcast television? Only magazines? Everything but magazines? Everything but cable? The opportunities to design the best of all worlds are virtually without limit. Would any of these choices violate the First Amendment? If so, which ones, and why? In Bollinger's realm of arbitrary choices to achieve the best of all worlds, there is not only "no law abridging the freedom of speech or of the press," there is no law. Indeed, it is revealing that in discussing *Red Lion* Bollinger enthusiastically applauds the Court for acting "as if it were reviewing a decision of an ordinary administrative agency" (p. 73). But that hardly seems the appropriate judicial stance for deciding whether the government may extensively regulate some, but not other, elements of the press.

One might argue that the decision to regulate broadcast but not print journalism makes sense even after the abandonment of the scarcity rationale because partial regulation has worked well in the past and has not appreciably impaired the freedom of the regulated media. On this view, the otherwise arbitrary decision to regulate the broadcast but not the print media is defensible because such differential treatment serves important societal interests at no real sacrifice of the rights of those who are subjected to regulation. But even if this argument is sensible in theory, it is implausible in fact. As the Court made clear in its unanimous decision in *Miami Herald Publishing Co. v. Tornillo,*[26] the type of access regulation that Bollinger endorses for the broadcast press significantly restricts journalistic freedom. Such regulation seriously limits the freedom of broadcasters relative to that of print journalists. In light of *Tornillo,* such regulations can hardly be dismissed as de minimis. Even a cursory glance at the differences between broadcast and print journalism reveals the impact of government regulation. By comparison with the unregulated media, broadcasting is bland, cautious, and studiously nonpolitical. Broadcasters do not endorse political candidates and they do not stake out controversial positions on issues of public importance. There can be no doubt that these differences are due in part to the effects of regulation. Directly and indirectly, government regulation makes broadcasters less willing to participate vigorously in public debate. Indeed, recognizing that the fairness doctrine may chill more speech than it fosters, even the FCC now calls for a return to the free market system for broadcasting.[27] Although Bollinger challenges this conclusion, his responses are insufficient to justify the discriminatory imposition of significant restrictions on only some members of the press (pp. 120-28).

One might argue further, I suppose, that the "best of both worlds" approach is uniquely appropriate in this context because there are First Amendment interests on both sides of the balance. As Bollinger observes, journalistic autonomy has certain advantages for the system of free expression, as does government regulation. To embrace either "extreme" may produce less effective public debate than a best of both worlds approach and thus frustrate the underlying goals of the First Amendment. In such circumstances, we are faced less with a conflict of competing interests than with a need to meld two competing models to produce the best possible First Amendment result. But this proves too much. On this view of constitutional law, the government could justify allowing school prayer for students who want to pray on the theory that such a policy accommodates the competing free exercise

26. 418 U.S. 241 (1974) (invalidating a right-of-reply statute as applied to print media).

27. Federal Communications Commission, General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (1985).

and establishment interests, thus giving us the best of both worlds. Similarly, the government could justify racial segregation in at least some of our public schools on the plea that such a policy accommodates the competing constitutional interests in freedom of association and racial equality, thus giving us the best of both worlds. And, on this view, the government could justify waiving the protections of *New York Times v. Sullivan* in libel actions brought by black or other minority political candidates on the plea that such a policy accommodates the competing constitutional interests in free expression and in expanding the opportunities for minority candidates, again giving us the best of both worlds.

I could go on, but the point is clear. The "best of both worlds" argument is an invitation to constitutional disaster. It cannot redeem a departure from the essential First Amendment principle that the government may not selectively impose significant restrictions on the political speech of some speakers, but not others, in the absence of an important difference between the speakers that directly furthers a substantial governmental interest.

Finally, I should note that even if Bollinger's partial regulation theory were otherwise sound, it is nonetheless seriously underinclusive as an effective response to many of the problems that plague our political discourse today. The theory of partial regulation was the product of thinking about the fairness doctrine and similar forms of access regulation to address one particular concern — the underrepresentation of unconventional points of view in the mass media. But the theory is wholly inadequate to deal with a host of equally important concerns, many of which certainly trouble Bollinger, such as the tendency of the media to treat political campaigns as sporting events, to trivialize public discussion, and to sensationalize private facts about political candidates, all to the detriment of our political process. Any serious effort to address the failures of the press today must come to grips with these concerns, as well as with the issue of access. The theory of partial regulation does not reach these issues and would not enable us to confront them effectively.

VI

The final step in Dean Bollinger's analysis calls for a "new image" of the idea of freedom of the press (p. 133). Under the "primitive" image of *Sullivan,* "the goal of press freedom [was] viewed as the creation of a vast space for 'uninhibited, robust, and wide-open' public discussion," and it was "assumed that the role of the Supreme Court is to stand guard against government intervention, permitting it only when the public interest counters with an overwhelming competing

interest to that of free and open debate."[28] Bollinger maintains that this approach is "insensitive to problems affecting the quality of public discussion that are posed by a laissez-faire system of modern mass media" (p. 133) and that before "we can be clearheaded in thinking about the great issues involving the press and the quality of public debate" we must develop "a new theoretical perspective" (p. 136).

In articulating this new perspective, Bollinger begins with the FCC's call for the abandonment of the fairness doctrine. In its 1985 report, the FCC reasoned that, with the proliferation of broadcast outlets and the emergence of new forms of print media, the fear of concentration that gave rise to government regulation was no longer reasonable (p. 136). Bollinger argues that this conclusion was premised on the faulty assumption "that the only acceptable rationale for public regulation must stem from some form of market failure" (p. 137). Bollinger identifies two now familiar objections to this assumption. First, because "the market for freedom of the press necessarily exists within the larger context of a market for goods and services . . . [c]itizens arrive at the system of press freedom with vast inequalities of wealth and, therefore, with very different abilities to participate effectively in public debate" (p. 137). Second, because "there 'is no necessary, or even probabilistic, relationship between making a profit (or allocating resources efficiently) and supplying the electorate with the information they need to make free and intelligent choices about government policy,' " there is a serious "conflict between the interests of those who manage for-profit media institutions and the interests of the democratic society in ensuring that citizens are supplied the information and ideas they ought to have."[29]

In Bollinger's view, these criticisms, though powerful, "do not provide as full and clear a picture as we need to determine the appropriate role of the state in mediating the deficiencies of a free press in the context of a free market system" (p. 138). Rather, they "represent only an intermediate step toward a deeper, more fundamental understanding" (p. 138). Bollinger explains that we "must address the nature of our own behavior in the discussion of public questions" and that we must "be concerned about the character of our demands in the market" (p. 139). Indeed, we "have good reasons to be wary of ourselves, and we should fear not just the failures of the market system but our own failures of intellect," for a "democratic society, like an individual, should strive to remain conscious of the biases that skew, distort, and corrupt its own thinking about public issues" (p. 139). Thus, "even in a world in which the press is entirely free and open to all voices, with a perfect market in that sense, human nature would still see to it that quality public debate and decision making would not

28. P. 133 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

29. P. 137 (quoting Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987)).

rise naturally to the surface but would, in all probability, need the buoyant support of some form of collective action by citizens, involving public institutions" (p. 139). As an example, Bollinger cites our criminal justice system, in which "we go to great lengths to ensure the decision-making process is purified of biases, and we recognize that an entirely laissez-faire system is likely to produce great injustice" (p. 140). Bollinger speculates that we accept the extraordinary constraints in this context, exemplified by the rules of evidence, "because we understand that the stakes are so high for the individual defendant" (p. 140). He maintains that we should think the same way about democracy. Indeed, it "should be considered a sign of high intellectual development when a society is able to take steps to correct those problems within itself that interfere with quality decision making" (p. 140).

Although conceding that the mass media may "give viewers and readers what they 'want,' or demand, through the expression of their preferences in the marketplace," Bollinger finds it nonetheless imaginable "that we — the same 'we' that issue our marketplace votes for what we get — might be very concerned about how we are behaving, about what choices we are making, in that system" (p. 141). Accordingly, we may "decide together, through public regulation, that we would like to alter or modify the demands we find ourselves making in that market context," for we may "recognize that if we are left to choose on our own whether and how to inform ourselves, too many will neglect to undertake the burdens of self-education, choosing instead to pursue more pleasant things" (p. 141).

Bollinger argues that "it would be a more advanced society, a more advanced democratic society, that could act to correct deficiencies arising out of the . . . citizens themselves" (pp. 141-42). He maintains that such regulation should not be condemned as elitist or paternalistic, for it "is not paternalism when a majority of a society recognizes that its own intellectual limitations call for some institutional or structural correctives" (p. 144). Bollinger concludes that an approach to government regulation stemming from a "self-conscious awareness" of our own frailties and biases in order to promote a higher level of public discussion and decisionmaking would "be a great and important advance in the history of press freedom" (pp. 144-45).

It is in his articulation of this approach that Bollinger offers his most important contribution. His vision of freedom of the press and of its relation to public institutions and to the character of the American people represents a significant step forward. By emphasizing the need to address failings in our national character, this approach presents a vision of government intervention that is designed to improve the press, the political process, and the people.

Bollinger's analogy to the criminal justice system is especially pow-

erful. As Bollinger notes, we exclude all sorts of evidence from the consideration of the jury in its decision of important questions of fact (p. 140). We do this for many reasons. Sometimes, as in the context of the attorney-client privilege, we exclude relevant evidence because its probative value is outweighed by the harm that its admission would cause to extrajudicial interests, such as the confidentiality of the privileged relationship. In other situations, we exclude evidence because we fear that jurors will exaggerate its probative value. We generally exclude evidence of prior convictions of criminal defendants, for example, because, in the jargon of the law of evidence, the probative value of the evidence is substantially outweighed by the risk of undue prejudice to the defendant. In such circumstances, we conclude that jurors are more likely to reach a fair and accurate result if they are denied access to the evidence completely. Bollinger asks us to consider extending this approach to the democratic system.

Consider the following extension of the analogy. Traditionally, the press did not report information about the private sexual conduct of political candidates. In exercising such discretion, the press acted like a judge in a criminal trial, preventing the people — the jurors — from learning information that arguably would distort their judgment and distract their attention from more important matters. Today, however, as part of a general breakdown of journalistic standards, the press, driven by rampant commercialism, routinely sensationalizes such information to the (arguable) detriment of the political process.

In its defense, the press argues that it would be irresponsible not to report such information, pointing to polls indicating that perhaps fifteen percent of the public would not vote for a candidate who engaged in such activity. But on the same theory, the press presumably would have to argue that because seven percent of the public would not vote for a candidate who engaged in oral sex with his spouse, it must disclose that information, too. Similarly, because five percent of the people would not vote for a candidate who did not shower or change his socks everyday, or wear pajamas to bed, the press would have to regard those facts, too, as appropriate for public disclosure. There must be some limit, however, and this limit must be designed not only to respect the legitimate privacy interests of candidates, but also to reflect our right, as a society, to decide that some matters simply should not play a significant role in our political process, even if some of our fellow citizens disagree. And our right to make such a decision should be strongest when, as in the trial context, the information has a greater potential to distract and distort than to inform our better judgment. As in the trial context, we should be able to protect the political process against our own failures of judgment.

Bollinger has offered us an innovative and powerful new image of freedom of the press. It merits serious consideration. In that vein, I

would like to venture a few tentative observations. First, although Bollinger does not seem to note this himself, his new vision of freedom of the press is much broader than his theory of partial regulation. It offers no justification for continued discrimination against the broadcast press. It does, however, provide a strong rationale for enabling the government to reach a much broader range of concerns than those addressed by mere access regulation. It offers a more principled and less arbitrary foundation on which to build a bolder and more innovative theory of government regulation of the press.

Second, Bollinger maintains that his new approach is neither paternalistic nor elitist. This is at least questionable. The mere fact that "a majority of us" agrees to enact restrictions on what the press may report does not mean that the restrictions are not elitist or paternalistic. Bollinger seems to assume that there is no paternalism in these circumstances because those supporting the restrictions do so in recognition of their own frailties. They are, in effect, tying their own hands by denying themselves access to information they fear they themselves might otherwise abuse. In truth, however, many if not most of those who would support such restrictions probably think themselves perfectly capable of handling the information at issue. It is the "others" they worry about. In this sense, at least, such restrictions cannot escape the taint of paternalism. Moreover, the minority of citizens who are prevented from obtaining information they consider useful in making their own political decisions are certainly the victims of elitism insofar as the "majority" finds that judgment inappropriate. It does not further the analysis to insist that such regulations are not elitist or paternalistic. At least in a subtle way, they are. The important — and difficult — task is to determine when a "majority of us" has the right, if ever, to decide that certain information about political candidates is not to play a role in political debate, even though "a minority of us" disagrees.

Third, although Bollinger puts forth his new image with considerable conviction, in the end he adopts a tentative stance, noting that it is uncertain whether our society is sufficiently "advanced" to embrace this theory, and that the essential "question is whether the government can be trusted with the power to intervene into the field of public debate" (p. 142). Bollinger is wise to recognize the risks in his approach and to doubt whether the government "can be trusted" to implement it. There is some irony in this, of course, for at its very core *Images of a Free Press* directly challenges *Sullivan*'s "central image" by attacking *Sullivan*'s distrust of government regulation of the press.

On the other hand, although there may be some tension in Bollinger's ultimate distrust of government, it is also true that he is prepared seriously to consider whether we should grant government a good deal more discretion than we have in the past. For those who, like myself,

generally accept *Sullivan*'s central image, this is a disquieting prospect. I am convinced by Bollinger and others,[30] however, that it is time to ask some hard questions about our political process. If we are unwilling to trust government to regulate the press, we must be content to leave the critical decisions to the press. But it is no longer clear to me that a society dedicated to maintaining an effective, fair, and open political process should delegate the decision of such fundamental questions concerning the structure and nature of our political discourse to the unelected, unrepresentative members of the private press. It is one thing to guarantee and protect freedom of speech and of the press. It is at least arguably another thing entirely to cede to the press the essentially unrestrained authority to determine the basic ground rules of our democratic process. Viewed in that light, the critical question is not whether we should trust the government to regulate the press, but whether we should trust the press to define our political process. We must understand that the choice that confronts us is more subtle and more difficult than whether we want the government to control the press. It is a choice between two competing power centers — one subject to political control, the other controlled increasingly by the market. That, in any event, is the choice and the challenge that Bollinger offers us in *Images of a Free Press.*

Throughout this work, Bollinger refers admiringly to a 1947 report on the condition of press freedom in the United States.[31] This report, which was the work of a prestigious commission chaired by Robert M. Hutchins, then Chancellor of the University of Chicago, concluded that the press "is not meeting the needs of our society."[32] Although the Commission stopped short of calling for full-scale government regulation, it emphasized that freedom of the press must be understood as a "conditional right" extended by the people to the press; it is not a law of nature, but a means of securing the advantages that "an autonomous press can provide a democratic society."[33] We have granted the press extraordinary protection for extraordinary reasons — reasons that go to the very core of our self-governing process. On this view, freedom of the press is a means to an end, and a press that fails to serve the ends for which it is free may lose that freedom. As the Hutchins Commission observed, no "democracy . . . will indefinitely tolerate concentrations of private power irresponsible and strong enough to thwart the aspirations of the people."[34]

It is time "to establish a modern sequel to the Hutchins commis-

30. *See* Cass Sunstein, *Free Speech Now,* 59 U. CHI. L. REV. 255 (1992); Fiss, *supra* note 29.

31. *See* COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947).

32. *Id.* at 68.

33. *Id.* at 12.

34. *Id.* at 80.

sion" (p. 135) in order to study the performance of the press today and to consider more fully the complex and important questions posed in *Images of a Free Press.* I can think of no more thoughtful or more knowledgeable person to chair that commission than Lee Bollinger.