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THE ROLE OF THE ACCESS DOCTRINE IN THE REGULATION OF THE MASS MEDIA: A CRITICAL REVIEW AND ASSESSMENT

DAVID L. LANGE†

I. INTRODUCTION

Among the issues which confront the American mass media, surely few are more important than the issues posed by the question of access: who finally shall decide which voices will be heard, which questions raised, and which events and matters covered in the nation's press?

In broadest terms, the access question is nothing less than an inquiry into the proper structure and purpose of the American press. More recently, however, the question has arisen in the narrower context of immediate confrontations between the owners of the media and their gatekeepers,¹ on the one hand, and individual members of the public on the other. Thus, a group of businessmen organized against the war in Vietnam demand the right to air their views in sixty-second broadcast editorials.² Members of a clothing workers union propose to buy a page of advertising space in a metropolitan daily newspaper to protest the importation of foreign-manufactured clothing.³ Individual citizens insist that they be allowed to use the origination facilities of their community's cable television system to express their personal views on any subject.⁴ In each case proponents of a point of view seek direct access to a communications medium that they do not generally control. If access is to be granted, some accommodation obviously is required among interests that are likely to conflict.

With increasing frequency, scholars, courts and regulators have proposed that the accommodation be implemented through an affirmative right of access in the proponents as against the owners and manag-

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¹The "gatekeepers" metaphor was first employed by David Manning White in his classic study of the screening role of editors. See *The "Gate Keeper": A Case Study in the Selection of News*, JOURNALISM QUARTERLY 383-90 (1950).

²*Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080 (1973).

³*Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

⁴See generally Botein, *Access to Cable Television*, 57 CORNELL L. REV. 419 (1972).

ers of the media enterprise.⁵ The proposals reflect a growing uneasiness

⁵The access question has inspired a considerable literature. The weight of opinion in the law reviews favors some form of limited access. A majority of the access proposals have been offered in the context of the broadcast and cable media, but there is substantial support for access to the print media as well. See Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Barron, *Access—The Only Choice for the Media?*, 48 TEXAS L. REV. 766 (1970); Botein, *Clearing the Airwaves for Access*, 59 A.B.A.J. 38 (1973); Botein, *The Federal Communications Commission's Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media*, 54 CORNELL L. REV. 294 (1969); Canby, *The First Amendment Right to Persuade: Access to Radio and Television*, 19 U.C.L.A.L. REV. 723 (1972); Clark & Hutchison, *Self-Censorship in Broadcasting—The Cowardly Lions*, 18 N.Y.L.F. 1 (1972); Drabelle & Taylor, *The President, The Fairness Doctrine, and Political Access to the Broadcast Media*, 15 ST. LOUIS U.L.J. 73 (1970); Firestein, *Red Lion and the Fairness Doctrine: Regulation of Broadcasting "In the Public Interest,"* 11 ARIZ. L. REV. 807 (1969); Johnson & Westen, *A Twentieth-Century Soap-box: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971); Mallamud, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 DUKE L.J. 89; Malone, *Broadcasting, The Reluctant Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?*, 5 U. MICH. J. LAW REFORM 194 (1972); Scanlon, *The FTC, the FCC, and the "Counter-Ad" Controversy: An Invitation to 'Let's You and Him Fight?'*, 5 ANTITRUST LAW & ECON. REV. 43 (1971); Zack, *F.C.C. and the Fairness Doctrine*, 19 CLEV. ST. L. REV. 579 (1970); Comment, *The Broadcast Media and the First Amendment: A Redefinition*, 22 AM. L. REV. 180 (1972); Comment, *And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising*, 60 CALIF. L. REV. 1416 (1972); Note, *A Fair Break For Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532 (1971); Note, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 904-07 (1972); Note, *Broadcasting and the Right of Access to Public Forums: Business Executives' Move for Vietnam Peace v. FCC*, 6 GA. L. REV. 208 (1971); Comment, *From the FCC's Fairness Doctrine to Red Lion's Fiduciary Principle*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 89 (1970); Note, *The Duty of Newspapers to Accept Political Advertising—An Attack on Tradition*, 44 IND. L.J. 222 (1969); Comment, *Freedom of Speech and the Individual's Right of Access to the Airwaves*, 1970 LAW & SOC. ORDER 424; Note, *The Public Domain and a Right of Access: Affect Upon the Broadcast Media*, 3 LOYOLA U.L.A.L. REV. 451 (1970); Comment, *Constitutional Law: The Right of Access to the Press*, 50 NEB. L. REV. 120 (1971); Note, *Freedom of Expression in the Media: The Public's Claim for a Right of Access*, 33 OHIO ST. L.J. 151 (1972); Note, *We Pick 'Em, You Watch 'Em: First Amendment Rights of Television Viewers*, 43 S. CAL. L. REV. 826 (1970); Note, *"Public Interest," "Fairness," And the First Amendment: A Broadcaster's Dilemma*, 4 SUFFOLK L. REV. 509 (1970); Note, *Resolving the Free Speech—Free Press Dichotomy: Access to the Press Through Advertising*, 22 U. FLA. L. REV. 293 (1969); 40 U. CIN. L. REV. 870 (1971); 85 HARV. L. REV. 689 (1972); 15 S.D.L. REV. 172 (1970); 24 VAND. L. REV. 131 (1971). There is, in addition, a substantial body of complementary writings which can be classified as neither clearly "for" nor "against" the proposals for access, but which nonetheless offer useful insights into the areas. See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 653-71 (1970); Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, 37 U. COLO. L. REV. 31 (1964); Botein, *supra* note 4; Cohn, *Access to Television to Rebut the President of the United States: An Analysis and Proposal*, 45 TEMP. L.Q. 141 (1972); Houser, *The Fairness Doctrine—An Historical Perspective*, 47 NOTRE DAME LAWYER 550 (1972); Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change*, 37 U. CIN. L. REV. 550 (1968); Johnson, *Freedom to Create:*

with the apparent concentration of power in the American media and a corresponding concern for the viability of effective and diverse public debate.⁶

In their most extreme form, the proposals have called for recognition of access to the press as "a new First Amendment right."⁷ But the courts have not yet accepted these proposals. In particular, private newspaper publishers have argued successfully that the first amendment ordinarily protects them in their traditional right to edit the contents of their publications.⁸ Thus, the clothing workers either must persuade the publishers to print their editorial advertisements or look elsewhere to find an outlet for their views.

Broadcasters, on the other hand, have not enjoyed the editorial autonomy of the publishers. Unlike publishers, broadcasters have long been subject to the "fairness doctrine," the requirement that they provide a balanced treatment of controversial public issues.⁹ To be sure,

The Implications of Anti Trust Policy for Television Programming Content, 8 OSGOOD HALL L.J. 11 (1970); Kalven, "Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court, 67 MICH. L. REV. 289 (1968); Putz, *Fairness and Commercial Advertising: A Review and a Proposal*, 6 U. SAN. FRAN. L. REV. 215 (1972); Symposium, *The FCC's Role in TV Programming Regulation*, 14 VILL. L. REV. 629 (1969); Comment, *A Constitutional Remedy For the High Cost of Broadcast and Newspaper Advertising in Political Campaigns*, 60 CALIF. L. REV. 1371 (1972); Note, *The First Amendment and Regulation of Television News*, 72 COLUM. L. REV. 746 (1972); Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971); Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, 40 GEO. WASH. L. REV. 933 (1972); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664 (1971); Note, *Frontiers of Fairness in Broadcasting*, 22 S.C.L. REV. 208 (1970); Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970); Comment, *The Broadcast Industry: The Commercial Television Licensee and the Editorial Function*, 18 WAYNE L. REV. 683 (1972); 44 NOTRE DAME LAWYER 447 (1969); 6 U. RICH. L. REV. 370, 448 (1972).

⁶See, e.g., Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1644-47, 1678; Johnson & Westen, *supra* note 5 at 606.

⁷Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5.

⁸See, e.g., *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Cook v. Advertiser Co.*, 323 F. Supp. 1212 (N.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972); *Resident Participation, Inc. v. Love*, 322 F. Supp. 1100 (D. Colo. 1971). *But cf.* *Tornillo v. The Miami Herald Publishing Co.*, No. 43,009 (Fla. Sup. Ct., filed July 18, 1973), *rehearing denied*, Oct. 10, 1973.

⁹The fairness doctrine was conceived in the FCC's 1946 "Blue Book," within which the Commission promulgated the principle that stations must reserve broadcast time for discussion of public issues. FCC, *PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES* (1946). The doctrine reached a maturity of sorts in 1949, when the Commission issued a report regarding editorializing by licensees. FCC, *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). Attacked as a violation of the precepts of the first amendment, the doctrine was nonetheless held to be constitutional in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The fairness doctrine

they have retained a degree of independence: while the fairness doctrine has called for balanced treatment of the issues, the broadcasters have been relatively free to define in the first instance the issues that they would treat.¹⁰ But their discretion has been largely circumscribed by the overriding requirement that they provide service "in the public interest"¹¹—a command which the Federal Communications Commission has interpreted to mean that broadcasters must attempt to identify and treat issues of particular concern to their audience.¹² Moreover, the fairness doctrine contemplates—and in some cases demands¹³—that the balance which is required of broadcast licensees be achieved through opportunities for direct expression by interested members of the public.¹⁴ Thus, we have grown accustomed to the broadcast editorial followed in turn by a reply from some "responsible" spokesman for another point of view. This right to reply is, of course, a species of access even though it arises as a result of some position taken initially by the licensee.

Meanwhile, cable television audiences in the so-called "top one hundred markets" in the country are the beneficiaries of a maze of recent FCC regulations intended in part to ensure public access to CTV

has been the subject of extensive commentary. For a useful discussion of its general development, see Houser, *supra* note 5.

¹⁰See, e.g., *CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080 (1973), in which Chief Justice Burger observes:

The regulatory scheme evolved slowly, but very early the licensee's role developed in terms of a "public trustee" charged with the duty of fairly and impartially informing the listening and viewing public. In this structure the Commission acts in essence as an "overseer," but the *initial and primary responsibility* for fairness, balance and objectivity rests with the licensee. . . . [S]o long as a licensee meets its "public trustee" obligation to provide balanced coverage of issues and events, it has *broad discretion* to decide how that obligation will be met.

Id. at 2093-94 (emphasis added).

¹¹Communications Act of 1934, 47 U.S.C. §§ 303, 309 (1970). The congressional standard of "public interest, convenience and necessity" runs throughout the Act as it applies to broadcasting.

¹²See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377-79 (1969), in which the Court stated:

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The broadcaster must give adequate coverage to public issues . . . and coverage must be fair in that it accurately reflects the opposing views. . . . The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter. . . ." 47 U.S.C. § 303 and § 303(r).

¹³395 U.S. at 373-75.

¹⁴See *Democratic Nat'l Comm.*, 25 F.C.C.2d 216, 222-23 (1970).

channels.¹⁵ In most of these markets, cable operators are required to originate programming for a "substantial part of the broadcast day";¹⁶ this programming is subject to the fairness doctrine and thus incorporates its reply provisions.¹⁷ But cable operators in these markets are also required to dedicate certain channels to the public on terms which recognize affirmative, individual rights of public access entirely independent of any position taken by the operators.¹⁸ The result is to force cable systems to operate *pro tanto* as common carriers.

Recently, it appeared that a more immediate right of access to the broadcast media might also be required. In a sweeping 1971 decision, a panel of the Court of Appeals for the District of Columbia held that the first amendment forbids broadcast licensees to reject all paid editorial advertising, at least in cases in which commercial advertising was otherwise accepted.¹⁹ But that tentative acceptance of an affirmative right of access was short-lived. In *CBS v. Democratic National Committee*,²⁰ a majority of the Supreme Court has held that the first amendment does not impose this requirement on broadcasters operating under present broadcast regulatory policies.

For those who have doubted the wisdom of an enforceable right of access to the mass media²¹—and I am among them for reasons I shall

¹⁵47 C.F.R. §§ 73.201, .205, .209, .213, .215, .217, .221, .225, .251 (1972).

¹⁶47 C.F.R. § 73.201(b) (1972).

¹⁷See 47 C.F.R. § 73.209 (1972); Public Notice, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

¹⁸47 C.F.R. §§ 73.251(4)-(8), .251(10)(ii)-(11) (1972).

¹⁹*Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080 (1973).

²⁰93 S. Ct. 2080 (1973).

²¹While not all of the following authorities have considered the access proposals specifically or at comprehensive length, the tenor of their observations is generally at odds with the concept of an enforceable right of access. See 2 Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 624-50 (1947); Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75 (1969); Daniel, *Right of Access to Mass Media—Government Obligation to Enforce First Amendment?*, 48 TEXAS L. REV. 783 (1970); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967); Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 GEO. WASH. L. REV. 974 (1970); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 GEO. WASH. L. REV. 719 (1964); Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, 47 N.Y.U.L. REV. 83 (1972); Note, *Newspaper Regulation and the Public Interest: The Unmasking of a Myth*, 32 U. PITT. L. REV. 595 (1971); Note, *Free Speech and the Mass Media*, 57 VA. L. REV. 636 (1971).

explain at some length in this article—the decision in *Democratic National Committee* is encouraging. And yet it clearly does not end the battle for a right of access to the broadcast media. On the contrary, a majority of the Court decides merely that the broadcast media present unique regulatory problems which are primarily within the province of Congress and the Federal Communications Commission;²² that the Communications Act of 1934 does not itself impose common carrier status on broadcast licensees;²³ and that, whether or not broadcast licensees are engaged in governmental action, they need not accept unwanted editorial announcements unless they are required to do so by the FCC.²⁴ In the view of the majority, balanced coverage of public issues under a system of editorial trusteeship is an adequate alternative to a right of access in individuals.²⁵ The question whether the FCC itself may impose a right of access without violating the first amendment is not actually decided, although a majority of the Court rather clearly supposes that it may.²⁶ Meanwhile, the majority continues to appear untroubled by the limitations imposed on broadcasters' discretion by the fairness doctrine and, in dictum, actually appears to welcome the relatively recent restraints on cable television.²⁷

Other dicta in the case suggest that a majority of the Court would find efforts to establish a right of access to the print media substantially more difficult to approve.²⁸ Traditional first amendment thinking has long held that the print media are unlike the broadcast media in that the latter are uniquely scarce:²⁹ anyone may establish a printing press;

²²*CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080, 2086 (1973).

²³*Id.* at 2087-92.

²⁴*Id.* at 2096-101, 2108-09.

²⁵*Id.* at 2097-98.

²⁶*See id.* at 2100.

²⁷*See id.* at 2100-01.

²⁸Chief Justice Burger, supported by Justices Rehnquist and Stewart, makes this comment: "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." *Id.* at 2094. And Justice Brennan, joined by Justice Marshall, notes in his dissenting opinion that: "The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers." *Id.* at 2126 n.12.

²⁹The most frequently quoted statement of the scarcity rationale was set forth by Mr. Justice Frankfurter: "Unlike other modes of expression, radio is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *NBC v. United States*, 319 U.S. 190, 226 (1943). While other theories of broadcast regulation have been offered—including, notably, the concept of public ownership of the air-

broadcast frequencies, on the other hand, are drawn from the limited electromagnetic spectrum and therefore must be regulated to avoid chaotic interference.³⁰ Thus a right of access to the broadcast media might be justified as a concomitant of an otherwise necessary regulatory structure. Access to the print media, on the other hand, would involve a more fundamental first amendment conflict. Although the access proponents have strongly questioned this traditional orientation on grounds which I shall discuss more fully, the Supreme Court itself has never squarely faced the issue. It now appears, however, that it may soon have an opportunity to do so. In *Tornillo v. The Miami Herald Publishing Co.*,³¹ which followed within weeks the decision in *Democratic National Committee*, a majority of the Florida Supreme Court has upheld a statute³² which, in effect, requires newspapers to give "equal space" to political candidates who are attacked either in news reports or on the editorial pages. In strictest terms, the Florida statute does not grant a full right of access. It more nearly resembles the FCC's fairness doctrine or, more nearly still, the "equal time" provisions of section 315 of the Communications Act of 1934.³³ Under the equal space statute, no one has a right to reply who is not a political candidate and who has not first been attacked. One needs no special insight, however, to see that the statute cannot be applied to privately owned newspapers unless quite basic assumptions about the traditional first amendment position of the print media are altered. If they are, it seems altogether possible that,

waves—it is the scarcity argument which has enjoyed the widest acceptance. See, e.g., Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 88-89; Note, *Newspaper Regulation and the Public Interest: The Unmasking of a Myth*, *supra* note 21, at 601-03.

³⁰See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375-86 (1969); *NBC v. United States*, 319 U.S. 190, 210-17 (1943); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940). More recently, the Chief Justice has observed: "We have noted that prior to the passage of the Radio Act of 1927 . . . broadcasting was marked by chaos. The unregulated and burgeoning private use of the new media in the 1920's had resulted in an intolerable situation demanding congressional action. . . ." *CBS v. Democratic Nat'l Comm.*, 93 St. Ct. 2080, 2087 (1973).

³¹No. 43,009 (Fla. Supp. Ct., filed July 18, 1973), *rehearing denied* Oct. 10, 1973.

³²FLA. STAT. ANN. § 104.38 (Supp. 1972).

³³47 U.S.C. § 315 (1964). It is true, of course, that the fairness doctrine and the earlier equal time provisions are distinct from each other. Yet the underlying rationale—fairness and balance—is essentially the same for both, and the commission has regarded the fairness doctrine as having been ratified by Congressional amendments to the equal time provisions in 1959. See Robinson, *supra* note 21, at 131-36. While there is room for substantial debate concerning the specific relationship between fairness and equal time, most observers of broadcast regulation would probably agree that the conceptual genesis of the fairness doctrine is more clearly expressed in § 315 than in other provisions of the Act. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379-86 (1969).

just as the fairness doctrine has evolved from the original equal time provisions, a similar regulatory scheme may evolve in the print media.

It is worth noting that Professor Jerome Barron, who has been the leading proponent of an affirmative right of access, has published a new book coincidentally with the decisions in *Democratic National Committee* and *Tornillo*. In *Freedom of the Press for Whom?*³⁴ Professor Barron renews the arguments for an affirmative first amendment right of access which he has been making persuasively during the past half-dozen years. The book has been written with his customary vigor and is altogether a useful and important restatement of the basic position of the access proponents. Its appearance at this time suggests, again, that the arguments for access are alive and well, however slightly they may have been set back by *Democratic National Committee*.

Obviously, both *Democratic National Committee* and *Tornillo* deserve extended analysis. But they can best be understood against an even more extensive review of the access question itself. That review appropriately begins with an appreciation of the case for access.

II. THE CASE FOR ACCESS

The typical argument for an affirmative right of access to the mass media begins essentially as follows: it is desirable to promote widespread debate on matters of public importance and to provide an opportunity for the expression of all points of view—not merely those which are in the mainstream of conventional thought.³⁵ The first amendment was intended to ensure the realization of these goals through what has popularly been called the “market-place of ideas.”³⁶ Unhappily, whatever success we may once have had in securing effective public debate, it is “romantic nonsense” now to suggest that there is an adequate market-place in the privately owned mass media.³⁷ To the contrary, the mass media have become vast repositories of privilege and what is worse, power.³⁸ Today’s media, it is suggested, are all-pervasive, with

³⁴J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1973).

³⁵See Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1641. Most of the pro-access articles collected in note 5, *supra*, also make this point.

³⁶The concept of the first amendment as the guardian of a “market-place” was articulated originally by Mr. Justice Holmes; e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919).

³⁷Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1642-43.

³⁸Characteristic of the access proponents’ attitudes on this point are the following remarks: Radio and Television . . . represent the most effective single forum for presenting any idea to a national audience, and are generally recognized as one of the most persuasive

enormous capabilities to influence, to suggest, to shape articulated thought—in short, to lead us into error at the will or through the sheer indifference of their owners.³⁹ Indeed, the argument runs, the owners and managers of the media have become the real sources of suppression and censorship in America, with perhaps an even greater capacity to suppress thought than the government itself.⁴⁰

The proponents of an access doctrine conclude, therefore, that something must be done to create new and effective forums for free expression in the media.⁴¹ Whether a right of access is predicated directly upon the first amendment or whether it is derived instead from other sources, this much is clear to the proponents: traditional first amendment arguments in favor of media owners must yield to the larger interest of the public in free expression.⁴² A first amendment intended to prevent suppression of thought and to foster a climate in which its expression may flourish can no more tolerate private censorship than public censorship. What must be attacked is the power to censor in whatever form it may appear.⁴³

influences in our culture. Because of its tremendous ability to impart ideas and influence thought, it is vital that access to the electronic mass communications medium not be controlled by a relatively small group.

Comment, *Freedom of Speech and the Individual's Right of Access to the Airwaves*, *supra* note 5, at 425 (footnotes omitted); see e.g., Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1644-47; Note, *Freedom of Expression in the Media: The Public's Claim For a Right of Access*, *supra* note 5, at 151.

³⁹Former Federal Communications Commissioner Nicholas Johnson has observed:

To place control of the broadcast media in the hands of a few gives them an inordinate amount of political, economic and social power. . . . Further, a media chain wields enormous national political power. . . . Democracies can only function with an informed and responsible electorate. But if the flow of information to that electorate is distorted or inhibited by private concentrations of control, then the democratic decision-making process will cease to function.

Johnson, *Freedom to Create: The Implications of Anti Trust Policy for Television Programming Content*, *supra* note 5, at 19-20. Commissioner Johnson does not stand alone in his perceptions of the media. See, e.g., Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1660; Clark & Hutchison, *supra* note 5, at 2.

⁴⁰E.g., Johnson & Westen, *supra* note 5, at 604; Comment, *The Broadcast Media and the First Amendment: A Redefinition*, *supra* note 5, at 218-19.

⁴¹See, e.g., Barron, *An Emerging First Amendment Right of Access to the Media?*, *supra* note 5, at 509; Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1678; Clark & Hutchison, *supra* note 5, at 7.

⁴²See, e.g., Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1678. Mallamud, *supra* note 5, at 127-33; Note, *The Public Domain and a Right of Access: Affect Upon the Broadcast Media*, *supra* note 5, at 474.

⁴³See, e.g., Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1663, 1675 1678.

The arguments summarized here are in many ways persuasive. There are elements in the major premises which seem clear enough to amount to common ground. For example, individual participation in the democratic process and, more broadly, in the inquiry after truth is surely desirable and in some measure provided for by the first amendment. If little else is clear about the first amendment, this proposition at least is implicit in all of the decisions which have considered the meaning of freedom of speech and press. But the issue posed by the proposals for access is whether the right to participate is sufficiently secured if protected against suppression by the state or whether, instead, participation ought affirmatively to be provided for. Neither the arguments nor the cases which have considered the problem have resolved this issue. I suggest that this ultimate failure results in large part from the initial difficulty in making out the case for access.

A. Access as a function of the "market-place myth."

The arguments for access are at their least persuasive when they rely on some aspect of the "market-place myth,"⁴⁴ the notion that the first amendment was intended to create a market-place of ideas. Indeed, Professor Barron has dismissed the concept of the market-place as "romantic," a "banality."⁴⁵ I agree. Yet a careful reading of his arguments in support of access suggests that he is himself a victim of the market-place myth. Thus, he argues that the purposes of the first amendment can be realized only if the media are made to become "effective forum[s] for expression of divergent opinion."⁴⁶ The difficulty is that his "effective forums" are really just another version of the "market-place of ideas." Perhaps the first amendment ought to be read as ensuring affirmative opportunities for effective public discussion. But that it is itself the question and surely one is not permitted to answer it by defining it away.

We may readily agree that public debate, "uninhibited, robust and wide-open,"⁴⁷ ought to be permitted. As Professor Glen Robinson has

⁴⁴The phrase appears in chapter five of *Media Task Force, National Commission on the Causes and Prevention of Violence, IX Mass Media and Violence* 67 (1969) [hereinafter cited as *MASS MEDIA and VIOLENCE*].

⁴⁵Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1641-43, 1649.

⁴⁶*Id.* at 1678.

⁴⁷This phrase, which came to be a kind of talisman for the Warren Court's approach to first amendment theory, was coined by Mr. Justice Brennan in *New York Times v. Sullivan*, 376 U.S.

observed, however, that does not mean that there is any intrinsic value in babel.⁴⁸ Diversity of opinion is not the necessary goal of the first amendment. On the contrary, diverse points of view may be tolerated not because diversity itself is prized, but rather because the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any sort of authoritative selection."⁴⁹ Of course, this means that views which do not reflect the conventional wisdom are entitled to expression, as against authoritative suppression, but the goal remains the same: conclusions, not a multitude of tongues.

If the first amendment protects against the suppression of ideas, it follows that a market-place of sorts *may* emerge. It does not follow that a market-place necessarily will emerge or that if it does the result will seem fair or balanced. Most clearly it does not follow that a balanced market-place ought to be established. The question is entirely fair, and its answer may even seem clear on other grounds, but it is not answered by proposals for effective public forums. The question remains whether the market-place can or ought to be anything more than accident or myth.

B. Access and the imaginary past.

It might be unnecessary to devote space to the task of debunking the market-place myth if the notion of a balanced market-place were not so much a part of a larger notion that once upon a time the press stood uncorrupted, above venality and self-service, free to act as "the champion of new ideas and the watch dog against government abuse."⁵⁰ Together, the market-place myth and this idealized conception of our heritage of free expression have provided a convenient background against which to present the arguments for access. It is convenient, and it is also largely misleading.

Set against this background, the access arguments have acquired a kind of spurious dignity. The suggestion is made that access is the only way to regain the "equilibrium" in the market-place which "changes in

254, 270 (1964); see Kalven, *supra* note 5.

⁴⁸See Robinson, *supra* note 21.

⁴⁹Associated Press v. United States, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.), *aff'd*, 326 U.S. 1 (1945).

⁵⁰Foreword to Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1641.

the communications industry have destroyed. . . ."⁵¹ Access is recommended, in other words, as the late Twentieth Century response to forces which have worked a new and dangerous imbalance in the market-place of ideas. Thus access is presented as something more than an *ad hoc* proposition: it appears instead to assume the role of successor to some venerable but now obsolete mechanism for achieving a balance among competing points of view. The difficulty with this role for access is that the quest for balance—and very nearly the whole idea of a free and responsible press—is the product of this century and a late arrival at that.

Certainly, little evidence suggests that the first amendment was adopted in order to achieve this sort of balance. Dean Leonard Levy has presented a persuasive argument that the framers did not arrive at an expansive libertarian conception of the amendment until well after its adoption, and then largely in order to meet the threat of prosecution for seditious libel brought about by the election of the Federalists in 1798.⁵² One need not accept all of Dean Levy's reconstruction of this period to agree with Zechariah Chafee's observation: "The truth is, I think, that the framers [of the First Amendment] had no very clear idea what they meant. . . ."⁵³ One may add that even if they did, there still is little evidence that they sought balance in the press. On the contrary, to the extent that the framers may be identified with philosophical movements underlying then contemporary concepts of free speech and press, it seems unlikely that they would have equated freedom with responsibility in the manner now suggested. More precisely, it would not have occurred to them that a "responsible" member of the press is one who takes a "balanced" position. Responsibility meant passionate, not dispassionate, commitment in the context of ideological debate.⁵⁴ Indeed they were themselves the most passionate of spokesmen for their own points of view. For example, during his tenure in Washington's cabinet

⁵¹Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1548.

⁵²See L.W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 245-48 (1960).

⁵³Chafee, Book Review, 62 HARV. L. REV. 891, 898 (1949).

⁵⁴See MASS MEDIA AND VIOLENCE, *supra* note 44, at 1-23. The discussion which appears in that Report is based on the manuscript articles "Historical Development of the Media in American Life," by J.W. Jensen and T. Peterson of the University of Illinois, and "The Role of the Press in the Process of Change," by W. Rivers of Stanford University, each manuscript prepared under private contract for the Media Task Force and under the editorial direction of the author of this article. Copies of the manuscripts are on file in the office of the University of North Carolina Law Review. See generally E. EMERY, *THE PRESS AND AMERICA* (1962).

Jefferson employed as "translator" a man named Freneau whose real work for Jefferson was the publication of a partisan journal so vitriolic in its attacks on Washington's policies that the President was driven into near-apoplectic fits of rage.⁵⁵ It is an amusing story, but an instructive one as well: surely the framers of the first amendment could scarcely have found it strange to find the press partisan, hostile or one-sided.

In fact, the press of that day was almost entirely partisan. The economic and political circumstances in which publishers found themselves invited, if they did not require, an alliance between each publisher and some patron in power. This was required not only because patronage meant lucrative printing contracts and similar privileges but also because effective alternative sources of news and public information did not exist.⁵⁶ If a publisher did not have the sympathetic attention of someone in office, his own access to the day's events⁵⁷—never mind the public's—was far from assured.

Not until the middle of the Nineteenth Century did the partisan press begin to pass largely out of existence. But its passing did not mark the emergence of a new period of altruism. Instead, the partisan press simply fell victim to circumstances which would in time lead to the mass media as we now know them. During this period, for example, the proprietors of the "penny press" discovered that mass circulation revenues were a profitable alternative to patronage.⁵⁸ It was also during this period that the establishment of the wire services brought new and cheaper means of gathering the news.⁵⁹ The results of these developments were perhaps inevitable. Daily newspapers with large circulations emerged and struggled for survival through the great press wars of the late Nineteenth Century. The battles were fought for mass public patronage and the resulting advertising revenues which soon replaced circulation revenues as the economic anchor of the press.⁶⁰ When the smoke had cleared, the partisan journals were gone, and their places were taken by a new institution comprised of major business enterprises.⁶¹ With all its faults the new press might have been defended as having contributed indirectly to a somewhat greater sophistication and

⁵⁵MASS MEDIA AND VIOLENCE, *supra* note 44, at 16.

⁵⁶*Id.* at 15-18.

⁵⁷*Id.*

⁵⁸*Id.* at 19.

⁵⁹*Id.*

⁶⁰*Id.* at 18-23.

⁶¹*Id.* at 25.

awareness among the masses.⁶² It certainly could not have been described as balanced.

The concepts of fairness and responsibility that we now routinely demand of the media did not emerge until this century. The Radio Act of 1927,⁶³ and later the Communications Act of 1934,⁶⁴ incorporated standards which presupposed the need for service in the public interest. In 1947, the privately financed Hutchins Commission published a report based on an extensive examination into the structure and purpose of the press; the title of the report, *A Free and Responsible Press*,⁶⁵ reflected the Commission's judgment that the press must accept a measure of responsibility if in larger measure it was to remain free.⁶⁶ Certainly, these developments suggested a growing public sentiment that the press ought to be made more responsible, but the fact remains that our present-day concern for balance in the press is late-born.

There is, in short, little direct support for the access doctrine in either the history of the framing of the first amendment or in the history of the American press.⁶⁷ To the extent that the access doctrine would restore a lost "equilibrium" in the press, it is based on an imaginary past. Imbalance is not a new problem nor one which has been brought about by technological revolution. As a new and largely *ad hoc* solution to an old problem, the access doctrine deserves a careful hearing. But it also deserves to be seen as no more than it is.

C. Access to the new media.

To dismiss arguments for access which unwittingly or deliberately rely on the market-place myth or some other form of historical revisionism is relatively easy. It is another matter, however, to respond to arguments which rely on the changed character of the modern mass media and in particular on what is seen as their increased impact upon society. Essentially, the arguments for access in this context resolve themselves into two propositions. First, the mass media have become pervasive and influential to a degree unknown to any previous generation. Their evolution has placed them among the main instruments of

⁶²*Id.* at 17.

⁶³Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162 (pt. II).

⁶⁴Act of June 19, 1934, ch. 652, 48 Stat. 1064, as amended 47 U.S.C. §§ 151-609 (1970).

⁶⁵COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* (1947).

⁶⁶*Id.* at 90-96.

⁶⁷For additional perspective on the press in the post-colonial period, see generally Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 874-82.

contemporary socialization. As such they are simply too important for their owners and managers to be permitted to be altogether free to determine their content.⁶⁸ Second, the emergence of the mass media has brought new threats to the free exchange of thought in the form of concentrated economic power which inhibits ideological debate and offers constantly increasing barriers to those who would establish new media outlets.⁶⁹

The development of the media is without precedent. Indeed, the statistics which describe this growth are staggering. From a beginning in 1690 which saw the first American newspaper die after a single issue,⁷⁰ through a colonial and revolutionary period in which journals were circulated periodically to some 40,000 homes,⁷¹ the press has evolved "from medium to media":⁷² 1,749 daily newspapers⁷³ and 8,301 weeklies;⁷⁴ some 9,000 other periodicals, including more than 150 magazines of general circulation;⁷⁵ more than 280 million books published each year;⁷⁶ nearly 200 new motion pictures released annually for general exhibition in more than 13,000 theaters;⁷⁷ 6,782 commercial and 549 educational radio stations;⁷⁸ 701 commercial and 221 educational television stations.⁷⁹ The evolutionary process has not ended. Cable television and "the wired city" are at hand as more than 2,839 existing cable systems⁸⁰ can expect to be joined by some 4,392 more within the decade.⁸¹ Only slightly further off is the day of the home videotape cassette player, a television play-back-and-recording device which promises to

⁶⁸See, e.g., Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 545-49 (1968); Johnson & Westen, *supra* note 5, at 582, 603-04; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 993-1000.

⁶⁹See, e.g., Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1646-47, 1666; Malone, *supra* note 5, at 203; Note, *Resolving the Free Speech—Free Press Dichotomy: Access to the Press Through Advertising*, *supra* note 5, at 295-99.

⁷⁰MASS MEDIA AND VIOLENCE, *supra* note 44, at 6.

⁷¹*Id.* at 16.

⁷²*Id.* at 25-32.

⁷³EDITOR AND PUBLISHER YEARBOOK (1972).

⁷⁴AYER DIRECTORY OF PUBLICATIONS (1973).

⁷⁵MASS MEDIA AND VIOLENCE, *supra* note 44, at 1.

⁷⁶*Id.* at 165. The figure refers to press runs, not individual titles, but does suggest something of the public's continuing appetite for books.

⁷⁷*Id.*

⁷⁸BROADCASTING YEARBOOK 12 (1973).

⁷⁹*Id.*

⁸⁰Cable Television Information Center, Cable Data (1972).

⁸¹*Id.* Of this number, franchises have been awarded for 1,663 systems which have not begun operation, and applications for franchises were pending in another 2,729 communities.

permit individuals to acquire a home library of television recordings in much the same way as they now buy sound recordings in a record shop.⁸²

No one denies, then, that the media have been transformed in this century. Indeed the metamorphosis has been so remarkable that it seems almost impolite to suggest that these obvious manifestations of change do not necessarily demand new attitudes toward media regulation. Still, it is fair to ask for some evidence of the need for change which goes beyond the obvious growth of the media. Insofar as the case for an affirmative right of access is concerned, the evidence is less than clear.

1. *The new impact of the media.* Throughout the arguments for access run certain commonly held assumptions concerning the new impact of the mass media in American life. These assumptions reflect the underlying premise that the new media are possessed of extraordinary capacities for producing particular effects upon their audience. Not infrequently, these supposed properties of the media are described in terms which suggest a new kind of magic: the media, it is said, "mesmerize";⁸³ we are their "captives";⁸⁴ caught up together in a new, and somewhat frightening, "global village".⁸⁵ Even when the more hyperbolic assertions are discounted, a nearly overwhelming residue of conviction remains that the media have the power to contribute quite directly to the resolution of the great social issues—"to advance the progress of civilization or to thwart it."⁸⁶ In particular, it is commonly assumed that the media are the principal means by which public opinion is shaped.⁸⁷ Not surprisingly, then, they are also seen as the main instruments for effective public dissent. These assumptions take on added importance in times of crisis. To the extent that the media deny access to dissenting points of view, they appear to abdicate their proper role and deny their own capacity to contribute peaceful solutions to prevailing unrest.⁸⁸

⁸²Meanwhile, inexpensive videotape systems already form the backbone of much programming originated for cable television. See N.Y. Times, June 13, 1972, at 14, cols. 1-3.

⁸³Barron, *Access to the Media—A New First Amendment Right*, *supra* note 5, at 1645.

⁸⁴*Id.*

⁸⁵H.M. McLuhan & Q. Fiore, *WAR AND PEACE IN THE GLOBAL VILLAGE* (1968).

⁸⁶COMMISSION ON THE FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* 3 (1947).

⁸⁷See, e.g., *id.*; H.M., McLuhan, *UNDERSTANDING MEDIA* (1964), *cited in* Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1645 n.11; Fisher, *Program Control and the Federal Communications Commission: A Limited Role*, 14 VILL. L. REV. 602 (1969); Johnson & Westen, *supra* note 5, at 582.

⁸⁸See generally Clark & Hutchison, *supra* note 5, at 1-15; Mallamud, *supra* note 5, at 96-106;

These assumptions are so widely held that it is easy to forget that they are also largely unproven. The radical growth and pervasiveness of the media make it tempting to suppose that they must be possessed of equally radical potential for producing specific effects upon the society which harbors them. As Professor Louis Jaffe has noted, influence is too easily confused with ubiquity.⁸⁹

The growth of the media is not in doubt and neither, in the obvious sense, is their pervasiveness. The Media Task Force of the National Commission on the Causes and Prevention of Violence found, for example, that "from any standpoint, the media clearly play an important, and perhaps critical, role in daily American living".⁹⁰

Some media are available to nearly everyone, and nearly everyone makes some use of them. Most (95 percent) American homes include at least one TV set; nearly all (99 percent) own at least one radio. In a typical weekday, 82 percent of adults watch television; the average time invested is more than two hours. Two-thirds of America's adults listen to the radio, on the average more than an hour a day. More than nine out of every ten adults read a magazine sometime during the month and approximately three-fourths of the adult population read one or more newspapers on a typical weekday. Although movie-going is less universal, a third of the adult population sees at least one film in a typical month.

. . . For most . . . children, as for most Americans generally, television provides more than entertainment: it also provides Americans with the single most important and credible source of news about the world around them.⁹¹

These statistics are reliable as indicators of media usage. We can also accept an assertion that for the "typical" American television is a more "credible" source of news than are the other mass media.⁹² But statistics and general assertions do not answer far more difficult and significant questions concerning specific media effects. Assuming that a child watches television four hours on Sunday afternoon, what of it?

Note, *The First Amendment and Regulation of Television News*, *supra* note 5, at 765-67; Note, 24 VAND. L. REV. 1273 (1971).

⁸⁹See Jaffe, *supra* note 21, at 769. See also Robinson, *supra* note 21, at 151, 154-56.

⁹⁰MASS MEDIA AND VIOLENCE, *supra* note 44, at 2.

⁹¹*Id.*

⁹²The credibility of television news must be assessed against other media, rather than all other sources. The larger suggestion in the passage is, I confess, an example of the hyperbole which tends to find its way into otherwise careful assessments of the media. See, e.g., COMMISSION OF THE FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 3 (1947).

What happens to him? How are his perceptions of the world around him shaped or influenced? If his father and his mother watch television but also read a newspaper, how, exactly, are their ultimate opinions influenced? More particularly, how are their opinions influenced by the mass media as compared with the influence exerted by their friends across the street, by bad stomachs, hard times, ungrateful children, by army buddies, old school chums, employers, employees or fellow workers—or by their wealthy bachelor uncle in upstate New York?

Few statements beyond the level of generalization can be made with confidence about the role of the media in contemporary American society unless questions like these can be answered with some degree of certainty. Yet the fact is that they cannot. Meaningful communications research in this country has barely begun. The answers—assuming that research can provide them—are yet to be found.

In a thoughtful summary of existing research into media effects, sociologist William R. Catton, Jr., has identified three distinct bodies of opinion which have enjoyed some currency since the late Nineteenth Century. The first he has described as the "hypodermic" theory, an early but persistent view in which the media were seen as "insidious shapers of consent . . . [and] their audiences . . . as atomized and defenseless targets of deliberate or inadvertent propaganda."⁸³ He writes:

The early supposition that mass media can "inject" effects into a passively recipient audience was based on a supposition about the nature of modern societies. It was assumed that western civilization had become a "mass" society, in which individuals were relatively detached from each other and from a social fabric, and therefore homogeneously susceptible to stimuli from impersonal media. It was supposed that the urban way of life, in which primary group relations had been largely displaced by secondary group relations, made this so. The traditional basis of solidarity had been undermined, it was assumed, the family had lost its place in the social order and the neighborhood as a social entity was disappearing. Segmentalization of human relations was seen as characteristic of but not confined to cities.

⁸³MASS MEDIA AND VIOLENCE, *supra* note 44, at 247. This section of the Task Force report was prepared by W.R. Catton, Jr., of the University of Washington, in an article, "Mass Media As Producers of Effects: An Overview of Research Trends." Professor Catton's paper is especially useful as an antidote to the conventional law journal citation of individual communications theorists. For reasons which he explains, individual theories be assessed against the larger theoretical framework within which they have been written.

The heterogeneity of urban populations, the sheer numbers of people, and increased mobility all tended to detach people from stable groups and to foster increased reliance on formal mechanisms of norm enforcement. Kinship ties, it was assumed, lose their effectiveness in urban environments, and territorial units such as the residential neighborhood cease to function as a basis for social solidarity. The city becomes "a series of tenuous segmental relationships superimposed upon a territorial base with a definite center but without a definite periphery."⁹⁴

The difficulty with the hypodermic theory, Catton goes on to say, is that this early view of urban society was not all so clearly borne out by the American experience in the first half of the Twentieth Century:

Family and neighborhood ties were found to be still functioning in varying degrees in all parts of even the largest cities. Astronomical numbers of people did not alone turn a community into a mass society where individuals were psychologically isolated from one another. There was diminishing acceptance of the assumption that a kind of social pathology called *anomie*, wherein human beings lose their capacity to relate to each other effectively, was the necessary result of over-elaboration of the division of labor. Thus there was growing skepticism among social scientists about the notion that a functionally heterogeneous population produces such a segementalized life that in relation to mass media, the people are uniformly submissive⁹⁵

Skepticism in the 1950's ripened into disparagement of the hypodermic theory.⁹⁶ In its place a second theory gained acceptance. Perhaps predictably, it rejected the concept of media effects altogether:

As research accumulated, it became necessary to introduce more and more "intervening variables" into this simple stimulus-response model. It became necessary to recognize significant variations in the desires and inclinations of audience members, in the way they received media stimuli, and in their socially-shaped opportunities to respond. The upshot of all these complications was that it began to seem as if the answer to the question "What effects do mass media produce?" had to be, "It all depends . . .," and it was only a short step from that to a feeling that the media really don't *produce* effects at all. The contingent nature of mass media impact made it seem that the effects ought to be attributed to the intervening variables instead of (rather

⁹⁴MASS MEDIA AND VIOLENCE, *supra* note 44, at 247-48.

⁹⁵*Id.* at 248.

⁹⁶*Id.* at 249.

than in conjunction with) the mass media stimuli.

Thinking was moved in this direction by research that established the selective nature of perception. Individuals with different values, or whose other personality characteristics differ, perceive the same stimuli differently. At first, this discovery resulted merely in a modification of the "hypodermic" concept of mass communication: media may produce different effects with different kinds of people, but if people can be put in categories, the effects of mass communications injections into a particular category may still be predictable and powerful. Later the emphasis on perceptual selectivity led to outright disparagement of the notion that media have effects at all.⁹⁷

Another two decades have brought still a third theoretical orientation toward media effects. Less cohesive than its predecessors and more tentative, the contemporary theory acknowledges that the media may not produce effects unmediated "by a complex nexus of social and psychological factors";⁹⁸ at the same time, it recognizes the probability that the media do possess some capacity to create effects, however modified.⁹⁹ Two factors have contributed to the emergence of this contemporary theoretical "middle ground." One is that in the past twenty years television appears to have achieved unprecedented capacity "to simulate primary interaction."¹⁰⁰ Walter Cronkite, the theory goes, has become another member of the family. The second is somewhat more complex and involves a modest irony. It stems from a certain innate "lag" in social science research: even as LaPiere was discovering in the early 1950's that urban society had not yet developed according to the initial hypotheses, the society itself may in fact have been in the very process of developing along the lines originally suggested by Tonnies and other classic theorists.¹⁰¹

Does all of this presage an imminent return to the hypodermic theory of the media? It does not. Social scientists, twice burned by premature attempts to formulate viable comprehensive theories of media effects, are no longer sanguine about the complex problems which this area of research poses. In contemporary theory, the media are seen as neither clearly guilty nor clearly innocent as producers of specific effects. They are instead, in Catton's phrase, "incompletely

⁹⁷*Id.* at 248-49.

⁹⁸*Id.* at 251.

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.* at 254.

exonerated":¹⁰²

To sum up, research has shown that mass media do not easily and inevitably produce intended effects . . . Serious investigation is needed now to determine what long-range-unintended consequences will occur from the way we have organized our lives around the mass media, and especially around that simulator of primary groups, television.¹⁰³

Meanwhile, what lies at the core of nearly all specific decisions implementing communications policy is not knowledge but conventional wisdom. More precisely, what is being served is not the certainty or even the reasonable assurance of some particular effect but rather a set of perceptions, often obscured although equally often disguised as known truth. The arguments for access also have been attended, in at least an off-hand way, by the conventional suppositions about what the media can or ought to do for us. Former Federal Communications Commissioner Nicholas Johnson, another leading access proponent, has been among the least restrained: television, he has said, is "the American people's principal source of information, opinion, aesthetic taste, moral values, political participation, education, and national priorities."¹⁰⁴ If statements like these do not invite outright rejection, they serve at least to call attention to one of the difficulties with the case for access. The access proponents are unable to demonstrate the existence of specific media impact for the reasons previously suggested. Existing research is simply inadequate to permit it.

I do not argue that that ought to end the inquiry into access. In the first place, I am persuaded by the contemporary theoretical orientation toward the media that some of the more reasonable speculations about media effects are probably correct. In particular, I am inclined to agree with Professor Jaffe that, subject to a host of other factors, the mass media probably do have a modest direct capacity to reinforce existing attitudes and, in cases in which attitudes are unformed or only tentatively held, to shape them.¹⁰⁵ I shall argue later that even if these speculations are true, they argue *against*, rather than for, an enforceable right of access for very practical reasons. In any event, we are free to formulate media policy without waiting for the social scientists to sup-

¹⁰²*Id.* at 253-58.

¹⁰³*Id.* at 258.

¹⁰⁴Johnson, *supra* note 5, at 15.

¹⁰⁵Jaffe, *supra* note 21, at 769-70.

port our judgments.¹⁰⁸ And yet, where the media are concerned, we have traditionally displayed a certain reluctance to call for action by the state, preferring instead to call upon the media themselves for an increased measure of self-regulation. Why is it, then, that the proposals for an access doctrine have developed to the contrary? Why have the access proponents called for an affirmative, enforceable right of access rather than increased access through voluntary media compliance?

There are obviously a number of reasons, but among them two are paramount. The first is that our restraint toward the media has not been rewarded with the degree of responsiveness which seems desired. Left to their own devices, the media—with occasional noteworthy exceptions—tend to continue in the very practices which have occasioned criticism in the first place. Politically, this tendency alone might well prove their undoing. The contemporary assessment of the media is that they *do* produce effects, that they *are* among the main instruments of contemporary socialization. That these hypotheses cannot be proven in very specific terms is true; it is also largely irrelevant so long as this assessment persists and so long as the media themselves remain blind

¹⁰⁸But see Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 993-1000. Professor Canby has argued that "the mere fact that radio and television do not convert the opposition does not make them of small political consequence, nor should it diminish the first amendment value of access. Political campaigns concentrate on activating the favorably committed, and this is what media persuasion does best." Canby, *supra* note 5, at 740. He adds:

The importance of access to the media is almost certain to be undervalued, then, if primary emphasis is laid upon the rarity of the media's effecting conversions of attitude. The reinforcing effect of media persuasion has more than sufficient political impact to give it substantial first amendment value. Nor is a high degree of informational content of importance to the reinforcing effect of campaign advertising. For the purposes of activating those already favorably committed, the less informational, one-sided presentation is probably more effective than a fully balanced one which attempts to deal with and refute points favoring the other side.

The persuasive impact of the broadcast media is also likely to be undervalued if viewed only in terms of national political campaigns or issues like the Vietnam war, where ideological lines have become sharply drawn. A media message may introduce viewers have few predispositions, and there is reasons to believe that the persuasive effect in such cases is accordingly higher. The same holds true for local political issues as to which the voters' general political inclinations may be irrelevant. Yet these new or local issues are frequently of undeniable public importance. One need not be guilty of oversimplification, then, to conclude that persuasion by means of the broadcast media is sufficiently effective and significant to justify the administrative and practical difficulties which may result from extending it first amendment protection. (Footnotes omitted.)

This is an attractive argument. But the "administrative and practical difficulties" are formidable, as Professor Canby himself acknowledges. *Id.* at 754-57. One can argue that the impact of the media at its greatest cannot be employed effectively because of these very difficulties. See text accompanying notes 331-32 *infra*.

to it. The Hutchins Commission was undoubtedly correct twenty-five years ago when it warned that continued media practices "which the society condemns" would inevitably result in media regulation and control. That day may well be at hand.

But there is a second, even more immediate reason why access doctrine promises to develop with, rather than without, the assistance of the state. As we have seen, the case for access is predicated in part upon unproven but commonly held perceptions concerning the new impact of the media. It is also predicated upon the altogether real concentration of media ownership in increasingly fewer hands. The pressures for the developing access doctrine cannot be appreciated without an understanding of this economic predicate.

2. *The economic predicate.* To begin with, the economic argument for the access doctrine rests on statistics which reveal, in broad terms, two facts about media ownership and control. One is that in any given medium there has been a tendency toward concentrated ownership and a corresponding concentration of economic power.¹⁰⁷ The other is that there has been a correlative tendency toward cross-ownership of the media.¹⁰⁸ Newspaper owners, for example, often control more than one paper;¹⁰⁹ they have also been inclined to seek ownership of the broadcast media as well.¹¹⁰

To the access proponents, the implications of these facts are obvious and inescapable. In the first place, they contend, the pressures to which media proprietors are subject are primarily economic, not ideological.¹¹¹ The modern mass media have developed because their owners

¹⁰⁷See Bennett, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 NW. U.L. REV. 159, 181-86 (1971); Flynn, *Antitrust and the Newspapers*, 22 VAND. L. REV. 103, 120 (1968); Johnson & Hoak, *Media Concentration: Some Observations on the United States' Experience*, 56 IOWA L. REV. 267, 269-70 (1970); Comment, "Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution, 47 N.C.L. REV. 794, 802 (1969). See generally Johnson, *supra* note 5, at 17-22.

¹⁰⁸See Bennett, *supra* note 107, at 181-86; Johnson & Hoak, *supra* note 107, at 269; Comment, "Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution, *supra* note 107, at 794-805.

¹⁰⁹See Bennett, *supra* note 107, at 181-86; Flynn, *supra* note 107, at 120; Comment, "Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution, *supra* note 107, at 802.

¹¹⁰See Bennett, *supra* note 107, at 181-86; Johnson & Hoak, *supra* note 107, at 269-71; Comment, "Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution, *supra* note 107, at 805.

¹¹¹E.g., Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1641, 1646-47; Johnson, *supra* note 5, at 36-37; Comment, *Freedom of Speech and the Individual's Right of Access to the Airwaves*, *supra* note 5, at 424-29.

realize that mass patronage is the source of substantial revenues. The penny press depended on direct circulation revenues; the modern large circulation newspaper, magazine or television station depends primarily on advertising revenues. In either case, the key to success lies in an appeal to the mass audience. In these circumstances, it is said, media owners literally cannot afford to serve aberrant ideology if, in the process, they are likely to lose the audience upon which they depend.¹¹²

Meanwhile, according to the argument, individuals who are ideologically motivated may find themselves barred from the mass media on two grounds. On the one hand, their views may be unacceptable to the media proprietor because they may offend or otherwise alienate the audience the proprietor dares not lose. On the other, the ideologues cannot realistically hope to enter into competition with existing mass media. The media are too well entrenched to permit viable competition.¹¹³

Some of these statements may be readily conceded: size, a certain concentration of ownership, and the decided economic advantages of the existing media are obvious. But the economic arguments thus far do not state a complete case for access. Access may well be difficult to obtain for economic reasons. The question remains whether that matters. In particular, one might ask whether it is not enough that dissent may find expression in alternative media. The underground press, for example, billboards, posters, pamphlets—even the hallowed, if somewhat embarrassing, tradition of the soapbox in the public square—presumably are all available to the spokesmen for points of view excluded from the more established media. The answer to these suggestions, of course, lies in the access proponents' ready assumptions concerning the unique capacities of the mass media to produce intended effects in their audiences. "The test of a community's opportunities for free expression," it is argued, "rests not so much in the abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact."¹¹⁴

It is this marriage of the economic predicate with the uneasy as-

¹¹²The point is made in the authorities cited in note 111, *supra*, and is recognized generally in the literature.

¹¹³E.g., Johnson, *supra* note 5, at 29, 32-33, 35-40; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 891-96; Comment, *We Pick 'Em, You Watch 'Em: First Amendment Rights of Television Viewers*, *supra* note 5, at 831-34. But see Daniel, *supra* note 21, at 789.

¹¹⁴Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1653. See Canby, *supra* note 5, at 744-46.

sumptions of particular media impact which provides the major source of motivation for the affirmative proposals for access. The access proponents are not primarily interested in the availability of alternative media. They are not even always interested in the potential of the anti-trust laws; in the main, they do not argue that the mass media ought to be broken up into smaller—presumably more accessible—components.¹¹⁵ Instead, the proponents appear to assume that the mass media are in effect natural monopolies. The media resemble natural monopolies not because they have grown large nor because ownership is concentrated in a few hands, but because they alone are effective instruments of communications in a mass urban society. In this sense, the media resemble a rather limited kind of natural monopoly: like the fountain of youth or the goose that laid golden eggs, these enterprises are thought to possess special properties which are not available elsewhere.

Yet unregulated monopolies are conventionally to be feared. It may still be true, as the Supreme Court once suggested in a rather distant context, that there is no “national policy” in favor of competition,¹¹⁶ but the contemporary judgment is widely held that monopoly power is evil unless regulated. That judgment is reinforced when it is made to appear that the cost of uncontrolled monopoly is the suppression of effective public debate. The solution, then, is thought to lie in some form of regulation which will at once allow the supposed benefits of the mass media to continue unimpaired while assuring that those benefits inure to the public interest. Accordingly, the monopoly power of the media is not merely occasion for alarm; it is the very excuse for affirmative action which otherwise might itself be feared.

The point is illustrated more specifically in the cases in which access to private newspapers was sought prior to *Tornillo*.¹¹⁷ In these earlier cases, the plaintiffs argued that a newspaper which enjoys a monopoly position does so in an area of “vital public concern”¹¹⁸ and is

¹¹⁵See Barron, *An Emerging First Amendment Right of Access to the Media?*, *supra* note 5, at 490, 498; Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1653; cf. Blake, *supra* note 21, at 91. There is still a substantial body of opinion which argues for a more rigorous application of the antitrust laws to the media, either independently or as an accompaniment to a right of access. See, e.g., Bennett, *supra* note 107; Johnson & Hoak, *supra* note 107, at 273-74; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 902-04.

¹¹⁶*FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91-92 (1953).

¹¹⁷No. 43,009 (Fla. Sup. Ct., filed July 18, 1973), *rehearing denied*, Oct. 10, 1973.

¹¹⁸The equation between state action and monopoly power in an area of vital concern seems to have been suggested first in *Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of*

therefore engaged in "state action" giving rise to a right of access, in much the same way that "private" shopping centers or "company towns" can be seen as serving essentially public functions which may in turn open them to the public.¹¹⁹ The basic analogy was first suggested by Professor Barron in his initial article proposing a right of access to the press.¹²⁰ While it has not yet been accepted, its appeal is undeniable. In a single equation, it posits not only the need for access but also the necessary jurisdictional predicate for action by the courts.

The courts which have rejected the "monopoly-state action" claims to access have done so on grounds which reveal at least an intuitive grasp of the real tensions in the claims. *Chicago Joint Board v. Chicago Tribune Co.*¹²¹ was the first case to test the theory. The case resulted essentially from a dispute between a local of the Amalgamated Clothing Workers Union and Chicago's largest department store, Marshall Field and Company. Field sold imported clothing which it advertised in Chicago's four major daily newspapers. The union, which was attempting to secure restrictive quotas on the importation of foreign clothing, sought to place a full page advertisement outlining its position in the papers. When four of the papers refused to carry the advertisement as submitted, the union sought injunctive relief. The main thrust of the union's attack consisted of an effort to establish that the papers were "quasi-public entities", either because they enjoyed a "special relationship" with the State of Illinois or because they enjoyed a monopoly position.¹²² In support of its first ground, the union pointed to an Illinois statute which exempted newspaper employees from jury duty, to other statutes providing for the publication of legal notices, to statutes which excluded newspaper publishers' suppliers (furnishing commodities such as ink and newsprint) from certain state taxes, to a Chicago ordinance purporting to restrict the use of newsstands on city streets to the sale of Chicago newspapers, and to the custom of providing press rooms in public buildings.¹²³ It was, in all, not an unimpressive list, and in an-

Colleges, 302 F. Supp. 459 (D.D.C. 1969). The case deals with educational resources, rather than the communications media, and did not actually find state action. Thus its only contribution has been the equation itself.

¹¹⁹See *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).

¹²⁰Barron, *Access to the Press—A New First Amendment Right*, *supra* note 5, at 1669.

¹²¹435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971). The author of this article was among counsel for the defendant newspapers in the case.

¹²²*Id.* at 473-74.

¹²³*Id.* at 473.

other context it conceivably might have been enough to establish the requisite showing of state action. As to the press, however, the court of appeals responded, as had the district court, with a firm finding against state action:

Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. . . . [T]he function of the press . . . has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the mass media and the government have had a history of disassociation.¹²⁴

In its response, the court clearly was influenced by its perception of the press as an institution engaged in a function essentially divorced from the state. Thus circumstances which might have contributed to a finding of state action in a more neutral setting were not enough to overcome what amounted in essence to a presumption against state involvement in the functions of the press. *Marsh v. Alabama*¹²⁵ and *Food Employees Union Local 590 v. Logan Valley Plaza*¹²⁶—in which a company town and a private shopping center had been held by the Supreme Court to have assumed traditional municipal functions—were distinguished by the court in *Chicago Joint Board* not only because the newspaper publishers had not consented to unrestricted public access but also because newspaper publication itself is not, in traditional contemplation, a public function.¹²⁷ *Terry v. Adams*,¹²⁸ in which the Supreme Court had found the Texas Jaybird Party to be an integral part of the state's primary process and therefore in violation of the fifteenth amendment in its policies of racial exclusion, was rejected as precedent in *Chicago Joint Board* because the court found no indication of "intermeshing of action or non-action by public officials with the action of the defendants . . . pursuant to a design or purpose to frustrate any First or Fourteenth Amendment right of the Union."¹²⁹ *Burton v. Wilmington Parking*

¹²⁴*Id.* at 474 (quoting the District Court opinion, *Chicago Joint Bd. v. Chicago Tribune Co.*, 307 F. Supp. 422, 427 (N.D. Ill. 1969)).

¹²⁵326 U.S. 501 (1946).

¹²⁶391 U.S. 308 (1968).

¹²⁷*Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470, 474-75 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

¹²⁸345 U.S. 461 (1953).

¹²⁹435 F.2d at 475.

*Authority*¹³⁰ was similarly distinguished: in *Burton*, a private restaurant and the state agency from which the restaurant's facilities were leased had established a relationship of "interdependence" which, on the facts, had persuaded the Supreme Court that a joint venture existed;¹³¹ in *Chicago Joint Board*, however, the court of appeals found no comparable relationship.¹³² In each of these cases, the court relied in part on specific factual distinctions as a basis for rejection; yet it seems clear that in a larger sense the court was influenced by a rather firm presumption against a finding of state action. The court was no less firm in its rejection of the union's second point—the monopoly argument—but the grounds for rejection were less direct than one might have wanted. In point of fact, Chicago—with four major daily papers and a number of smaller dailies in addition—is hardly the town in which to claim monopolization of the print media. And it was on this ground—that is, no monopoly in fact—rather than a more sweeping analysis of the point, that the Court rejected the claim.¹³³

Other courts after *Chicago Joint Board* have also heard and rejected state action arguments predicated on the exercise of monopoly control. In *Cook v. Advertiser Co.*¹³⁴ the plaintiffs brought a class action on behalf of themselves and other Negroes against the publisher of the only daily and Sunday newspapers in Montgomery, Alabama. The suit alleged that the newspapers discriminated against Negroes in that white engagement and wedding announcements were published on the papers' regular society pages while similar announcements involving Negroes were published on a separate "Negro news page." The plaintiffs argued that due process and equal protection were denied when discrimination was practiced by an entity which exercises "monopoly control in an area of vital public concern." Although the court stated that it found the argument "quite appealing," it declined without elaboration to accept it.¹³⁵ Instead, citing *Chicago Joint Board*, the court granted the defendant's motion to dismiss.¹³⁶ In an opinion only slightly more instructive, the Ninth Circuit held that a newspaper could not be required to accept a movie advertisement exactly as submitted. In

¹³⁰365 U.S. 715 (1961).

¹³¹*Id.* at 724-2.

¹³²435 F.2d at 476.

¹³³*Id.* at 477. But see D. GILLMOR & J. BARRON, MASS COMMUNICATION LAW 33 (Supp. 1971).

¹³⁴323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972).

¹³⁵323 F. Supp. at 1214.

¹³⁶*Id.* at 1214 n.4.

Associates & Aldrich Co., Inc. v. Times Mirror Co.,¹³⁷ the plaintiff sought an order directing the *Los Angeles Times* to publish advertisements for "The Killing of Sister George" without blue-pencilling the copy to suit the *Times*' editorial policy. The plaintiff pointed to the *Times*' "semi-monopoly and quasi-public position" in support of arguments for a finding of state action.¹³⁸ The court, citing *Chicago Joint Board*, rejected the argument in an opinion which did not squarely discuss the relationship between monopoly power and state action.¹³⁹ Instead, the court was apparently influenced by the same presumption against a finding of state action in the publication of a privately owned newspapers which had first appeared in *Chicago Joint Board*. Thus, in an echo of the earlier case, the court observed merely that "the press and government have had a history of disassociation."¹⁴⁰

A more expansive discussion of the monopoly issue appears in *Resident Participation of Denver, Inc. v. Love*.¹⁴¹ The plaintiffs, a group of Denver citizens seeking to block the construction of a meat processing plant, had submitted advertisements to two Denver newspapers which had refused to print them. The papers later moved to dismiss portions of a complaint alleging state action in the refusal to publish. A three-judge panel of the federal district court granted the motion in an opinion which squarely addressed the issue:

Plaintiffs argue that newspapers ought to have a duty to provide reasonable space for citizens to express their views because in Denver, as elsewhere, newspapers exercise "monopoly control in an area of vital public concern." This does not mean, we take it, that defendants are monopolies within the meaning of the antitrust laws, since no violation of those laws is alleged, but rather than the soapbox has yielded to radio and the political pamphlet to the newspaper. . . . However, the fact that defendants control a method of reaching a large audience and that this is a matter of importance to us all does not mean defendants' conduct should be considered government conduct. . . .¹⁴²

The court distinguished the same group of earlier state action cases which had been rejected in *Chicago Joint Board*, and added a passage which recalled the Seventh Circuit's presumption against government

¹³⁷440 F.2d 133 (9th Cir. 1970).

¹³⁸*Id.* at 134.

¹³⁹*Id.* at 134-35.

¹⁴⁰*Id.* at 136.

¹⁴¹322 F. Supp. 1100 (D. Colo. 1971).

¹⁴²*Id.* at 1104.

involvement in the press:

Of course, state action, like government itself, is not a fixed notion, and we do not mean to suggest that enquiry comes to an end merely because the cases which plaintiffs cite do not, in our view, support their theory. However, the above-mentioned cases [*Logan Valley Plaza*; *Marsh v. Alabama*; and *Terry v. Adams*] do indicate that, where private conduct is concerned, there must be some justification for concluding that the private party serves as an alter ego for government, either because officialdom has in some important way become involved with the private party or because the latter performs a function of a governmental nature. Whatever may be the reach of these imprecise ideas, we find them peculiarly inappropriate for describing the relationship between defendant newspapers and the State of Colorado and City of Denver. Plaintiffs have made no allegation which would suggest a marriage among these parties, and the historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice.¹⁴³

While these cases obviously suggest that courts may be unwilling to accept Professor Barron's "monopoly-state action" theory without something more, that additional element may unwittingly have been supplied by the newspaper publishers themselves in their recent successful efforts to gain exemptions from the antitrust laws under the so-called "Failing Newspaper Act."¹⁴⁴ The Act permits competing newspapers in

¹⁴³*Id.* at 1105.

¹⁴⁴Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1970). The Act provides:

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operation arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter. § 1802. Definitions. As used in this chapter—

(1) The term "antitrust law" means the Federal Trade Commission Act and each statute defined by section 44 of this title as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in *pari materia*.

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspapers owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be indepen-

distressed circumstances to combine their business functions—advertising, production and circulation in particular—in order to

dently determined.

(3) The term “newspaper owner” means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

(4) The term “newspaper publication” means a publication produced on news-print paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term “failing newspaper” means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term “person” means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

§ 1803. Antitrust exemption.

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24ⁿ 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

§ 1804. Reinstatement of joint operating arrangements previously adjudged unlawful under antitrust laws.

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 1803(a) of this title.

(b) The provisions of section 1803 of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

permit them to continue independent editorial functions. As others are beginning to observe,¹⁴⁵ the Act itself suggests something of the government involvement in newspaper operations which the courts have thus far refused to find. To be sure, this additional element may not be enough to tip the balance. The essential purpose of the Act is to encourage continued competition among editorial voices in circumstances which might otherwise result in the entire failure of effective competition,¹⁴⁶ and the actual degree of government involvement under the Act is rather slight. There is, in particular, no provision for overseeing the editorial policies of the "failing newspapers" and only modest requirements for complying with the act in other respects. Certainly the act provides no scheme approaching the regulation of broadcasting under the Communications Act. This may be of some importance, since at present the Supreme Court lacks a clear majority for the holding that broadcast licensees are engaged in state action when they deny access in the exercise of editorial discretion, and has a substantial minority for the proposition that they are not.¹⁴⁷

Moreover, the concept of state action itself appears to have experienced at least a slight contraction as a result of two recent cases. In *Moose Lodge No. 107 v. Irvis*,¹⁴⁸ the Court has held that a private club which discriminated against Negroes did not engage in state action even though it held a liquor license under a state regulation which required the club to observe its own by-laws and thus, incidentally, their discriminatory provisions. The remedy, a majority held, was injunctive relief against enforcement of the regulation, not against the discriminatory practices themselves. The case is not directly relevant, but it does tend to offset some of the more expansive language in earlier state action cases. It is perhaps most useful for its suggestion that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' . . . in order for the discriminatory action to fall within the ambit of the Constitutional prohibi-

¹⁴⁵See, e.g., Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 906.

¹⁴⁶See H.R. REP. NO. 91-1193, 91st Cong., 2d Sess. 1-2 (1970).

¹⁴⁷See text accompanying notes 197, 213, *infra*. It should be noted that one of the reasons that five Justices in *CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080 (1973), agree that access to the broadcast media is not required is because Congress and the FCC have already developed adequate regulatory patterns, regardless of whether licensees are affected by governmental action. See text accompanying notes 194-96 *infra*. It is arguable that the very absence of established regulatory patterns might require access to the print media if state action could otherwise be established.

¹⁴⁸407 U.S. 163 (1972).

tion.”¹⁴⁹ There is at least some support in this language for the proposition that the state must involve itself in some significant way with newspaper editorial policies before state action can be found. A second case, *Lloyd Corp. v. Tanner*,¹⁵⁰ is somewhat more closely related to the state action arguments made in the newspaper cases. Those arguments have placed particular reliance on both *Marsh*¹⁵¹ and *Logan Valley Plaza*.¹⁵² In *Lloyd*, a majority of the Court has restricted the reading to be given to *Logan Valley Plaza* and may actually have limited *Marsh* to its own facts. Like *Logan Valley Plaza*, the *Lloyd* case involved a private shopping center which had been made the forum of first amendment expression. In *Logan Valley Plaza* a labor union had picketed one of the shopping center stores; in *Lloyd*, however, antiwar protestors had distributed handbills unrelated to the operation of the shopping center itself. Although the Court had approved the picketing in *Logan Valley Plaza*,¹⁵³ it found that the distribution of handbills violated legitimate private property interests where the speech “had no relation to any purpose for which the center was built and being used”¹⁵⁴ and where “adequate alternative avenues of communication exist.”¹⁵⁵ Obviously, this language has two edges: access proponents will argue that newspapers are devoted to the purpose of communication and, with the other media, are the only effective means of communication. Taken alone, the language might support the argument, although one could debate at least its second half. In the context of the case, however, the language has a rather different meaning. The Court obviously intended to limit the notion that private property arguably serving a public function is thereby implicated in state action. Thus *Marsh* is explained as having involved “an economic anomaly of the past, ‘the company town.’”¹⁵⁶ And *Logan Valley Plaza* is distinguished on its facts.¹⁵⁷ In short, the

¹⁴⁹*Id.* at 173.

¹⁵⁰407 U.S. 551 (1972).

¹⁵¹326 U.S. 501 (1946).

¹⁵²391 U.S. 308 (1968).

¹⁵³All we decide here is that because the shopping center serves as the community business block ‘and is freely accessible and open to the people in the area and those passing through’ . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20 (1968).

¹⁵⁴407 U.S. at 564.

¹⁵⁵*Id.* at 567.

¹⁵⁶*Id.* at 561.

¹⁵⁷*Id.* at 563.

Court's opinion can hardly be argued to expand the frontiers of state action. Indeed, the Court places particular emphasis on "the scope of the invitation extended to the public" by the private enterprise.¹⁵⁸ It notes, for example, that in the case of the shopping center in question "there is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests . . . [being served]."¹⁵⁹ By analogy, one can also argue that private newspapers extend no "open-ended invitation" to publish material which is "incompatible" with the editorial interests that they wish to serve.¹⁶⁰

For the time being, then, the principal response to the state action arguments for access to the print media will probably continue to be that given by the courts in *Chicago Joint Board* and *Love*: the traditional "disassociation" between newspapers and government and the resulting presumption against state involvement. That response is weakened as tradition is displaced by new legislation under which the government appears to provide special support for the press. Yet no general legislation to date appears clearly to suggest the "significant involvement" of the state which is required in order to find state action.¹⁶¹

It would be misleading, however, to suggest that the future of the access doctrine depends on the resolution of the state action question. The question is intriguing, as much for its very ingenuity as for the possibility it offers of establishing a right of access without initial recourse to Congress, the legislatures or administrative agencies. Yet these cases are important chiefly as illustrations of the substantial motivation for access which is provided by the economic predicate. So long as the concentration of economic power in the established media is identified with the premise of the new impact of the media, the pressures for access will continue. And as *Democratic National Committee* and *Tornillo* suggest there may still be room for the development of a comprehensive right of access along lines not present in the earlier cases.

¹⁵⁸*Id.* at 564.

¹⁵⁹*Id.* at 565.

¹⁶⁰Cases prior to *Chicago Joint Bd.* have typically found that newspapers do not hold themselves out as willing to accept unwanted material. *E.g.*, *Approved Personnel, Inc. v. Tribune Co.*, 177 So. 2d 704 (Fla. App. 1965) (1968). See Note, *Newspaper Regulation and The Public Interest: The Unmasking of a Myth*, *supra* note 21, at 603-05.

¹⁶¹Efforts to gain legislation in support of a "newsman's privilege" against compulsory disclosure of sources, if successful, would undoubtedly raise again the question of state action. At least some members of the press are beginning to recognize the dangers in this kind of legislation. See Laphaw, *The Temptation of a Sacred Cow*, *HARPER'S*, Aug. 1973, at 52, 54.

III. CBS v. DEMOCRATIC NATIONAL COMMITTEE AND TORNILLO v. THE MIAMI HERALD PUBLISHING CO.: ACCESS AT THE CROSSROADS

A. *Democratic National Committee.*

The background of the decision in *Democratic National Committee* has been rather extensively discussed in earlier articles and needs only a brief rehearsal here.¹⁶² The case is really two cases involving similar claims by groups which had sought access to the broadcast media in 1970. The Democratic National Committee had attempted to buy advertising time in order to air the political viewpoints of the Democratic Party and, one supposes not wholly incidentally, to invite contributions to the party's coffers. A second organization, the Business Executives Move for Vietnam Peace, had sought to broadcast paid advertisements in opposition to the Vietnam War. Rebuffed by the broadcasters, both organizations had sought an FCC ruling in their favor, again without success.¹⁶³ A consolidated appeal to the Court of Appeals for the District of Columbia proved more fruitful. In a majority opinion, Judge Wright held that a broadcaster who accepts commercial announcements may not wholly ban "paid public issue announcements."¹⁶⁴ Instead, Judge Wright posited an "abridgeable" first amendment right to access under "reasonable procedures and regulations" to be established by the FCC on remand.¹⁶⁵ Thus, neither the Democratic National Committee nor the Business Executives were themselves specifically assured of access; they were assured only that the broadcasters could no longer simply refuse to sell them time.

For Judge Wright, the central issue was whether the first amendment itself affirmatively requires some form of direct access to the commercial broadcast media.¹⁶⁶ In his opinion, the answer was to be found in two "functional considerations." First, he suggested, the broadcasting industry has been founded upon the basis of government regulatory patterns which have established a relationship of "interde-

¹⁶²See, e.g., Jaffe, *supra* note 21, at 781-88; 40 U. CIN. L. REV. 870 (1971); 6 U. RICH. L. REV. 448 (1972); 24 VAND. L. REV. 1273 (1971).

¹⁶³See *Democratic Nat'l Committee*, 25 F.C.C.2d 216 (1970); *Business Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970).

¹⁶⁴*Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 646 (1971).

¹⁶⁵*Id.* at 646, 655.

¹⁶⁶"[W]e conclude that the constitutional question must be faced and is, indeed, the essence of these cases. Whether our decision is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements 'in light of the First Amendment' matters little." *Id.* at 649.

pendence" and "joint participation;" thus the broadcast media have become involved with government along lines which strongly suggest the presence of state action.¹⁶⁷ State action was particularly indicated, he thought, by the FCC's role in upholding the broadcasters' policies concerning the advertisements.¹⁶⁸ Secondly, he added, the broadcast media are not only "specifically dedicated to communication," but have become "our foremost forum for public speech and our most important educator of an informed people."¹⁶⁹ Judge Wright therefore concluded that "the public's First Amendment interests constrain broadcasters not only to provide the full spectrum of viewpoints, but also to present them in an uninhibited, wide-open fashion and to provide opportunity for individual self-expression."¹⁷⁰ These obligations, he went on to say, are met only partly by the requirements of the fairness doctrine. Some procedures must also allow direct public access to the commercial broadcast media: controversial speech may not be discriminated against by those who have opened their facilities to commercial or non-controversial speech.¹⁷¹ Accordingly he held "that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted."¹⁷²

It is this holding which a majority of the Supreme Court has rejected. In an opinion by the Chief Justice, with several concurrences, the majority concludes that although broadcasting is appropriately the subject of regulation in the public interest, the regulatory scheme envisioned by Congress and the FCC does not embrace the principle of a direct right of access—and under the first amendment need not do so.

Beginning with what has been the standard, if increasingly less persuasive, justification for broadcast regulation, Chief Justice Burger acknowledges the "inherent physical limitation" imposed by the electro-

¹⁶⁷*Id.* at 651.

¹⁶⁸*Id.* at 652.

¹⁶⁹*Id.* at 653.

¹⁷⁰*Id.* at 655.

¹⁷¹*Id.* at 658-60.

By opening up a forum for some paid presentations, independently edited and controlled by members of the public, the broadcasters have waived any argument that advertising is inherently disruptive of the proper function of their stations. The exclusion of only one sort of advertising—which we have shown to have great First Amendment value—is then highly suspect, a *prima facie* constitutional violation. To justify the exclusion, there must be a substantial factor distinguishing the disruptive effect of editorial advertising from that of commercial advertising.

Id. at 660. Judge Wright found no such factor evident in the case.

¹⁷²*Id.* at 646.

magnetic spectrum.¹⁷³ Broadcasting must be regulated, in this view, because it is a scarce medium: "all who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated."¹⁷⁴ And having accepted the proposition that broadcasting must be regulated in the public interest, he moves easily to an acceptance of the corollary which holds that competing first amendment claims must be carefully weighed against the purposes served by the established regulatory structure.¹⁷⁵

In a review of the legislative history of the Radio Act of 1927 and the Communications Act of 1934, the Chief Justice concludes that Congress considered—and rather specifically rejected—proposals which would have required the broadcast media to serve as common carriers for all points of view concerning public issues.¹⁷⁶ Instead, he writes, "it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act."¹⁷⁷ The Chief Justice's analysis of the legislative history of the two acts is persuasively drawn, although it may well suggest more than he intends. In an article written nearly a decade ago, Professor John Sullivan employed a similar analysis to suggest that the fairness doctrine itself contravened the intentions of those who framed the acts.¹⁷⁸ For the Chief Justice and those who join him, however, it is the fairness doctrine which has provided an essential balance in the legislative scheme:

Of particular importance in light of Congress' flat refusal to impose a "common carrier" right of access for all persons wishing to speak out on public issues, is the Commission's "Fairness Doctrine," which evolved gradually over the years spanning federal regulation of the broadcast media. Formulated under the Commission's power to issue regulations consistent with the "public interest," the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing

¹⁷³CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2086 (1973).

¹⁷⁴*Id.*

¹⁷⁵93 S. Ct. at 2086, 2090.

¹⁷⁶*Id.* at 2088-90.

¹⁷⁷*Id.* at 2090.

¹⁷⁸See Sullivan, *supra* note 21, in which the author notes the ambivalent nature of the fairness doctrine in its early stages, and traces its evolution into a major legal concept in broadcast regulation. See also Blake, *supra* note 21, at 76-82.

viewpoints. . . . In fulfilling its Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable . . . and it must initiate programming on public issues if no one else seeks to do so.¹⁷⁹

In short, the fairness doctrine provides both balance and a bridge between opposing considerations. Broadcasting is constrained by limitations which make it "physically impossible to provide time for all viewpoints;" yet the public interest requires robust discussion of issues so that the public is fully and fairly informed. Under the fairness doctrine, it is the broadcaster who, in the exercise of editorial judgment, is "responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance."¹⁸⁰

This view of the case is scarcely new. In fact, it is quite consistent with the Court's opinion in *Red Lion Broadcasting Co. v. FCC*¹⁸¹ in which the fairness doctrine was upheld against attacks by broadcasters. In *Red Lion*, Justice White had said:

A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. 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 banned from the air-waves.¹⁸²

To be sure, this language had not clearly established that the broadcaster's role as "proxy or fiduciary" would be sufficient to satisfy individual claims to access. In particular, the access proponents had found encouraging a subsequent passage in the opinion which had seemed to suggest that at least a limited right of access might be forthcoming:¹⁸³

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have

¹⁷⁹93 S. Ct. at 2090 (footnotes omitted).

¹⁸⁰*Id.* at 2091 (footnotes omitted).

¹⁸¹395 U.S. 367 (1969).

¹⁸²*Id.* at 389.

¹⁸³See, e.g., Comment, *From the FCC's Fairness Doctrine to Red Lion's Fiduciary Principle*, *supra* note 5, at 95; Note, *The Listener's Right to Hear in Broadcasting*, *supra* note 5, at 866-72; 15 S.D.L. REV. 172 (1970).

the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government” It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.¹⁸⁴

Yet whatever promise this and similar language in *Red Lion* may have held, the majority in *Democratic National Committee* suggests rather clearly that balanced coverage under a system of trusteeship is an adequate alternative to a right of access in individual members of the public.¹⁸⁵

The concept of the broadcaster as a kind of editorial trustee is indeed central to the case. For a majority of the Court assumes that under either the “public interest” standard of the Communications Act or the standard imposed by the first amendment there is but one answer to the question whether an affirmative individual right of access to the broadcast media is required. Under either standard, a right of access not only is not required, but might actually jeopardize the “delicate balance” which has been developed through a system based on editorial trusteeship. A right to have access through paid advertisements might result in domination of the media by the affluent;¹⁸⁶ even if fairness doctrine principles were invoked to permit response by those who could not initially afford to pay, the thrust of public discussion would still be determined by those who could.¹⁸⁷ There is reason to be concerned, the Chief Justice adds, when broadcasting’s “captive audience” may be subjected to the views of those who, unlike licensees, are held to no standards of accountability.¹⁸⁸ Of more importance than these objections, however, is the likelihood that “[u]nder such a regime the congressional objective of balanced coverage of public issues would be seriously

¹⁸⁴395 U.S. at 390.

¹⁸⁵See text accompanying notes 225-27 *infra*.

¹⁸⁶93 S. Ct. at 2097-98.

¹⁸⁷*Id.* at 2096-97.

¹⁸⁸*Id.* at 2097.

threatened.”¹⁸⁹

One cannot read the concluding passages of the opinion without gaining some insight into the essential ambivalence inherent in the concept of editorial trusteeship. On the one hand, there are classic statements of the most traditional view of *laissez-faire* journalism under the first amendment:

For better or worse, editing is what editors are for: and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.¹⁹⁰

There is corresponding concern that an affirmative right of access may lead to an enlargement of government control over the content of broadcast discussion of public issues.¹⁹¹ Yet it is abundantly clear that the majority is unprepared either wholly to accept the “risks of abuse” posed by unlimited editorial discretion or to abandon the “government control” already imposed upon broadcast content. On the contrary, the majority readily accepts what it interprets as the Congressional judgment that broadcast content be shaped by standards of regulated accountability:

It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet their legitimate needs. No such accountability attaches to the private individual whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be “robust, and wide-open” does

¹⁸⁹*Id.*

¹⁹⁰*Id.*

¹⁹¹*Id.*

not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators.¹⁹²

There is, again, nothing really new in this ambivalence. Broadcasting regulation has always posed the paradoxes reflected in the majority opinion.¹⁹³ The disposition by the majority is in no important sense a retreat from the well-established principles under which broadcast regulation has developed. Broadcasting must be regulated because it is scarce—and the task is essentially one for Congress and the FCC together with the licensees. The creation of an affirmative right of access also will depend upon their initiative. Meanwhile, the first amendment does not require it under the established regulatory scheme.

While this summary is essentially accurate, the case is more subtle and requires some further explanation. Indeed, the case is of interest more for what it does not do than for what it does. In the first place, it affords little insight into the difficult question of the degree to which the American mass media have become affected by "governmental action." The Court, including the members of the majority, are quite unable to agree on that question even in the relatively limited context of the broadcast media in which one might have supposed the answer reasonably clear. Justices White, Blackmun, and Powell find it unnecessary to decide the question since, in their view, a broadcaster's refusal to accept paid editorial advertising does not necessarily contravene the first amendment even if government action is involved.¹⁹⁴ For them in particular, the existence of the fairness doctrine and the balanced coverage that it requires is enough.¹⁹⁵ They are joined in this view by Mr. Justice Rehnquist and the Chief Justice who assume its correctness even though they are prepared to find no government action in the case.¹⁹⁶

Justice Stewart joins Justice Rehnquist and the Chief Justice in concluding that government action is not implicated either in the broadcasters' refusal to accept the controversial advertisements or in the FCC's acquiescence in that position.¹⁹⁷ In their view, Congress has es-

¹⁹²*Id.* at 2097-98.

¹⁹³*Id.*

¹⁹⁴See *Kalven*, *supra* note 21, at 24-26; *Robinson*, *supra* note 21, at 67-68, 87-97; *Sullivan*, *supra* note 21, at 721, 728.

¹⁹⁵93 S. Ct. at 2108-09.

¹⁹⁶*Id.* at 2092-96. The point is explicit in Justice White's concurring opinion. Justice Blackmun's concurring opinion is more cryptic but seems to suggest the same point.

¹⁹⁷*Id.*

established a regulatory structure under which broadcasters are subject to general oversight in the public interest but nonetheless retain substantial independent "journalistic discretion."¹⁹⁸ Under this approach, broadcasters presumably reject the advertisements in their independent capacities.¹⁹⁹ FCC acquiescence amounts to no more than the performance of a function compatible with the Commission's role as general overseer in the public interest, an overseer divorced from the particular exercise of journalistic discretion involved in the case.²⁰⁰ The analysis calls to mind the problems encountered by the legendary tailor who found himself instructed by the King to sew a vest with sleeves. Yet it is intriguing and, in an area in which paradoxes are to be expected, not without appeal. Contrary to the earlier conclusions reached by Judge Wright, the three Justices find no "symbiotic relationship" between the broadcast licensee and the FCC under the Communications Act.²⁰¹ *Public Utilities Commission v. Pollak*²⁰²—in which the Court had found government action in the approval by a public agency of loudspeakers for a bus system—is distinguished on at least three grounds:

Here, Congress has not established a regulatory scheme for broadcast licensees as pervasive as the regulation of public transportation in *Pollak*. More important, as we have noted, Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard. In *Pollak* there was no suggestion that Congress had considered worthy of protection the carrier's interest in exercising discretion over the content of communications forced on passengers. A more basic distinction, perhaps, between *Pollak* and this case is that *Pollak* was concerned with a transportation utility that itself derives no protection from the First Amendment.²⁰³

It is true, of course, that differences exist between broadcast regulation and the regulation of public utilities like bus companies. Individual programming decisions and changes are not routinely examined in the way that changes in utility services are. Yet, it must be conceded that few major program decisions are taken without some thought for FCC

¹⁹⁸*Id.* at 2091, 2102-06.

¹⁹⁹*See id.* at 2090, 2102-05.

²⁰⁰*Id.* at 2094.

²⁰¹*Id.*

²⁰²343 U.S. 451 (1952).

²⁰³93 S. Ct. at 2095.

attitudes and the possibility of difficulty at license renewal time.²⁰⁴ Even before the license has expired, broadcasters who offend their audience may find themselves required to respond to complaints lodged with the FCC²⁰⁵—as, indeed, the very cases in issue demonstrate. Thus one might suppose that pervasiveness of regulation is not the ground on which chiefly to rely in distinguishing *Pollak*. The other grounds, however, are somewhat more appealing. The Chief Justice suggests, in this minority portion of his opinion, that a right of access would not only undermine Congressional efforts to establish a system of “essentially private broadcast journalism,” it would also do much to undermine the most basic premises upon which free expression rests:

More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest. Every licensee is already held accountable for the totality of its performance of public interest obligations.²⁰⁶

One can find this passage both appealing and troublesome. Its central thesis—that a right of access is at odds with robust debate—will be discussed at some length later. Yet this thesis in itself is surely insufficient to resolve the government action issue unless the first amendment is given more nearly absolute sway than the Chief Justice seems prepared to do in this context. As the last sentence of the quoted passage makes clear, broadcasters, though their individual programming decisions may be made in the exercise of journalistic discretion, remain, nonetheless, accountable in the public interest. Nothing in the opinion threatens the fairness doctrine; the question of the constitutionality of an access doctrine imposed on broadcasters is expressly reserved in this portion of the opinion;²⁰⁷ and a majority of the Court—including the Chief Justice and Justice Rehnquist—appear later to suppose that

²⁰⁴See Sullivan, *supra* note 21, at 723-24; Note, *The Public Interest in Balanced Programming Content: The Case For FCC Regulation of Broadcaster's Format Changes*, *supra* note 5, at 940.

²⁰⁵See Robinson, *supra* note 21, at 118-21.

²⁰⁶93 S. Ct. at 2095.

²⁰⁷*Id.* at 2094.

a limited right of access might one day be recognized.²⁰⁸ Thus it is not at all clear that the first amendment, as it applies to broadcast regulation, is enough to affect the question of government action on more than a somewhat troublesome *ad hoc* basis.

The point is clearer when one considers the concurring opinion of Mr. Justice Douglas. He assumes that commercial broadcasters are not engaged in government action and, reasoning from that assumption, concludes not only that a right of access need not be imposed by the FCC but that the fairness doctrine itself is unconstitutional under the first amendment.²⁰⁹ Though he does not quite say so, his opinion suggests that most of the public interest standards for program content—indeed, most of the licensing procedures established by the FCC under the Communications Act of 1934—are probably also unconstitutional.²¹⁰ For its value as precedent, one can agree with his opinion while recognizing that it probably is, in Professor Harry Kalven's phrase, "an insight more fundamental than we can use."²¹¹ Broadcasting is simply not likely to be "de-regulated" at this date.²¹² But Justice Douglas' opinion is useful, nonetheless, because it suggests the conclusions that one might ordinarily expect from a finding that broadcast licensees' judgments as to program selection are essentially private. If one were prepared to reach these conclusions on the basis of traditional first amendment thinking, then it would not be particularly troublesome in conceptual terms to employ similar first amendment premises to resolve the initial question of government action. In effect, one would call upon the kind of presumption that appeared in *Chicago Joint Board* or *Resident Participation of Denver, Inc. v. Love*. To be sure, that is not what Justice Douglas himself does. He assumes no government action, but only because he has been unsuccessful in persuading the Court on other occasions that government licensees are government agencies.²¹³ But his reasoning still possesses something of the conceptual consistency which is lacking in the opinion of the Chief Justice.

It is quite possible, however, to accept the Chief Justice's opinion for what it is: an attempt to deal with the never simple government action concept in an area which does not lend itself to ready analogies

²⁰⁸See *id.* at 2100-01.

²⁰⁹*Id.* at 2110-12.

²¹⁰See *id.* at 2110-17.

²¹¹Kalven, *supra* note 21, at 30-32.

²¹²See *id.* at 30; Robinson, *supra* note 21, at 85-86.

²¹³93 S. Ct. at 2110.

with earlier cases.²¹⁴ That is, indeed, the view taken by Mr. Justice Stewart in a separate concurring opinion:

The problem before us, however, is too complex to admit of solution by simply analogizing to cases in very different areas. For we deal here with the electronic press, that is itself protected from Government by the First Amendment. Before woodenly accepting analogies from cases dealing with quasi-public racial discrimination, regulated industries other than the press, or "company towns," we must look more closely at the structure of broadcasting and the limits of governmental regulation of licensees.²¹⁵

A more conventional view of the question is taken by Mr. Justice Brennan, who is joined in a dissenting opinion by Justice Marshall. Although Justice Brennan acknowledges that there is no single test for deciding "whether particular conduct must be deemed private or governmental,"²¹⁶ he finds present in the case indicia which have contributed to findings of governmental action in other cases: the use of public resources (in this case, the electromagnetic spectrum);²¹⁷ the establishment of preferred positions through the discriminating exercise of the licensing power;²¹⁸ the existence of "continuing and pervasive" government regulation;²¹⁹ and the particular involvement of the government in the very issues in the case—issues which are resolved by the FCC in favor of the broadcasters' position in at least partial reliance upon its own fairness doctrine.²²⁰ Referring to the last of these indicia, Justice Brennan notes that the FCC has not merely acquiesced in but has affirmatively approved the broadcasters' policies.²²¹ In these circumstances, he argues, *Pollak* cannot meaningfully be distinguished:

Although the Chief Justice, joined by Mr. Justice Stewart and Mr. Justice Rehnquist, strains valiantly to distinguish *Pollak*, he offers nothing more than the proverbial "distinctions without a difference." Here, as in *Pollak*, the broadcast licensees operate "under the regulatory supervision of . . . an agency authorized by Congress." And,

²¹⁴See Jaffe, *supra* note 21, at 782; Note, *Free Speech and the Mass Media*, *supra* note 21, at 642-44; cf. Kalven, *supra* note 21, at 37-45.

²¹⁵93 S. Ct. at 2102.

²¹⁶*Id.* at 2121.

²¹⁷*Id.* at 2122.

²¹⁸*Id.* at 2122-23.

²¹⁹*Id.* at 2123.

²²⁰*Id.* at 2124-25.

²²¹*Id.* But cf. Jaffe, *supra* note 21, at 783; Note, *Free Speech and the Mass Media*, *supra* note 21, at 646-47.

again as in *Pollak*, that agency received "protests" against the challenged policy and, after formal consideration, "dismissed" the complaints on the ground that the "public interest, convenience and necessity" were not "impaired" by that policy. Indeed, the argument for finding "governmental action" here is even stronger than in *Pollak*, for this case concerns not an incidental activity of a bus company but, rather, the primary activity of the regulated entities — communication.²²²

Thus, he concludes that FCC participation in the broadcasters' position is so substantial that government action is implicated inescapably in the broadcasters' action.

One can wonder about this issue which the Court has left unresolved.²²³ In particular, if broadcast licensees are not engaged in government action when, with FCC approval, they refuse to allow paying advertisers to air particular points of view, then one may ask whether the print media could ever be found to be so engaged in any circumstances not involving the kind of outright ownership and control represented, for example, in state college publications.²²⁴ Surely operation under the Failing Newspaper Act would not be enough, for the analogy between the issues in *Democratic National Committee* and the issues one would expect in the failing newspaper case would almost certainly be greater than the analogies to other state action cases not involving the media.

An effort to resolve the issue as to broadcasting however, would be not only an essentially pointless undertaking but, a misdirected one as well. For seven members of the Court in *Democratic National Committee* are prepared either to hold or to assume that governmental action is involved in the case. Yet only two among this number agree that this conclusion requires the recognition of an affirmative right of access. The remaining five either hold or assume instead that the alternative regulatory scheme—the one imposed by Congress and developed by the FCC—is sufficient to answer whatever claims to access the proponents may have. This division of opinion invites a more important set of observations than does the question of governmental action itself.

²²²93 S. Ct. at 2125.

²²³See Jaffe, *supra* note 21, at 782-87.

²²⁴See, e.g., *Lee v. Board of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969). In these cases, access followed a finding of state action in the operation of state college and public high school publications. Cf. *Radical Lawyers Caucus v. Poole*, 324 F. Supp. 368 (W.D. Tex. 1970).

The discussion begins with a somewhat more precise restatement of the disposition of the issues in the case. I have referred in my earlier summary to "the majority." Perhaps "coalition" would have been better. Clearly, a majority agrees that the first amendment does not require an individual right of access to the broadcast media under existing regulation. In fact, all of the Justices but Brennan and Marshall agree with this proposition. A smaller majority, however—or a coalition—agrees that this is so essentially because even if government action is assumed, the existing regulatory scheme provides for balanced coverage of public issues under a system which makes licensees accountable as editorial trustees. Justices White, Blackmun and Powell hold as much;²²⁵ the Chief Justice and Justice Rehnquist join in this opinion in considered dictum.²²⁶ It is dictum only because they have previously found no state action, and one would suppose that it is rather carefully considered since the Chief Justice himself has written the only extensive opinion on the point and since Justice Rehnquist—the only member of the Court who concurs with everything the Chief Justice has said—has written no opinion of his own.²²⁷ Thus, while there is no holding on the point, it appears to represent at least the considered judgment of a majority.

The point itself is worth isolating because it suggests some rather important insights into what may be required when government is implicated in judgments concerning the content of the media. The central issues are whether a right of access necessarily follows a finding of government action and, if not, what alternatives may be permissible or required. These issues are first suggested clearly in the concurring opinions of Justice Douglas and Justice Stewart.

As previously mentioned, Justice Douglas has assumed that there was no government action because he has been unsuccessful in persuading the Court that licensees are government agencies. But he does observe that if licensees were government agencies, a right of access would follow "inexorably" because "a licensee, like an agency of the government, would within limits of its time be bound to disseminate all views

²²⁵CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2108-09 (1973).

²²⁶*Id.* at 2096-99.

²²⁷It is also worth pointing out that their opinion here is a holding on the question whether the public interest standard of the Communications Act requires access. Since they agree that "the 'public interest' standard necessarily invites reference to First Amendment principles," *id.* at 2096, they are not far from a holding on the substantive first amendment issue itself. *But see id.* at 2120-21 (Brennan, J., dissenting); *cf. id.* at 2106 (Stewart, J., concurring).

. . . it would be unable by reason of the First Amendment to 'abridge' some sectors of thought in favor of others.'"²²⁸ Justice Douglas does not make it entirely clear whether he would find a limited right of access to be enough, but one can assume that he would since he refers approvingly to "the thesis" of Justice Brennan who argues for no more than limited access.²²⁹ Justice Stewart, on the other hand, would not accept limitations on access if government action were found. Instead, he argues that a finding that "broadcasters are government" would require common carrier status²³⁰—by which one supposes that he means essentially a first-come, first-served system.

In either case, the major premise seems unassailable: if government action is involved in content selection, surely the involvement must be subject to constraints which favor no particular point of view. The conclusions as to a right of access, however—whether limited or unlimited—are less clear. If some speech *must* be abridged—and a clear majority of the Court in both *Red Lion* and *Democratic National Committee* has recognized that it must be in a medium which cannot always accommodate everyone who would speak at the same time²³¹—then what surely follows is any system which is reasonably designed to operate without particular favoritism. A common carrier system might meet this test in a rather narrow sense, although one could argue with justification that it would not, in Professor Thomas Emerson's formulation, "best promote the system of freedom of expression."²³² A limited right of access, carefully controlled, might also provide an adequate system. But then, so may the fairness doctrine and its companion concept of editorial trusteeship. One would suppose on general principles that if more than one system may be independently

²²⁸*Id.* at 2110 (Douglas, J., concurring).

²²⁹*Id.*; see *id.* at 2136-38 (Brennan, J., dissenting).

²³⁰*Id.* at 2104-05 (Stewart, J., concurring).

²³¹"Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969).

²³²T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 663 (1970). See Marks, *supra* note 21, at 981-82. See also text accompanying notes 197, 213, *infra*. But see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), in which Mr. Justice White, writing for the Court suggested:

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or broadcast week.

Id. at 390-91.

constitutional in terms of substantive first amendment requirements, the choice rests with Congress and whatever administrative agency it may select. This appears essentially to be the reasoning employed by the five Justices and, as to this point in the case, their disposition seems defensible.²³³

In his dissenting opinion, however, Justice Brennan argues with some force that the fairness doctrine is inadequate because it depends too much upon the concept of trusteeship:

Thus, the Fairness Doctrine does not in any sense require broadcasters to allow "non-broadcaster" speakers to use the airwaves to express their own views on controversial issues of public importance. On the contrary, broadcasters may meet their fairness responsibilities through presentation of carefully edited news programs, panel discussions, interviews, and documentaries. As a result, broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation and, perhaps most important, who shall speak. Given this doctrinal framework, I can only conclude that the Fairness Doctrine, standing alone, is insufficient—in theory as well as in practice—to provide the kind of "uninhibited, robust, and wide-open" exchange of views to which the public is constitutionally entitled.²³⁴

Critical of what he deems the unwarranted "interposition of journalistic middlemen," Justice Brennan argues that in a powerful medium specifically dedicated to communication some individual right to participate directly is required.²³⁵

It is clear, however, that he does not envision an unlimited right of access or a complete abandonment of broadcast licensees' "journalistic supervision over the use of their facilities."²³⁶ Instead, he emphasizes—as had Judge Wright—that what is at stake is the "allocation of *advertising* time—airtime that broadcasters regularly relinquish to others without the retention of significant editorial control."²³⁷ Essentially, the argument is that broadcasters who make commercial time available should not be permitted to exclude all non-commercial advertising:

²³³See Note, *Free Speech and the Mass Media*, *supra* note 21, at 650-53, in which the author argues that while "judicial recognition of a right of access would be consistent with the underlying policies of the first amendment, it does not follow that recognition is constitutionally compelled."

²³⁴93 S. Ct. at 2128-29.

²³⁵*Id.* at 2130.

²³⁶*Id.* at 2135.

²³⁷*Id.*

Viewed in this context, the *absolute* ban on editorial advertising seems particularly offensive because, although broadcasters refuse to sell any airtime whatever to groups or individuals wishing to speak out on controversial issues of public importance, they make such airtime readily available to those "commercial" advertisers who seek to peddle their goods and services to the public. Thus, as the system now operates, any person wishing to market a particular brand of beer, soap, toothpaste, or deodorant has direct, personal and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak. Instead, he is compelled to rely on the beneficence of a corporate "trustee" appointed by the Government to argue his case for him.

It has long been recognized, however, that although access to public forums may be subjected to reasonable 'time, place, and manner' regulations, "[s]elective exclusions from a public forum may not be based on *content* alone. . . ." Here, of course, the differential treatment accorded "commercial" and "controversial" speech clearly violates that principle. Moreover, and not without some irony the favored treatment given "commercial" speech under the existing scheme clearly reverses traditional First Amendment priorities. For it has generally been understood that "commercial" speech enjoys *less* First Amendment protection than speech directed at the discussion of controversial issues of public importance.²³⁸

While these arguments have been made from time to time by the access proponents—and, of course, by Judge Wright—the logic has never seemed self-evident.²³⁹ If there were no constitutional difference between commercial speech and speech concerning public issues, it would follow that one could not be favored over the other. But as Justice Brennan himself acknowledges, the Court has in effect excluded commercial speech from the reach of first amendment protection;²⁴⁰ indeed, it has reaffirmed this position in the last term.²⁴¹ Since commercial speech is not protected, it is hardly "ironic" to find discrimination

²³⁸*Id.* at 2135-36 (footnotes omitted).

²³⁹See Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 1043-44; *cf.*, Jaffe, *supra* note 21, at 775-80. Professor Jaffe argues that the fairness doctrine ought not be expansively applied to advertising in cases which do not raise fairly clear public controversies.

²⁴⁰See *Valetine v. Chrestensen*, 316 U.S. 52 (1942).

²⁴¹*Pittsburgh Press Co. v. The Pittsburgh Comm'n on Human Relations*, 93 S. Ct. 2553 (1973). The Court holds that bans on sex discrimination in newspaper want-ads do not violate the first amendment.

between commercial advertising and public-issue advertising. The fallacy in Justice Brennan's argument lies in the supposition that all "advertising" should be treated alike. Broadcasters presumably may discriminate among "purely commercial" advertisements: indeed they do, as the absence of liquor and condom commercials will suggest.²⁴² But they may not display favoritism in their coverage of public issues. When advertisements raising public issues are accepted, these advertisements surely must be considered by the licensees in their overall assessment of their coverage.²⁴³ In this respect, broadcasters must be discriminating, in a sense, in order not to discriminate.

The reason for this discrimination is suggested in Justice Brennan's own words taken from an earlier passage in his opinion: "[U]nlike the streets, parks, public libraries and other 'forums' that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated specifically to communication."²⁴⁴ This is undoubtedly true,²⁴⁵ but it can lead to rather different conclusions about what may be required of parks as opposed to television stations. Parks and similar forums which are generally open to the public may not ban the exercise of first amendment rights, at least when their exercise is not wholly inconsistent with the intended use of the forum.²⁴⁶ In these forums, however, a somewhat crude common carrier status is imposed.²⁴⁷ It works well enough in political terms because, by tradition, we are accustomed to it and because demand for space rarely exceeds supply; and it raises no important problems of invidious discrimination among competing ideas because, virtually by definition, a common carrier concept involves no selection of content at all.²⁴⁸ Parks presumably are free

²⁴²Professor Robinson has suggested that FCC regulation of ordinary commercial advertising has been largely confined to controlling excessive spots. See Robinson, *supra* note 21, at 109-11.

²⁴³"If a [commercial] message advocates one side of an important public issue, the fairness doctrine should apply." Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 1040; see *id.* at 1039-42. But cf. Jaffe, *supra* note 21, at 780.

²⁴⁴CBS v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2132-33 (1973).

²⁴⁵But cf. Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 100-02. The author argues that broadcasting is not necessarily a public forum. The argument is respectable but, assuming *arguendo* a finding of a governmental action, it is difficult to sustain. In any case, the question of access need not turn on whether broadcasting is a public forum or not.

²⁴⁶See *Niemotko v. Maryland*, 340 U.S. 268 (1951).

²⁴⁷In other words, speech is permitted essentially on a first-come, first-served basis, subject to reasonable "traffic" regulations.

²⁴⁸But see Marks, *supra* note 21, at 986-87; in which the author observes that parade permits may be issued in response to content. Thus he suggests that a permit to march down New York's Fifth Avenue on St. Patrick's Day would go to the Irish, not the DAR, assuming that both wanted

to regulate commercial advertising, however, or to ban it altogether; there is simply no complete correlation between the presence of commercial advertising and the acceptability of protected speech. I say "no complete correlation" because there is a line of cases, exemplified by *Kissinger v. New York City Transit Authority*,²⁴⁹ which hold that when commercial advertising is displayed or otherwise accepted in a public place, other protected speech may not be excluded on grounds which would independently contravene the first amendment.²⁵⁰ Thus, as in *Kissinger*, if commercial posters are displayed in New York subway tunnels, antiwar posters may not be excluded simply because their message is offensive.²⁵¹ While I think these cases might be explained on the grounds that the existence of commercial advertising simply demonstrates that the "forum" is indeed "open", it is not necessary to reach that position. For these cases do not sustain either of the two further propositions necessary to Justice Brennan's thesis. They do not hold that a complete ban on commercial speech forecloses the question whether protected speech must be allowed.²⁵² More important, they do not hold that protected speech must be accepted on a basis of complete parity with commercial advertising, or indeed, that protected speech must be accepted on a common carrier basis; the latter is simply assumed, and with some justification in a forum like a park or a subway tunnel which is not specifically dedicated to communication and is not subject to comprehensive regulation intended to draw a balance among competing claims to first amendment expression. But broadcasting is unlike parks or subway tunnels precisely because it is dedicated to communication and because it is subject to speech-oriented regulation. If that regulation is accepted, as Justice Brennan seems generally willing to do, then again, surely all that is required is that it be designed not to favor a particular point of view. A limited right of access might complement that design or even replace it in large part. But to accept the

a permit at the same time. He is probably right, and he would certainly be right if his example were transferred, say, to Chicago where even the River runs green on the good Saint's day. But exceptions simply prove the rule. Normally, this kind of conflict would not be encountered and normally parade permits would simply issue upon request.

²⁴⁹274 F. Supp. 438 (S.D.N.Y. 1967).

²⁵⁰E.g., *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967); *Hillside Community Church, Inc. v. City of Tacoma*, 76 Wash. 2d 63, 455 P.2d 350 (1969).

²⁵¹274 F. Supp. at 442-43 (S.D.N.Y. 1967).

²⁵²But cf. Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 93 n.54.

concept as possible is not to accept it as a necessity under the first amendment²⁵³—and certainly not simply on the grounds that editorial advertisements are “advertising.”

Of course, Justice Brennan’s position does not rest entirely on this ground. He also argues that the fairness doctrine is seriously flawed because, in practice, broadcasters find that it is in their own self-interest to limit discussion, and also because the discussion permitted tends to be a didactic reflection of “prevailing opinion” offered by those whose own points of view are merely “representative.”²⁵⁴ Indeed, he adds, broadcasters are required by the fairness doctrine to decide whether particular points of view even deserve discussion.²⁵⁵ These limitations, in his judgment, make the fairness doctrine insufficient to promote the full and free discussion which the first amendment ordinarily presupposes.²⁵⁶ Although these observations are not new, they are important and essentially correct. It is not at all clear, however, that the right of access for which Justice Brennan argues would escape these limitations. I shall argue later that a controlled right of access to all the media would be afflicted by all of these limitations and would lead to additional dangers as well. Yet even in the narrower context of the broadcast media, it is possible to see that the limitations of the fairness doctrine stem essentially from the same conceptual cost which would be borne by a controlled right of access.

The conceptual cost is ideological balance, and it is imposed as a matter of substantive first amendment doctrine. For if government is implicated in decisions or regulations directly affecting the ideological content of the media on any basis other than a common carrier principle, then it surely follows that no judgment may be taken that does not contribute essentially to the establishment of a representative balance among competing ideologies. Indeed, no other judgment can be taken if the government is to avoid the ideological favoritism which, by general consent, it may not show. In broadest terms, this limitation means that the medium affected by government loses, to that extent, its ability to commit itself. In the context of broadcasting, it means more specifically that editorials beget replies and that individual points of view are limited in favor of opposing points of view.²⁵⁷ It probably does not mean

²⁵³Note, *Free Speech and the Mass Media*, *supra* note 21, at 651.

²⁵⁴*CBS v. Democratic Nat’l Comm.*, 93 S. Ct. 2080, 2130-31 (1973).

²⁵⁵*Id.* at 2131.

²⁵⁶*Id.*

²⁵⁷This is the immediate function of the fairness doctrine. But the fairness doctrine must be

that unopposed views must be excluded on the account (although the thought is an interesting one) nor does it mean that "news" reporting and accompanying explanatory comment need be balanced²⁵⁸—here the theory, shakier now, must rest on the implicit premise of journalistic objectivity; but it clearly does mean that some individual expression must be excluded, not for its own repugnance but simply because it has been anticipated. Obviously, these requirements are at odds with traditional first amendment thinking, but they are wholly consistent with the position in which government finds itself when, on independent grounds, it must interfere in the process of media content selection.²⁵⁹ Thus, as Justice White observed in *Red Lion*, "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable first amendment right to broadcast comparable to the right of every individual to speak, write, or publish."²⁶⁰

assessed against the FCC's still larger requirement of "balanced programming" which it imposes on licensees under the "public interest" standard. See Robinson, *supra* note 21, at 111-18; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 1031-32; cf. Sullivan, *supra* note 21, at 725-26. The relationship between balanced programming and the ideological balance referred to in the text is tenuous, not direct, since not all broadcast content involves obvious ideology. Even so, balanced programming can be said to serve first amendment interests which arguably would be violated if the FCC permitted broadcasters generally to program without regard for variety or diversity in their content. See Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, *supra* note 5, at 942-43.

²⁵⁸The fairness doctrine does not apply to news reporting and commentary within news programs, although it is probable that deliberate fraud or bias would bring sanctions. See Note, *The First Amendment and Regulation of Television News*, *supra* note 5, at 747-48, 765; Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 941-44.

²⁵⁹For the most part, they are nothing more than extensions of standard fairness doctrine theory. The most difficult questions arise in the context of entertainment programming. Although the FCC traditionally has displayed little interest in entertainment beyond requiring that it be offset by at least some more serious fare, it can certainly be argued that entertainment may reflect ideology. When it does, then, as in the case of commercial advertising which raises public issues, the requirement of balance arguably ought to be applicable. This general requirement might be overcome in most cases, however, on the ground that the ideological content reflected in standard entertainment fare is essentially *de minimis*. See generally Note, *The Fairness Doctrine and Entertainment Programming: All in the Family*, 7 GA. L. REV. 554 (1973); Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcasters' Format Changes*, *supra* note 5, at 937, 942-44, 963; Note, *Media and the First Amendment in a Free Society*, *supra* note 21, at 944-49; Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 99-100.

²⁶⁰*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). The comprehensive regulatory theory suggested here is similar to theories offered by Professor Barron some years ago in defense of the fairness doctrine. It was his view that licensees could be seen as "governmental actors" and the fairness doctrine therefore justified as a necessary limitation upon government

The requirement of balance also surely cannot turn, as both Justice Stewart and Justice Brennan appear to suppose, on whether licensees *are* government or are merely affected by government action. Instead, the requirement arises in the latter case *pro tanto*, and becomes complete as government involvement is complete. If government action is implicated in the entire licensing transaction, licensees are wholly subject to the requirement of balance.²⁶¹ Yet as individual bits of expression contribute to a balance, each bit is entirely free of restraint; to this extent, the licensees themselves retain the right to advocacy within the larger framework of their obligation to provide a balance. This is the point I understand Professor Emerson to make in part in his discussion of the concept of the editorial trustee:

The licensee therefore can only be considered as the agent of the government, or trustee of the public, in a process of further allocation. Hence the licensee would have no direct First Amendment rights of his own, except as to his own expression. The First Amendment right would run from the individual or group seeking to engage in expression, or seeking to listen, to the government; not from the licensee (except as to his own expression) to the government. This would mean that there could be no censorship of the actual user of the facilities, but there could be controls over the Licensee to assure that he made a fair allocation of the limited facilities both to users and to listeners. Only through such a system, indeed, would the requirements of the First Amendment be met.²⁶²

As Professor Emerson says, this was essentially the Court's position in *Red Lion*. It appears still to be the position of the five Justices who concur in the judgment that the fairness doctrine and editorial trustees are adequate under the first amendment. To be sure, there are many references in the Chief Justice's opinion to the licensees' "journalistic discretion." But they are never far from equally insistent references to licensees' "accountability" for their performance or to the "congressional objective of balanced coverage of public issues." These references can be harmonized, I think, only when it is recognized that the discre-

power to censor. See Barron, *In Defense of Fairness: A First Amendment Rationale for Broadcasting's "Fairness" Doctrine*, *supra* note 5, at 44-45. Assuming governmental action in the licensing process, his view seems correct, although the requirement of ideological balance actually subsumes the fairness doctrine and, in the process, undoes his later first amendment arguments for individual access to the broadcast media.

²⁶¹This would be true, however, only to the extent that program content were ideologically oriented. Other programming would remain subject to the more general public interest standards imposed by the Communications Act.

²⁶²T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 663 (1970).

tion here is quite unlike the discretion of conventional editors who are free to select for publication whatever they please. The discretion of a licensee is the discretion of an editorial trustee accountable to the public for balanced coverage of public issues. This proposition is virtually explicit in the Chief Justice's opinion, as is the proposition that the established system itself is substantively adequate; what is implicit in the two propositions is that the concept of balanced coverage is not merely an acceptable Congressional policy but is an expression of first amendment doctrine as well.²⁶³

Editorial discretion in this context must therefore mean, as I have suggested, not the conventional discretion to discriminate but rather to be discriminating in the pursuit of balance. Indeed, one can see the licensee as a kind of surrogate, doing essentially what must be done under any system which does not depend on a first-come, first-served allocation of resources but depends instead on government supervision. The licensee might be replaced as functionary, but the function must be performed. This inevitability seems to be what the Chief Justice has in mind when he describes what the FCC would find it necessary to do in administering a limited right of access:

Under a constitutionally commanded and government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired.²⁶⁴

With these observations, one can again consider Justice Brennan's objections to the fairness doctrine. He is, of course, correct: it works imperfectly.²⁶⁵ Yet the controlled right of access for which he contends would be subject to the same conceptual requirement of balance as the fairness doctrine and to almost certainly as many practical impediments. In the circumstances, one can accept the position of the five Justices not so much because it represents the best choice as because no other choice is clearly better.²⁶⁶

²⁶³*Cf.*, Jaffe, *supra* note 21, at 773-74.

²⁶⁴*CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080, 2098 (1973).

²⁶⁵*See* Blake, *supra* note 21, at 82-86.

²⁶⁶It should be emphasized that the requirement of ideological balance depends on a finding of governmental involvement in the determination of content. It is possible to limit that finding and thus to fashion alternative rationales substantially limiting the scope of the balance require-

Two final points need to be made concerning this analysis. First, it must be conceded that the analysis itself is tendentious. As Justice Brennan notes, the Court does not quite hold that the fairness doctrine

ment as well as the fairness doctrine. Mr. Justice Douglas' opinion in *Democratic National Committee* proceeds readily from the initial assumption of no governmental action. No rationale is free from difficulty, however, so long as it accepts the public interest standard of the Communications Act as applicable to ideological programming.

For example, one commentator has suggested that "scarcity is the central theory of broadcast regulation, and balancing is brought in only to cover the one area the scarcity theory may not reach marginal issues projected into controversy by a licensee." Marks, *supra* note 21, at 993. The author adds:

The courts must nonetheless be sure that the Commission's enforcement of public service requirements does not infringe licensee free speech rights. The sanctions available in the renewal process, and the other less drastic means of enforcement open to the Commission, must be applied so as not to punish protected speech in contravention of [*Near v. Minnesota*, 283 U.S. 697 (1931)]. Accordingly, the Commission can avoid punishment of all protected speech only if it denies renewal for what is *not* broadcast. That is, the FCC should deny renewal only for failure to cover a subject whose coverage was necessary for adequate community broadcast service. To restate this rule in terms of any views which the licensee expresses over the air, *the Commission should be prohibited from denying renewal because of any broadcast*. In that way, the licensees would know that views they expressed could not result in administrative sanctions.

Id. (Emphasis in original). However, whether the Commission ostensibly enforces the public interest standard by denying renewals for what is or is not broadcast, its power of review is conceptually the same. What *is* broadcast will have to be considered and may necessarily have to be limited in order to accommodate what otherwise would *not* be broadcast. It is difficult to see how the charge of government involvement in the determination of content can be avoided under either approach. This seems to be recognized by Professor Robinson, who argues that the Commission may not establish general standards of programming acceptability under a public interest standard. Yet he dismisses as "extreme" and "naive" the argument that the Commission should be confined to regulation of "only the technological aspects of radio and television." Instead, he observes:

[I]t does not necessarily follow that because the Commission may not constitutionally impose its own standards of orthodox programming or its own standards of balance, fairness, and diversity that it may not in general insist that a licensee investigate and be responsive to demonstrated needs of his community. The first amendment does not require that a licensee must be permitted to operate a radio facility purely in his private and selfish interest with no concern for public needs and interests. The first amendment comes into play, however, when the Commission, in the name of reviewing a licensee's responsiveness, begins to concern itself with programming or program operations to the point of establishing standards of acceptable and nonacceptable programming. It has already reached and gone beyond this point.

Robinson, *supra* note 21, at 162-63. Certainly, the Commission has no business engaging in conventional censorship. It would also undoubtedly be better for the Commission to impose standards flexibly suited to local situations than to insist on a blind application of a single national standard. And it would be possible for licensees, in their role as trustees, to be given more initial discretion than they now have to determine those standards. However, if the Commission is to remain the final arbiter, it is again difficult to avoid the argument that it is engaged in the determination of content. Indeed, one could argue that clear standards—even somewhat silly ones—are less likely in the long run to result in suppression and censorship than is a "simple" value-laden prohibition against selfish unconcern.

is an adequate alternative to access, although a majority seems to think so. Nor is the role of balance as constitutional doctrine explicit in the case, although, again, I think it fairly implicit. The second point, however, tends to offset the concessions in the first. For reasons discussed later, it seems clear that whether or not balance is required by the first amendment as an affirmative matter, it is wanted by most of the access proponents on practical grounds which will, in political terms, require acknowledgment. Thus the practical limitations implicit in the concept of balance will almost certainly influence the development of the access doctrine in any event.

Meanwhile, the net effect of *Democratic National Committee* can be fairly easily summarized. It is clear that nothing in the case forbids Congress or the FCC to impose an affirmative right of access to the broadcast media. Indeed, the opinion of the Chief Justice leaves room for a change of regulatory policy which would convert broadcasters from their position as editorial trustees into mere common carriers. Although virtually unthinkable as a political proposition, a conversion is still possible under a view which assigns broadcasters to a unique first amendment role predicated on spectrum-imposed scarcity.²⁶⁷ In any event, five Justices assume that "at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable."²⁶⁸ In short, the question of access to the broadcast media is not foreclosed. It is simply transferred from the courts to the commission and Congress where, one may safely speculate, it will continue to be vigorously pursued.

It is equally clear that the cable television access policies already established by the commission are unaffected by the case. In fact, the Chief Justice cites the commission's cable regulations with evident approval²⁶⁹—presumably in order to suggest that the commission has not been stubbornly unwilling to require access in circumstances which warrant it. To be sure, the reference is in the briefest dictum, but there is at least no suggestion that the validity of the regulations is in doubt.

When *Democratic National Committee* is considered with the decision in *Tornillo*,²⁷⁰ it is fair to say that the access doctrine has arrived at a kind of crossroads. Its course is not yet certain, but there is at least

²⁶⁷See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-91 (1969).

²⁶⁸*CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080, 2100 (1973).

²⁶⁹*Id.* at 2100-01.

²⁷⁰No. 43,009 (Fla. Sup. Ct., filed July 18, 1973), *rehearing denied*, Oct. 10, 1973, [hereinafter cited as *Tornillo Opinion*].

the possibility that time will bring about the development of a comprehensive, controlled right of access to the media at large.

B. *The Tornillo Case.*

Tornillo is the product of a dispute between a candidate for the Florida Legislature and *The Miami Herald*, Florida's largest daily newspaper. The *Herald* had published personal attacks²⁷¹ directed

²⁷¹At least the Supreme Court of Florida calls them attacks on Tornillo's "personal character." *Tornillo Opinion* 2. The characterization is somewhat unfair. The attacks were caustic, but they were also clearly directed at Tornillos' candidacy and fitness for public office. On Wednesday, September 20, 1972, the *Herald* published the following editorial:

THE STATE'S LAWS AND PAT TORNILLO

LOOK who's upholding the law!

Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking "the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law."

Czar Tornillo calls "violation of this law inexcusable."

This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.

Brief for Appellant, Exhibit. 1.A Second editorial appeared on Friday, September 28, 1972:

SEE PAT RUN

(Picture of empty classroom)

FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule.

Brief for Appellant, Exhibit #3.

against Tornillo who, in turn, demanded the right to reply²⁷² under a

²⁷²Tornillo submitted two responses for publication. To the first editorial he offered the following reply:

FROM: PAT L. TORNILLO, JR.
CTA Executive Director
1809 Brickell Avenue
Miami, Florida 33129

Legislative Candidate, District 103

TO: MIAMI HERALD
One Herald Plaza
Miami, Florida

PAT TORNILLO AND THE CTA RECORD

Five years ago, the teachers participated in a statewide walkout to protest deteriorating educational conditions.

Financing was inadequate then and we now face a financial crisis.

The Herald told us that what we did was illegal and that we should use legal processes instead. We are doing just that through legal and political action.

My candidacy is an integral part of this process.

During the past four years:

- CTA brought suit to give Dade County its share of state money to relieve local taxpayers.
- CTA won a suit which gave public employees the right to collectively bargain.
- CTA won a suit which allowed the School Board to raise \$7.8 million to air-condition schools and is helping to keep this money.

Unfortunately, the Herald dwells on past history and ignores CTA's totally legal efforts of the past four years.

We are proud of our record.

Brief for Appellant, Exhibit #2. The second editorial brought a second reply:

FROM: PAT L. TORNILLO, JR.
CTA Executive Director
and Candidate (Dem.) for
State Rep., Dist. 103
1809 Brickell Avenue
Miami, Florida 33129
Phone: 854-0220

September 30, 1972

EDITORIAL REPLY

Since the *Herald* has chosen to publicly attack my record, accomplishments, and positions on various issues, and those of the CTA, I again request that under Florida Statute 104.38, the *Herald* print the following record of affirmative and legal action.

In 1968, CTA signed a no-strike affidavit.

In 1969, CTA filed and won a suit in the Supreme Court of Florida, which gives all public employees the right to bargain collectively without the right to strike.

long standing, but never tested, Florida statute.²⁷³ The newspaper refused; Tornillo brought suit, and the lower court found the statute unconstitutional on its face. A majority of the Florida Supreme Court holds, however, that the statute is consistent with the election provisions of the Florida Constitution and with the free speech and press provisions of both the Florida and United States Constitutions.²⁷⁴

The statute provides that a newspaper must give equal space for replies by political candidates who have been attacked in the newspaper's columns:

If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immedi-

In 1971, CTA filed the Tornillo suit, which enabled the School Board to receive \$7.6 million and are presently cooperating with the Board in their effort to retain this money and avoid further financial chaos.

Since 1968, CTA has reimbursed the taxpayers of Dade County for the full salary and all fringe benefits of its President.

Since 1970, CTA has not used the school mail service to communicate with its members.

Since 1970, CTA has paid all costs of payroll deduction of dues for its members.

We have attempted to obey all the laws of the state, not intentionally violating any, while continuing our efforts to alert the public to the impending financial crisis facing the schools.

We have, however, also retained our belief in the right of public employees to engage in political activity and to support the candidates of our choice, as is the right of any citizen in this great country of ours.

Aye, there's the rub.

Brief for Appellant, Exhibit # 4. The Herald did not publish either reply as such, although in its regular news columns it did report the substance of Tornillo's defense. Tornillo's replies were denied free publication on the basis of the Herald's long-standing policy against allowing its "letters" column to be used by political candidates during election campaigns. The policy reflects the paper's editorial judgment that political candidates should not be permitted to "swamp" the letters column to the exclusion of the average writer. It is feared that this would be the practical result if the column were opened to candidates.

²⁷³FLA. STAT. ANN. § 104.38 (Supp. 1972). The statute was earlier declared unconstitutional at the trial court level in *State v. News-Journal Corporation* (County Judge's Court, Volusia County, February 14, 1972) (opinion attached as Exhibit A to Brief for Appellee, *Tornillo v. The Miami Herald Publ. Co.*, No. 43,009 (Fla. Sup. Ct., filed July 18, 1973)). The Attorney General of Florida refused to appeal from this ruling because of his own doubts about the statute's constitutionality. See Brief for Appellee at 2-3.

²⁷⁴*Tornillo Opinion* 2-3.

ately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor²⁷⁵

Although the lower court had found the language of the statute impermissibly vague, the Florida Supreme Court has little difficulty construing the statute to avoid this objection. The court interprets the statute to mean that the reply must be "wholly responsive" to the attack and must be neither defamatory nor vulgar or profane.²⁷⁶

It is in the context of first amendment doctrine that the case is of major importance. The court holds that the statute does not violate the first amendment because it "supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be 'blacked out' as to the other side of the controversy."²⁷⁷ Thus in the majority's view, the statute promotes, rather than inhibits, freedom of expression:

The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded*. There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information.²⁷⁸

This is, of course, a major thesis of the access proponents. Other echoes of their arguments also abound in the opinion. There are repeated references to the need for freedom of expression "*for all the people and not merely for a select few*."²⁷⁹ The court acknowledges both the assumptions of media influence and the resulting economic predicate:

The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are

²⁷⁵FLA. STAT. ANN. § 104.38 (Supp. 1972).

²⁷⁶*Tornillo Opinion* 10-11.

²⁷⁷*Tornillo Opinion* 12.

²⁷⁸*Tornillo Opinion* 12 (emphasis by the court).

²⁷⁹*Tornillo Opinion* 6 (emphasis in original), see *Tornillo Opinion* 4, 5.

acquiring monopolistic influence over huge areas of the country.²⁸⁰

In short, the case rests principally on the concept of fairness in media content. The theory of the case might easily be extended to support a broader statute imposing a fairness doctrine on newspapers or a more direct right of individual access intended to provide "both sides of controversial matters." Thus the case must be read for what it is: a straightforward assault upon the traditional position of the print media under the first amendment.

Lacking direct precedent for its decision, the court pieces together bits of dictum from earlier Supreme Court decisions which lend color to its position. Thus, the court uses a passage from the concurring opinion of Mr. Justice Frankfurter in *Pennkamp v. Florida*²⁸¹ which suggests that freedom of the press is not an absolute but instead implies "responsibility for its exercise."²⁸² *New York Times Co. v. Sullivan*²⁸³ is cited for the proposition that "there is a broad societal interest in the free flow of information to the public"²⁸⁴ *Associated Press v. United States*²⁸⁵ suggests to the court that "[f]reedom of press . . . does not sanction repression of that freedom by private interests."²⁸⁶ A particularly egregious dictum in a closing footnote to *Red Lion* also appears—shorn by the Florida court, however, of its introductory clause which is included here in italics together with the remainder of the sentence which the Court "excerpts":

*A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.*²⁸⁷

It is not difficult to distinguish these cases. *Pennkamp* dealt with criticism of the judiciary by newspapers and decided only that the criticism in question could not be made the subject of contempt since it did

²⁸⁰*Tornillo Opinion* 6.

²⁸¹328 U.S. 331 (1946).

²⁸²*Id.* at 355. (Frankfurter, J., concurring).

²⁸³376 U.S. 254 (1964).

²⁸⁴*Tornillo Opinion* 6.

²⁸⁵326 U.S. 1 (1945).

²⁸⁶*Id.* at 20.

²⁸⁷*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 401 n.28 (1969) (emphasis added).

not present a clear and present danger to the administration of justice.²⁸⁸ Justice Frankfurter's concurrence was occasioned chiefly by his distaste for the use of the "clear and present danger" test as legal doctrine; he suggested, in the context of his own analysis of the issues in the case, that freedom of the press must be tempered with responsibility.²⁸⁹ As an abstract proposition, most members of the present Supreme Court probably would agree with Justice Frankfurter. It is by no means clear that they would concur in its application to the issues in *Tornillo*—and certainly not on the basis of *Pennekamp* which is itself all but irrelevant.

In *New York Times*, the Court held that under the first amendment, defamatory statements concerning public officials could be made the subject of libel actions only if published with "actual malice," which the Court defined as either knowing falsity or reckless disregard for the truth.²⁹⁰ Although technically a decision restricting the traditional power of the states to impose sanctions for libel, *New York Times* undoubtedly does support the Florida court's concern for a "free flow of information." But nothing in the case suggests clearly that newspapers have an affirmative obligation to print unwanted matter. Indeed, the editorial advertisement in *New York Times* was printed only after it had been "approved" by the newspaper's advertising department, a fact which the Court acknowledges with no suggestion of disapproval.²⁹¹

Moreover, in a larger sense, the case itself stands more for the proposition that robust discussion of public issues will result from unfettered criticism by the press than that the press should be required to publish in accordance with conventional concepts of fairness and balance.

Associated Press v. United States established that the first amendment does not protect predatory business practices in the press. But the Court was also careful to establish that its decision did not mean that publishers could be required initially to publish against their own judgment:

It is argued that the decree interferes with freedom "to print as and how one's reason or one's interest dictates." The decree does not compel AP or its members to permit publication of anything which their "reason" tells them should not be published. It only provides that after their "reason" has permitted publication of news, they shall not,

²⁸⁸328 U.S. at 349-50.

²⁸⁹See *id.* at 353, 356.

²⁹⁰*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

²⁹¹*Id.* at 260-61.

for their own financial advantage, unlawfully combine to limit its publication.²⁹²

Red Lion is perhaps most readily distinguishable on the ground that the fairness doctrine and accompanying regulations which the Court upheld were occasioned in the first place by the need to license broadcasters. As previously noted, broadcast regulation is most frequently justified on the basis of spectrum scarcity, a condition which traditionally has been thought to have no parallel in the print media. That was the explicit judgment of the Court in *Red Lion*, in which the Court actually declined to consider other grounds for regulation.²⁹³ The argument has been made, of course, that the traditional distinction recognized between the broadcast and print media is largely specious.²⁹⁴ I am inclined to agree, but abandonment of this distinction does not mean that the print media must therefore be subject to regulation; it can as well be said, as others have, that what is called for instead is an abandonment of much of the present broadcast regulatory structure.²⁹⁵ Meanwhile, so long as *Red Lion* is itself predicated on a theory of unique scarcity, it has no ready application to the print media.

The Florida court does make persuasive use of statements in *Rosenbloom v. Metromedia, Inc.*,²⁹⁶ the most recent of the Supreme Court decisions in the line of defamation cases begun by *New York Times*. In *Rosenbloom*, the Supreme Court held that all statements involving matters of general interest or concern are privileged against an action for damages in defamation unless the statements are knowingly false. In an opinion announcing the Court's decision, Mr. Justice Brennan had suggested that "[if] the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of assuring their ability to respond, rather than in stifling public discussion of matters of public concern."²⁹⁷ And he had added the following footnote:

Some States have adopted retraction statutes or right-of-reply statutes. . . . One writer, in arguing that the First Amendment itself

²⁹²326 U.S. at 20 n.18.

²⁹³395 U.S. at 400-01, 401 n.28.

²⁹⁴See Robinson, *supra* note 21, at 158-59; Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, *supra* note 21, at 104-05. But cf. Jaffe, *supra* note 21, at 785.

²⁹⁵See, e.g., Sullivan, *supra* note 21, at 756-57. But cf. note 212 *supra* and accompanying text.

²⁹⁶403 U.S. 29 (1971).

²⁹⁷*Id.* at 47.

should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. . . . It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.²⁹⁸

While these statements alone might be read as supporting the Florida statute, in *Rosenbloom* they take on a more restricted meaning. *Rosenbloom* was notable chiefly because it finally made clear that the privilege in *New York Times* applied not only to defamatory statements concerning "public officials" or "public figures" but to otherwise private individuals whose activities were a matter of public concern as well. This extension was significant in part because it tended to undercut one of the grounds on which the earlier cases had seemed to rest. *New York Times* had involved public officials of whom it was later said in passing that their position might enable them to rebut defamatory statements more readily than could private individuals.²⁹⁹ Similar reasoning was present in the *Butts* and *Walker*³⁰⁰ cases which extended the *New York Times* privilege to statements concerning public figures whose position in life either invited public attention or whose purposeful activities had thrust them into the vortex of a public controversy.³⁰¹ The ability to command a forum for reply, however, was by no means the principal underpinning for the *Times* privilege. Indeed, well before *Rosenbloom*, it had become all but certain that the privilege was intended primarily to encourage "uninhibited, robust, and wide-open" discussion of public issues—no matter who might be involved. Numerous state and lower federal courts had so interpreted the *New York Times* rule,³⁰² and the

²⁹⁸*Id.* at 47 n.15.

²⁹⁹*See* *Time, Inc. v. Hill*, 385 U.S. 374, 391 (1967).

³⁰⁰*Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

³⁰¹*Id.* at 154-55 (Harlan, J.).

³⁰²*E.g.*, *Time, Inc. v. McLaney*, 406 F.2d 565, 573 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969) ("We conclude that the constitutional privilege extends to discussions by specific individuals, not associated with government, if those individuals are involved in matters of important public

Supreme Court itself had seemed to say as much in *Time, Inc. v. Hill* in the context of a privacy action.³⁰³ Still, it was possible to offer the "ability to command access to a forum" argument in *Rosenbloom* because the Court had never quite foreclosed the question in a libel case. The plaintiff made that argument in *Rosenbloom* and in response to this argument Justice Brennan employed the language and footnote relied on by the court in *Tornillo*. Against this background, Justice Brennan was actually making two points, neither of which affords direct support for the Florida statute. First, he apparently supposed that some retraction or reply statutes might be appropriate in the case of "defamatory falsehoods." Narrowly limited, statutes of this sort presumably would be no more objectionable than an award of damages and might, in some cases, be more important to the injured plaintiff.³⁰⁴ His second point, although acknowledging the case for access "not limited . . . to defamatory falsehoods," does so, I think, in order to suggest that libel actions themselves inhibit access to the press since they tend to discourage vigorous coverage of public issues. Thus in response to the plaintiff's argument against extending the *Times* privilege to private citizens, Justice Brennan observes that this position "conceives the individual's interest too narrowly."

While there is no precedent for *Tornillo*, there is also very little authority squarely opposed to it. Reply statutes of the Florida variety are few in number and have remained virtually untested by the courts on first amendment grounds.³⁰⁵ An exception is found, however, in

concern."); *Garfinkel v. Twenty-First Century Publishing Co.*, 30 App. Div. 2d 787, 291 N.Y.S.2d 735, 737 (1968) (per curiam) (summary disposition of complaint warranted where accused publication involved "matters of general public interest").

³⁰³See 385 U.S. at 379, 387-88.

³⁰⁴Draftsmanship presents the principal difficulty with reply statutes in a defamation context. They must be neither vague nor overbroad, and they should not require a reply until there has been a finding of liability. Practically, therefore, they may not always be valuable to the plaintiff. The reply may not appear until the defamatory publication has already escaped effective rebuttal. A reply may also simply review and aggravate the original injury to reputation. Still, an argument can reasonably be made that a right of reply ought to be available as an additional or optional remedy in a case of defamation. See generally Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967). These were the two articles cited by Justice Brennan in his footnote in the *Rosenbloom* case, 403 U.S. at 47 n.15.

³⁰⁵See Note, *Vindication of the Reputation of a Public Official*, *supra* note 304, at 1746 n.104. At present, there appears to be no operative "equal space" statute except for the Florida provision. A former Nevada statute was repealed in 1969 by legislation which now provides only for retractions of defamatory publications. Act of April 14, 1969, ch. 310, [1969] Laws of Nevada 553; repealing NEV. REV. STAT. § 200.570 (1963). A Mississippi statute has been limited by judicial

Opinion of the Justices,³⁰⁶ an advisory opinion of the Massachusetts Supreme Judicial Court delivered five days prior to the decision in *Tornillo*. In its *Opinion*, the Massachusetts court considers the constitutionality of a proposed statute creating a limited right of access to print media which publish paid political advertising. Under the statute, the publishers also would be obliged to carry advertisements expressing contrary views.³⁰⁷ In a brief discussion, the court holds that the statute would violate the first amendment in its application to the print media.³⁰⁸ Observing that the proposed bill "may produce the chilling effect of discouraging newspapers . . . from accepting any political

construction to require replies only to defamatory comment on the "honesty or integrity or moral character of the candidate. . . ." *Manasco v. Walley*, 216 Miss. 614, 630, 63 So. 2d 91, 96 (1953) (construing § 3175 of the Mississippi Code of 1942, ch. 19, § 12B, [1935] Miss. Laws 43 (now Miss. STAT. ANN. § 23-3-35 (1972))). Of course, this construction would be still further limited by the *New York Times* line of cases.

³⁰⁶ ____ Mass. ____, 298 N.E.2d 829 (1973).

³⁰⁷Mass. House No. 3460, submitted to the Justices by the Massachusetts Senate on May 11, 1973, would provide:

SECTION 1. Chapter 56 of the General Laws is hereby amended by inserting after section 39 the following two sections:

"Section 39A. If the owner, editor, publisher or agent of a newspaper or other periodical of general circulation publishes any paid political advertisement designed or tending to aid, injure or defeat any candidate for public or political office or any position with respect to a question to be submitted to the voters, he shall not refuse to publish any paid political advertisement tending to aid, injure or defeat any other candidate for the same public or political office or any other position with respect to the same question to be submitted to the voters in the primary or election unless such publication would violate section forty-two or any other provision of this chapter.

"Whoever refuses to comply with this section may be ordered to comply therewith in a suit in equity commenced by any aggrieved candidate or other person or persons and shall forfeit to him or them not less than one hundred dollars. The court may award such additional damages as it may deem proper, together with costs of suit, including a reasonable attorney's fee.

"Section 39B. The owner, editor, publisher or agent of a newspaper or other periodical of general circulation shall not charge for the publication of any paid political advertisement an amount greater than the local display rate charged for a paid nonpolitical advertisement offered under similar circumstances and of comparable size, complexity, and location in the same edition or issue of such newspaper or periodical.

"A candidate or other person or persons aggrieved by a violation of this section may recover treble the differential between the amount charged and the amount that should have been charged, plus court costs, and a reasonable attorney's fee."

³⁰⁸ ____ Mass. at ____, 298 N.E.2d at 831-35. The court had also held that an earlier draft of § 39A would be unconstitutional, but on the grounds of "impermissible vagueness." *Opinion of the Justices*, ____ Mass. ____, 284 N.E.2d 919, 921 (1972), 7 SUFFOLK U.L. REV. 711 (1973). In its present *Opinion*, the Court notes that "[t]he proposed legislation now considered by us remedies almost all of the difficulties which were found in the previous bill." ____ Mass. at ____, 298 N.E.2d at 831.

advertisements,"³⁰⁹ the court adds:

The situation at which § 39A is directed may be the "monopolistic" status of certain news publications. However, compulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. . . . Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement.³¹⁰

Democratic National Committee also strongly indicates that the Supreme Court would not accept legislation of the sort presented in *Tornillo*. This conclusion is implicit in the views expressed by the Chief Justice³¹¹ and is entirely consistent with the position taken by Justices Douglas and Stewart in their separate opinions. Justice Brennan is fairly explicit in his views concerning regulation of the print media:

The decision as to who shall operate newspapers is made in the free market, not by Government fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers.³¹²

Professor Emerson, although critical of a comprehensive right of access to newspapers, has suggested that reply statutes and even a broader obligation to print all editorial advertisements might conveniently be enforced without substantial adverse impact.³¹³ The adminis-

³⁰⁹ ____ Mass. at ____, 298 N.E.2d at 834.

³¹⁰*Id.* at ____, 298 N.E.2d at 834-35.

³¹¹The Chief Justice, joined by both Justices Rehnquist and Stewart, observes in *dictum*: "The power of a privately owned newspaper to advance its own political, social and economic view is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." *CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080, 2094 (1973).

³¹²*Id.* at 2126 n.12.

³¹³T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 669-71 (1970). In practice, many newspapers make effective provision for replies, either as a matter of journalistic ethics or even more formally. Probably few journalists would be prepared, however, to accept their own reply procedures as legal obligations. See Daniel, *supra* note 21, at 789-90. Professor Chafee considered reply statutes at length, but concluded that they were probably unwise:

In spite of what has been said about the possible desirability of the compulsory right of reply, it is my opinion that the chief cure for falsehoods in mass communications should be sought outside the realm of law. Reckless misstatements in a particular

trative burdens probably would not be insurmountable. But the question of adverse effect is another matter. Reply statutes do present a substantial threat of the "chilling effect" which concerned the Massachusetts Justices. Newspapers simply may be less ready to cover election campaigns or public issues if they must provide free space for all replies.³¹⁴ While the effect probably would be felt more keenly by small publishers, even major daily papers literally cannot afford to provide free space for all the readers' contributions that they may receive.³¹⁵

Obviously the more limited the scope of the right to reply, the more limited will be the likely impact of the right. But this is at best a weak proposition of degree which still leaves substantial room for undesirable results. The publisher of a four-page, single-fold weekly in some rural section of Florida, for example, may find little comfort in the relatively limited scope of the Florida statute if, in exchange for editorial opinion on the candidacies of a dozen would-be local school board members, he must allow perhaps one-fourth or even one-eighth of a week's space for their replies. Multiply the drain on his space by another half dozen elections of local interest, and he may sacrifice as much as a week's production in every year. In these circumstances, he may easily persuade himself to cover the Loyal Bercans' potluck supper and let the candi-

newspaper are not isolated events in its life. They are an expression of the soul of that newspaper. Occasional attacks on a few falsehoods here and there, by libel suits or by new legal remedies, may accomplish a little, but they will not get the kind of newspaper it needs so long as irresponsibility prevails to a substantial extent among editors and owners. And law cannot reach what is inside human beings. The community must proceed on a broader front and with other weapons. Somehow the community must make the newspaper want to be better. If this task be hopeless, then a way must be found to get another and better newspaper started.

1 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 195 (1947). See generally *id.* at 145-95.

³¹⁴Former *New York Times* Managing Editor Clifton Daniel has estimated that if the *Times* had printed all of the publishable letters received in 1969, "they would have filled up at least 135 complete weekday issues . . ." Daniel, *supra* note 21, at 785.

Every day of the year *The New York Times* receives an average of one million, three hundred thousand words of news material. At best, a tenth of it can be printed. A highly skilled, high-speed process of selection is involved—a massive act of discrimination, if you like—discrimination between the relevant and the irrelevant, the important and the unimportant. Actually, 168 bushels of wastepaper, most of it rejected news, are collected and thrown away every day in the editorial departments of *The New York Times*.

Id. at 785-86.

³¹⁵Indeed, considerations like these led the Florida Chapter of the ACLU to argue in *Tornillo* that the Florida statute is violative of due process as a taking of property without payment of just compensation. See Brief for Florida ACLU as Amicus Curiae at 27-36. The Florida Court holds, however, that the statute "is a valid exercise of the state police power to assure the integrity of the electoral process." *Tornillo opinion* 11.

dates go hang. Nor is it obvious that the major daily newspaper will escape the pinch. Many metropolitan papers attempt to provide a comprehensive editorial review of candidates for state-wide elections. The review may involve dozens or even scores of candidates and may fill several editorial pages over a period of days. If an equal number of pages must then be set aside for free replies, even the largest paper may be tempted to forego or curtail at least some of its customary coverage.

While the facts in *Tornillo* do not present quite the problems just discussed, they do suggest another source of concern for the "chilling effect." The Florida statute is intended partly to prevent unfairness to the candidate who is singled out for attack. But it promotes another kind of unfairness. The candidate who is first attacked and then replies gets a kind of double bonus: the net effect of the exchange may be to cancel whatever persuasive effect either the editorial or the reply might independently have had; but the candidate still gets two exposures. In turn, the double exposures can provide an edge in terms of voter recognition. Sophisticated editors will readily understand this possibility and may decide, on balance, to withhold at least marginal comment in order to avoid exaggerating the appeal of an otherwise little-known candidate.

These problems are not at all exhaustive, but they illustrate some very practical adverse effects of even limited reply statutes. As the effects multiply, so will the pressures to "correct" them. An obligation to print paid editorial advertisements upon demand might seem a desirable alternative, but even it would not escape serious practical objections. For example, as Chief Justice Burger observes in *Democratic National Committee*, a right of access begun through paid advertising would either simply favor the wealthy or require further efforts at control in order to strike a balance.³¹⁶ In short, Professor Emerson's response to these alternatives seems too easy. The real problem with them is that they cannot be enough. Recognition of the claims to access represented in these proposals will inevitably lead to enlarged claims until, in time, we can expect a comprehensive, controlled right of access to the press at large. This will require, of course, a corresponding redefinition of the first amendment, but that will present no insurmountable obstacle either, so long as the first steps have been taken. The difficulty with the first amendment is that there are no real second lines of defense. And the result has been summarized in two sentences by Professor Emerson himself:

³¹⁶93 S. Ct. at 2096-97.

A limited right of access to the press can be safely enforced. But any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all "newsworthy" events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity.³¹⁷

One cannot make these points without experiencing a sense of *deja vu*. Certainly they have been made before.³¹⁸ Yet so long as they are not self-evident—so long, indeed, as access is at the cross-roads—one can feel an obligation to continue the debate in terms which may suggest again why the fundamental first amendment reorientation implicit in *Tornillo* ought not go unchallenged.

IV. ACCESS TO THE MASS MEDIA: A DISSENTING ASSESSMENT

A "right" of access to the mass media can obviously exist in meaningful terms only if some provision is made for its enforcement. The access proponents have suggested three principal means by which an affirmative right might be implemented. The first is legislation; a second is some form of administrative oversight—patterned, perhaps, after the FCC's administration of the fairness doctrine; the third is access enforced by the courts. Probably all three will have a role to play if a comprehensive access doctrine is developed. A limited statutory right of access to the print media has been upheld in *Tornillo*; if that decision stands, additional legislation may appear in other states and, perhaps, in Congress as well. The courts, of course, can expect to be drawn into the development of an access doctrine to resolve disputes arising under the legislation. Indeed, unless the Supreme Court issues an opinion far more definitive than any it has yet handed down, the courts can also expect continued efforts to establish a right of access based on state action. Moreover, since neither courts nor legislatures are well suited to the task of administering access on a continuing basis, administrative

³¹⁷T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 671 (1970).

³¹⁸Professor Chafee, who wrote with greater evidence of real understanding of the media than have many commentators since, believed that increasing professionalism and a resulting sense of moral obligation would be preferable and more workable than laws intended to impose a public service obligation. While he would allow some room for FCC regulation of broadcasting, he resisted broader legislation on these grounds: first, that there is really no place to draw the line; second, that laws intended to produce impartiality cannot be drawn clearly enough to be workable in practice; and, third, that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATION* 628-33 (1947). See generally *id.* at 624-50. See also authorities cited note 21 *supra*.

agencies will almost certainly be drawn into the role of immediate umpire.³¹⁹ For these reasons, and because the objectionable aspects of a comprehensive access doctrine are not substantially affected by questions of jurisdiction, I shall not bother to draw distinctions among the three main avenues of enforcement.

Something needs to be said at this point, however, about the distinctions which might be drawn among the media. The commentators who have resisted the access proposals at length have done so primarily in the context of specific media, particularly the broadcast media. This relatively narrow focus has had some advantages; a specific focus makes it convenient to offer equally specific objections which may well carry greater force than would more general observations. Yet specific objections can tend to obscure still larger and more sweeping objections, either because they are not identified or because, although identified, they do not lend themselves to extended articulation in a specific context. In my opinion, the proposals for access are most objectionable on grounds which are amplified as they cut across the established mass media. The reasons why begin with a brief examination of the conceptual cost of the access doctrine.

A. *The Conceptual Cost*

1. *The question of suppression.* It is surely unnecessary to describe in detail the access doctrine's most obvious cost: the possibility that the state may exercise its power to deny enforcement in some particular case. In conceptual terms the power to enforce also necessarily imports the power to withhold enforcement. Thus an obvious but nonetheless necessary cost of the access doctrine is that the state must acquire new powers not only to require particular publications but also to suppress them. This conceptual reality is not lessened by arguments which point to instances of suppression in the traditional private editorial process. Private suppression unquestionably exists; the very essence of the editorial function obviously is to decide what shall be published. But to acknowledge this fact is not to diminish the larger reality:

³¹⁹In *Democratic National Committee*, Chief Justice Burger suggested that a right of access would require oversight of "far more of the day-to-day operations of broadcasters' conduct . . ." 93 S. Ct. at 2098. The statement is not an exaggeration. Indeed, the equal time and fairness provisions, which are no more complex than would be required under a controlled right of access, have nevertheless required the intervention of the FCC staff into determinations of broadcast content quite literally on a day-to-day basis. See *Wall Street Journal*, Oct. 2, 1972, at 34, cols. 1-6.

all power to affect the content of the press is of necessity the power to suppress as well as to publish.³²⁰

The question remains, however, whether it is conceptually worse for the state to exercise editorial powers than for private individuals so to do. To Professor Jaffe the answer is clear:

The proposition that the threat of government censorship is much less than that of private censorship cannot withstand the lesson of the government's attempt to suppress publication of the Pentagon Papers. An argument of this sort can only be made by one who, not having lived under a system of government censorship, appears to have no idea what it really means. If one private person suppresses a fact there are others who may publish. Not so if the government forbids!³²¹

It is true, of course, that one whose demand for access is denied suffers something in comparison with those whose demands are granted. It is not quite so clear, however, that the particular loss is necessarily greater at the hands of the state than at the hands of private editors. Professor Jaffe appears to assume that a state denial of access precludes publication elsewhere in a way that private denial would not. Yet it is entirely possible for the state to deny access to a particular publication in a particular medium at a particular time without precluding publication elsewhere or at some other time. In that case, the immediate loss would be precisely the same as in cases in which private editors refuse publication.

Professor Jaffe may mean only that the precedents established by state denials of access in particular circumstances will lead inevitably toward more sweeping rejections of proposed publications. I think that will indeed be the case. But it will result from considerations beyond the conceptual requirements of the access proposals. Insofar as occasional denials of particular access are concerned, there is no clearly greater danger in state regulation than in the traditional private editorial process. In either case, if one is denied access to *The New York Times* or the NBC network, one is still free to seek other outlets or to come back later.

Yet concern for the potential suppressive power of the state is not wholly beside the point. The real conceptual cost of a comprehensive right of access lies not in the potential for suppression, but rather in the limitations which must be imposed upon the state in order to control that potential.

³²⁰See Note, *Free Speech and the Mass Media*, *supra* note 21, at 636.

³²¹Jaffe, *supra* note 21, at 786.

2. *The limitations of the golden mean.* The access proponents have not been unconcerned with the problems posed by state intercession in behalf of access. Their concern, however, has been directed mainly toward the immediate problems posed by the questions of suppression. Their response has been to call for a system of balances which will prevent arbitrary action by the state. Thus, for example, Professor Barron has written:

No illusions are entertained about government as compared with private power. The need is to build counter-balances into each sector to stimulate them to develop a responsiveness to the longing for an information process which is truly participatory.³²²

What is wanted, in other words, is a kind of "golden mean"—a mechanism for assuring that state enforcement of the access doctrine will be administered in a non-discriminatory manner, with objectivity and balance.

This is not only what the access proponents want; it is almost certainly what they must have. As I have suggested, a limited right of access may be required, as a matter of substantive first amendment doctrine, to operate under rules or regulations intended to achieve a balance in the resulting ideological spectrum. This seems implicit in the reasoning of the five Justices in *Democratic National Committee*, and it is consistent with the state's general obligation not to dominate the content of the press that it regulates. Even if balance is not required as constitutional doctrine, however, it is virtually unavoidable as a political proposition. A moment's reflection will suggest that if an access doctrine is developed because of concern for bias in the media, it will scarcely be satisfactory if it does no more than perpetuate that bias or establish another. In short, if the state is to play a role in enforcing access, then it must surely do so under an accompanying obligation to seek some balance in the process.

To be sure, that obligation arises clearly only when the state involves itself in the process of content selection. Common carrier regulation, for example, presumably would not require the establishment of balanced content. But few of the access proponents have seriously proposed a "first-come, first-served" system for access,³²³ and with good

³²²Barron, *An Emerging First Amendment Right of Access to the Media?*, *supra* note 5, at 509.

³²³Former Federal Communications Commissioner Nicholas Johnson is most frequently identified with proposals for a first-come, first-served system. He has advocated as much in his dissents

reason. Unless the system were administered under comprehensive rate regulation, it would amount to little more than a series of microcosmic *laissez-faire* market-places.³²⁴ As both the Chief Justice and Judge Wright recognized,³²⁵ an access doctrine based solely on the ability to pay the going rate would provide access most often to those who can afford it. That might be constitutionally defensible in a common carrier system,³²⁶ but politically it would be most unattractive and would obviate most of the gains the access proponents seek. Yet rate regulation—or even free time—would not resolve the difficulties inherent in a common carrier concept of access.³²⁷ What works well enough with the telephone and telegraph would by no means be satisfactory in the mass media. The established media simply cannot guarantee simultaneous time or space to everyone who may wish to speak or write at the same time, and a randomly ordered “waiting list” would scarcely lend itself to effective timely discussion of public issues.³²⁸ For very practical reasons, then, most proposals for access assume a limited right under which individual claims to access must be weighed against other competing claims, and with that sort of limited right of access, objectivity and balance are required for the reasons we have seen.

Yet if objectivity and balance are the necessary concomitants of the access doctrine, they are also its real, if subtle, conceptual costs. They are costs, in a perfectly conventional sense of the term, because they limit what is possible. The private press is free to establish its content according to whatever judgments, good or bad, suggest themselves from time to time; the state is not. What the state must do instead is avoid serving any judgment which does not essentially contribute toward the establishment of a balance. The result in the latter case is a press that may have less capacity to do harm. It will also have less capacity to do good. These are the necessary limitations of the golden mean. Of course, this observation is not new. It is implicit in much of what is said by the Justices (including those in dissent) in *Democratic National Committee*,

in Commission proceedings, *Democratic Nat'l Comm.*, 25 F.C.C.2d 216, 234-35 (1970), and, in more muted form, in law review commentary. See Johnson & Westen, *supra* note 5, at 627-29, 628 n.235.

³²⁴*Cf.* Botein, *supra* note 4, at 440.

³²⁵*CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080, 2096-97 (1973) (Burger, C.J.); *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 664 (D.C. Cir. 1971) (Wright, J.).

³²⁶*But see* Marks, *supra* note 21, at 981-82.

³²⁷*See* Jaffe, *supra* note 21, at 787-89. Professor Jaffe is persuasively critical of proposals for rate regulation.

³²⁸*See* Marks, *supra* note 21, at 981-82; 85 HARV. L. REV. 689, 697 (1972).

and it is clearly what Madison had in mind in his memorandum to the French Ambassador that explained why the American press was not more closely confined:

Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.³²⁹

Still, conceptual analysis has its own limitations. One may rationally choose to pay a conceptual price in exchange for apparent improvements in one's practical circumstances. The ultimate question, then, is whether the developing access doctrine offers that exchange.

B. The Promise and the Reality: A Pragmatic Analysis.

The twin promises of the access doctrine are increased opportunities for the effective expression of diverse opinion and thus more "robust, wide-open" debate in "the media of greatest impact." Reality, I think, promises something quite different. It has been suggested that access will not bring about greater diversity.³³⁰ I think that is a fair assessment of the prospects in any given medium. But the problem goes beyond that when it is considered in terms of all the media. A controlled right of access to the press at large means not only no substantial gain in diversity, but also the distinct possibility of a new consolidation of American orthodoxy in which balanced mainstream thinking will come to dominate the press even more so than at present while serious dissent will be, in relative terms, even more surely suppressed.

1. *Robust debate and a balanced diversity.* In the first place, the new diversity offers no real prospect of a robust debate. On the contrary, what is offered is a managed debate in the context of a balanced diversity. The reason why is suggested by the majority's basic assumption in *Democratic National Committee*: careful steps must be taken to ensure, in effect, that no side of the debate begins to gain dominance. If one side does begin to dominate, another must be promoted (and the first therefore either diluted or suppressed) in order to achieve the balance that is the price of state intervention in the process. It is in this respect

³²⁹Quoted in *Near v. Minnesota*, 283 U.S. 697, 717-18 (1931).

³³⁰See, e.g., Robinson, *supra* note 21, at 161-62.

that the conceptual limitations of the access doctrine will first ripen into practical reality.

The immediate practical consequence is not altogether clear. In his opinion, Judge Wright spoke of the need for "reasonable regulations" (whatever that means);³³¹ law review commentary is filled with individual suggestions for implementing access. Consider the following proposal, for example:

It is by the judicial process that we shall establish the contours for answers to questions which a working right of access obviously presents. What is a minority point of view? When and where shall such opinions be heard? Has some significant space already been given to a particular controversy? Isn't it possible to reach saturation of a given subject? When is the decision not to publish on a particular issue a "news" decision and when is it a decision based upon an effort to obstruct the opinion process? Surely resolving these problems is no less baffling than deciding when a book is "without redeeming social importance" or when it is marketed against a "background of commercial exploitation." But which task accommodates itself more easily to the basic theory of the first amendment? A task which winnows out that which is to be suppressed, or a task whose point of inquiry is whether the communications media have been in default and whether a particular point of view has been suppressed?³³²

One may doubt in passing whether the final rhetorical questions in the quoted passage resolve themselves in the way their author supposes. But that is not the point. The point is that the "contours" of the access doctrine will almost surely develop very much as this proposal suggests. These questions and others like them will have to be considered and resolved if the state, in its efforts to enforce access, is not also to undo the ideological balance in the press.

³³¹*Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971): [I]nvalidation of a flat ban on editorial advertising does not close the door to "reasonable regulations" designed to prevent domination by a few groups on a few viewpoints. Within a general regime of accepting *some* editorial advertisements, there is room for the Commission and licensees to develop such guidelines. For example, there could be some outside limits on the amount of advertising time that will be sold to one group or to representatives of one particular narrow viewpoint. The licensee should not begin to exercise the same "authoritative selection" in editorial advertising which he exercises in normal programming. . . . However, we are confident of the Commission's ability to set down guidelines which avoid that danger.

Id. at 664 (emphasis in original).

³³²Barron, *An Emerging First Amendment Right of Access to the Media?*, *supra* note 5, at 496.

Meanwhile, the larger outlines are reasonably clear. As statutes are enacted, regulations implemented and precedents established, the day of the clear editorial stand will have largely passed.³³³ I suppose it requires a kind of ontological faith to lament its passing. It may require a certain naivete as well, inasmuch as the press has not always taken clear stands on even the most vital issues. And yet I suspect—unaided by the elaborate content analyses and retrospective polls it would require to prove the point—that we do owe something to the capacity of the press to change its posture from indifference to commitment when moved to do so. The course of the civil rights movement and the war in Viet Nam might have been settled in the streets alone; I could be persuaded, however, that attitudes reflected in the press have contributed something toward their resolution. If that is so, the contributions—whether viewed as good or bad—have not been the product of the kind of balance a “working right of access” will require.

Access enforced by the state almost surely means the loss of what Professor William Canby has recently termed “the right to persuade.”³³⁴ In an article which identifies the problem but, I think, fails to appreciate the reasons why it is inherent in a “right” of access, he argues that some provision ought to be made to allow individual arguments to prevail when they are meritorious—that is, when they gain a substantial number of adherents.³³⁵ His concern is well-placed; it is not at all clear why we should want the media converted into sterile academics of balanced debate. The difficulty is that we cannot have things both ways: we cannot, in other words, expect to establish a system in which the state is asked to restore a lost “equilibrium” and, at the same time, to allow the more appealing arguments to prevail.

In the search for balance, another phenonemon will also be at work. Since it is not possible for the media to accommodate everyone who may care to speak concerning a given issue at the same time, it will frequently be necessary to search for representative points of view rather than distinctly individual arguments. Indeed, this is routinely assumed by most of the access proponents.³³⁶ The difficulty here, however, is

³³³See Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, *supra* note 21, at 91.

³³⁴Canby, *supra* note 5.

³³⁵See *id.* at 754-57; *cf.*, Note, *The Public Interest in Balanced Programming Content: The Case for FCC Regulation of Broadcaster's Format Changes*, *supra* note 5, at 955-56, in which the author offers “a theory of proportional representation, whereby significant blocs of listeners are entitled to proportionately significant blocs of programming.” *Id.* at 956.

³³⁶“It is self-evident that a system which contemplates personal access on demand is impossi-

that representative points of view tend in themselves to strike a balance between the extreme edges of the spectrum of opinion that they represent.³³⁷ Thus the larger balance which is inherent in the access doctrine will be complemented and reinforced by a further balance in the very opinions that are offered.

The result of all of this will be debate only in the most pointless and distasteful sense of the term: arid, dull and, on the whole, unpersuasive.³³⁸ Mill's contentions concerning the nature of effective discourse come to mind. Debate is meaningful, he argued, only when it is conducted passionately, without restraint, by those who advocate points of view which are themselves passionately held. Otherwise, the effect resembles learning by lecture: opinion is abstractly received and held, untested, and may interfere with real capacity for understanding:

[E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this . . . the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.³³⁹

ble. There must always be some guidelines that determine who shall speak. It is the exchange of ideas which is the goal." Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 1043 n.973.

³³⁷This is one of the objections which Justice Brennan offers to the fairness doctrine. See *CBS v. Democratic Nat'l Comm.*, 93 S. Ct. 2080, 2130 (1973) (dissenting opinion). While his objection is valid, the access doctrine offers no improvement. A representative balance is the unhappy accompaniment to any extensive government effort to satisfy competing claims to speech.

³³⁸Professor Kalven has responded in part to the argument for fair debate this way:

[I]t misconceives the utility of bias in public discussion. Public discussion is all a sort of adversary process on a grand scale, kept alive by the lively and firm expression of opinions. The Supreme Court has . . . recognized the point in the *New York Times* case when it speaks of the commitment to discussion on public issues that is "*uninhibited, robust, and wide open*." It is most unlikely that public discussion will have that muscle tone if each publisher must worry about being fair to both sides.

Kalven, *supra* note 21, at 47.

³³⁹J.S. MILL, *ON LIBERTY* 46-47 (McCallum ed. 1947). Of course, Mill can be cited from more than one perspective. Professor Barron suggests that Mill was moved more by fear of power than by fear of government and can therefore be read in support of the arguments for access. See J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* 81-85 (1973). But one can ask whether Mill would have thought the access doctrine, as it actually seems likely to develop, a worthwhile exchange.

One need not look far to find contemporary support for these observations.³⁴⁰ The lifeless quality of mannered debate is readily apparent when one considers the fairness doctrine and the "robust" debate which it has engendered. Surely no one who has heard or seen the typical broadcast editorial or the typical "responsible" reply can fail to sense something of the futility in argument-according-to-format—argument endlessly in check in a game which admits no mate. There are exceptions, undoubtedly. Yet in the main, I think, robust debate and a balanced diversity are inherently at odds.

2. *The new centrism.* One might accept a certain loss in vigor, however, if balanced debate could be relied on to expose a truly wide-open spectrum of opinion. If the inherent centrism of the mass media were merely altered so that genuinely divergent opinion were exposed with some regularity, one could see a gain. However sterile the debate in the media, the mass audience might at least be encouraged to engage in robust debate in other, less constrained circumstances.

Practically, however, there seems little likelihood that access will bring wide-open discussion. What seems likely instead—if not certain—is simply the establishment of a new and expanded centrism. What seems equally likely is that the new centrism will be gained only at the cost of a relatively greater degree of suppression of serious dissent.

That the present media are primarily centrist in their orientation is, I take it, commonly accepted. There are fairly clear reasons why. In the first place, the desire to appeal to a mass audience fairly assures content aimed at common denominators, content which will attract more than it repels. There are additional reasons. The ethics and practice of mass journalism—a journalism which prizes the appearance of objectivity in a practice which reflects what Sander Vanocur calls the "rat pack" psychology of what is important—tend rather clearly to reflect the middle ground, the common causes and the conventional wisdom.³⁴¹ The background of the media proprietors provides a further impetus toward centrist points of view. There is little reason, after all, to expect those who operate the media to invest consistently in attacks upon the system which supports them.

³⁴⁰The Supreme Court acknowledged Mills' argument when it upheld the reply provisions of the fairness doctrine. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 n.18 (1969).

³⁴¹Conversation with Sander Vanocur, August 7, 1973, Duke University. Durham, North Carolina.

There is also little reason to doubt that the access doctrine will tend somewhat to broaden the present spectrum of opinion in the media. Once an initial right of access is established, courts and other administrators should not find it particularly troublesome to enforce the right in cases which offer no more than another side to an established debate. Publishers and broadcasters who fail to sense the particular interests of their audience at a point in time will find the audience able, as it were, to serve itself. I think it fair to speculate, however, that in all but the exceptional case, the broadened spectrum will remain decidedly conventional in its expression and only slightly less so in its substance. Certainly that has been the experience to date in the cases which have considered access. Labor issues; discrimination in the placement of Negro wedding announcements; blue-pencilled movie advertisements; Democratic Party opposition to the Republicans; conventional opposition to the Viet Nam War—these and similar expressions of dissent have formed the substance of the proposals for access. No one could deny that they are issues which deserve to be raised in the press. But it would require a narrow view of the ideological spectrum to suggest that they are anything but establishmentarian in their range. If all of these proposals to publish had been resolved in favor of their proponents, the range of thought represented in the press might have been widened by a notch or so, but surely little more.

A tendency toward the mainstream is also suggested by the rather obvious economic implications of access. As they are most often advanced, the proposals begin with the notion that those who will gain initial admission to the media will be those who can afford to pay the going rate for advertising. Yet, as we have seen, the proposals cannot stop there. In practical, political terms, the doctrine must be broad enough to provide for at least some "right to respond" independent of ability to pay. It is at this point, however, that economic considerations begin to confine the scope of what can be said. So long as a portion of the incremental costs of access must be absorbed by the media proprietors, the proprietors will have understandable reasons for resisting an unlimited scope of debate. That has been our experience with the fairness doctrine, and it ignores economic realities to suppose that these same pressures will not also shape the access doctrine.

Meanwhile, even as the mainstream is slightly widened and reinforced, non-mainstream thinking will still be apt to find itself excluded—the more so as its substance and expression depart from what is conventional. The apparent grounds for exclusion will have little initial relationship to the access doctrine. Instead, relying on definitions

of obscenity, speech-action relationships, the clear and present danger test, interest balancing—even in some cases, general canons of “good taste” and “suitability for general audiences”³⁴²—courts and administrators can be expected to reject a fairly distinct category of potential publications. The rejections will not normally be addressed to the more abstract ideas but rather to their particular expression. For serious dissent, however, that will represent a very real form of suppression.

The New Left and related movements offer an instructive model. While they are undeniably rooted in ideology, it is nearly impossible to separate the ideology from rather particular forms of expression. There is scarcely any satisfactory translation of “fuck the draft”; obscene and indecent expression are part and parcel of the contempt for conventional society which adherents to these movements seek to convey. Yet the form of the expression, and thus the ideology itself, are of precisely the sort which we can expect to be excluded from the mass media whether a right of access is established or not.³⁴³

³⁴²See Marks, *supra* note 21, at 994-97. See generally Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, *supra* note 5.

³⁴³Consider, for example, the FCC's action in the case of WUHY-FM, Eastern Education Radio, 24 F.C.C.2d 408 (1970). The licensee aired a taped interview with Jerry Garcia, leader of the rock group “The Grateful Dead.” The interview was offered as part of an “underground” program intended to reach “youthful persons” in the Philadelphia area. Garcia discussed a number of subjects which, as the Commission was to point out in its subsequent opinion, might have been expressed in conventional terms: ecology, politics and music, to suggest a few. His language, however, was peppered with obscenities, primarily the words “fuck” and “shit.” The Commission, with two members in dissent, reviewed the circumstances surrounding the broadcast, determined that the licensee had violated the public interest in permitting the broadcast of “indecent” matter, and imposed a “forfeiture”—that is, a cash penalty amounting to a fine. *Id.* at 415. The majority opinion provides a fairly clear illustration of the ways in which unconventional expression may be suppressed even as the principle of “robust, wide-open debate” is reaffirmed in ringing terms. A broadcast licensee, the majority asserted, has the “right to present provocative or unpopular programming which may offend some listeners.” *Id.* at 410. But that right does not extend to speech which “has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the ‘public interest in the larger and more effective use of radio.’” *Id.* The obvious argument that Garcia's language is its own statement of his point of view did not escape Commissioners Cox and Johnson in dissent. Not so with the majority, however:

The licensee argues that the program was not indecent, because its basic subject matters . . . “are obviously decent”; “the challenged language though not essential to the meaning of the program as a whole, reflected the personality and life style of Mr. Garcia”; and “the realistic portrayal of such an interview cannot be deemed ‘indecent’ because the subject incidentally used strong or salty language” . . . We disagree with this approach in the broadcast field. Were it followed, any newscaster or talk moderator could intersperse his broadcast with these expressions, or indeed a disc jockey could speak of his records and related views with phrases like, “s---t, man, . . . , listen to this mother f---r”, on the ground that his overall broadcast was clearly decent, and that this manner

Indecency and obscenity are not, of course, the only grounds on which unconventional expressions of dissent will be excluded from the media. There are embedded in the law of the first amendment a number of related devices for suppressing speech which is offensive or dangerous. Among these, I suggest that it is the speech-action test and its conceptual predecessor, the clear and present danger test, which will be drawn into most frequent use. Everyone knows, of course, how these tests work in principle: speech is protected unless it has, in effect, the present capability of inducing action which is itself prohibited. Thus, in the classic example, there is no right to yell "fire" in a crowded theater, not because the right to yell fire is denied, but because there is no right to induce panic in a crowd. These elementary principles will find a ready application in the present context. It is precisely at the point that genuinely revolutionary calls to arms offer the greatest prospect of immediate action that they will be suppressed. Black militants may be heard—but not when what they propose to say is thought likely to bring

of presentation reflected the "personality and life style" of the speaker, who was only "telling it like it is." The licensee itself notes that the language in question "was not essential to the presentation of the subject matter . . ." but rather was ". . . essentially gratuitous". We think that is the precise point here—namely, that the language is "gratuitous"—i.e.; "unwarranted or [having] no reason for its existence" (Websters Collegiate Dictionary, Fifth Ed., p. 435). There is no valid basis in these circumstances for permitting its widespread use in the broadcast field. . . .

Id. at 413. The majority added:

We conclude this discussion as we began it. We propose no change from our commitment to promoting robust, wide-open debate Simply stated, our position—limited to the facts of this case—is that such debate does not require that persons being interviewed or station employees on talk programs have the right to begin their speech with "S--t, man . . .", or use "f-----", or "mother f-----" as gratuitous adjectives throughout their speech.

Id. at 415.

Professor Barron is critical of the Commission's decision in *WUHY*, as he is of other commission actions enforcing morality, but seems to argue in effect that access will at least result in more public and predictable suppression:

Enforcement of a right of access to broadcasting is not designed to broaden exposure to the obscene, or to lessen it, for that matter. Access as a right is dependent to some extent on the establishment of program content standards dealing with obscenity. The paradox, therefore, is that a larger access is dependent on censorship, a minimal censorship to be sure, but nonetheless censorship. But the censorship must be one whose standards are public, and whose criteria will be constitutional instead of submerged, private, extra-constitutional and eccentric as are the censorship standards now in actual use in American broadcasting.

J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* 287-88 (1973). If this is supposed to be an advantageous development, perhaps one can be pardoned for concealing one's gratitude behind a cough.

new violence to the cities. White racists may speak and publish—but not at the possible cost of still more violent reactions. Youthful extremists may call for institutional reforms—but not for bombing of the institutions. And so on. The list multiplies itself readily, and in these kinds of cases, I submit, it is not at all unlikely that the expressions will be excluded.

But what has this to do with access? Is it not merely an illustration of the conventional proposition that first amendment rights are not absolute? That, after all, we are not to be taken literally when we speak of “robust, uninhibited, and wide-open” debate? Would not those whose points of view are excluded from the mass media still be free to go on as they now do—seeking other methods of expression while occasionally making such nuisances of themselves that they qualify as legitimate “news”? In a sense, the answer to these questions is yes. In immediate practical terms, a right of access will do little more than consolidate and reinforce the inherent centrism of the mass media. It will be a “new centrism,” but only in the degree to which it is balanced and slightly widened. In other ways, however, the realities of the access doctrine will have a direct relationship to the realities of a greater suppression of dissent and the corresponding establishment of a new American orthodoxy.

3. *The new American orthodoxy.* This will come about, I suggest, as a result of interaction between two sets of considerations. First, those whose views continue to be suppressed will not in fact find themselves in their accustomed position. In relative terms they will be worse off. By definition, they will be fewer in number: only the seriously disaffected will remain outside the pale. As a result, they can be expected to feel still more isolated, more threatened, and thus more desperate than they do now. The implications of an increased sense of alienation among radical dissidents are scarcely minor. In a prophetic “note to liberals,” New Left activist Tom Hayden has warned that violent confrontations—“an absolute right to resistance”—become necessary “when the democratic system is less than pure, when in fact it is corrupt . . . [and] First Amendment rights are ineffective”³⁴⁴ Whether the democratic system is “corrupt” in some absolute sense is, of course, beside the point; the question is how the system is perceived by those who feel themselves affected by it. And the first effect of the new centrism which the access doctrine promises will almost certainly be a sharpened sense

³⁴⁴T. HAYDEN, TRIAL 44 (1970).

of institutional corruption among those who remain outside the widened mainstream. In effect, the access doctrine will mean they are no longer merely pitted against an amorphous "establishment." They will be able to contend with some justification that it is the government itself which has set them apart.

At the same time, the occasions for suppression may actually increase as courts and administrators encounter new difficulties in measuring speech against action in the unaccustomed context of the mass media. Traditionally, this kind of evaluation has taken place, in a sense, after the fact, usually in the setting of a criminal prosecution.³⁴⁵ A right of access poses the problem in a different setting. It will be necessary to decide in advance what effect the proposed speech will have in circumstances not yet clearly developed. The decision will be complicated by the fact that the speech will be intended not merely for a handful of partisans but rather for an unseen and thus unpredictable audience at large. The point involved here is a fine one, and necessarily tendentious, but I do not think it wholly unwarranted to suggest that the new settings in which these decisions will take place may lead to an enlarged body of cases in which speech will be categorized, in effect, as undeserving of first amendment protection.³⁴⁶ In this sense, as I have said, Professor Jaffe's concern for the suppressive effect of the access doctrine has real substance.

It is an effect which will be heightened in direct relationship to the impact of the media. If the media have merely the power to confirm existing attitudes and to influence those which are unformed, the tendency of an access doctrine which can deliver no more than a new consolidation of centrist points of view will be, nonetheless, to raise new

³⁴⁵E.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1968); *Herndon v. Lowry*, 301 U.S. 242 (1937); *De Jonge v. Oregon*, 299 U.S. 353 (1937). Professor Barron has observed that a right of access is unlikely to develop "unless it is made very clear that . . . [the right] does not compel the broadcast media to transmit all material submitted no matter how obscene or socially corrosive." J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* 288 (1973). On the other hand, he has concluded "reluctantly" that there may have to be some "access for hate." *Id.* at 301. How these two positions are to be reconciled from case to case is not made clear. A suggestion of a likely approach made in the *Georgetown Law Journal* affords little peace of mind as to results:

Clearly, groups attempting to sponsor an advertisement have an interest in seeing their ideas reach the public. The public, as a consumer of ideas, has an interest in being exposed to varying opinions. But the government has an interest in maintaining the public peace and order. The potential disruption, real or imagined, resulting from an editorial advertisement must be balanced against government's concurrent duty to protect the rights of all its citizens.

Note, *Media and the First Amendment in a Free Society*, *supra* note 5, at 888-89.

³⁴⁶See text accompanying note 321 *supra*.

barriers to the effective expression of dissident thought. Persons whose minds are made up obviously do not make good listeners. The problem increases as even greater powers of persuasion are ascribed to the media. If the access proponents are correct in their assumptions concerning the "media of greatest impact," the access doctrine may well establish the outlines of a new orthodoxy. It will still be an orthodoxy of middle-thinking, distinguishable in substance from what we now have only in the degree to which it is broadened and more balanced. But it will deserve the label orthodoxy, nonetheless, as it comes increasingly to shape and hold attitudes and beliefs of the American people.

I would be unwilling to posit a result so dramatic if it were not for the potential effect of a second set of considerations. Professor Jaffe has dismissed the assumption that the American people can be manipulated by the media as "maddening," an "hysterical overestimation of media power and underestimation of the good sense of the American public."³⁴⁷ In traditional circumstances I would agree. But traditional circumstances have implied a healthy skepticism toward the press, a skepticism engendered in no small part, I suspect, by the fundamental assumption that the press cannot be relied upon to be fair and balanced in its content. There is probably no more satisfying evidence of a basically healthy relationship between a free press and the people who are served by it than outraged protests against bias, unfairness and other similar abuses. Of course, neither the abuse nor the outrage is valuable; what is important is that the press is free to err (which is merely to say that it is free to commit itself) and the people are sufficiently aware to sense the error.

The access doctrine and the regulatory structure which it necessarily implies threaten that relationship in both of its essential parts. To insist on a balanced diversity in the press is to diminish its capacity for good as well as bad. But the effect goes beyond that. The dangerous quality of the access doctrine lies in the suggestion that the media can be "made safe for democracy" if we will merely trust others—the regulators—to do the job. The problem is not so much that they will not succeed but rather the romantic naivete that entertains the notion that they may. It is an innocence which is dangerous, rather than merely foolish, because it can be gained only at the expense of the skepticism which is the single reliable defense against abuse of freedom of the press. To the extent that the people doubt the media, the manipulative power

³⁴⁷Cf. Jaffe, *supra* note 21, at 787-92.

of the media is correspondingly slight. It is only when the guard is relaxed, when the assumption is made that something meaningful has been done to eliminate the media "problems," that whatever latent influence may inhere in the relationship between mass media and a mass urban society can make itself felt. The access doctrine, which poses as a new solution to the old problem of imbalance in the press, carries with it the very real threat of undoing the "good sense of the American public" on which Professor Jaffe quite correctly relies.

It is no answer to suggest that that skepticism can be redirected toward the regulators. In the first place, the suggestion is unrealistic in its own terms. The perennial experience of American regulation has been that one of its clearest costs is the assumption that it works.³⁴⁸ Even when the regulatory process does not satisfy, the resulting discontent is likely to be directed toward the process itself rather than toward the underlying circumstances which may make regulation inherently unsatisfactory. The FCC's fairness doctrine is a classic example of this phenomenon. If a single general statement can be made with some certainty about the fairness doctrine, it is that it pleases no one, not the public nor the broadcaster nor even the FCC. I do not find this surprising since nearly all that may be said against the access doctrine applies in some degree to the fairness doctrine as well.³⁴⁹ Yet for more than twenty years, the main focus of attention has been on how to perfect the doctrine rather than on the distinct possibility that the doctrine itself is essentially hopeless.³⁵⁰ I suppose this has produced a kind of skepticism as a by-product of the discontent. But it is not the kind best calculated to lead individuals to bear the immediate responsibility of assessing broadcast content for themselves. It is instead a misdirected skepticism which still supposes that the real burdens of judgment belong to the regulators and the regulated who must simply be made to do their jobs.

In any case, there is little advantage in replacing editors with regulators if the regulators themselves cannot be trusted—if, indeed, in order to insure that the regulators do not abuse their trust, it is necessary to impose still further restrictions that have the effect of limiting the ability of the press to take a decided stand on any issue and consolidating the

³⁴⁸Cf. Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 J. LAND P.U. ECON. 161 (1965).

³⁴⁹See, e.g., Blake, *supra* note 21, at 82-86; Robinson, *supra* note 21, at 159-62; Sullivan, *supra* note 21, at 748-52.

³⁵⁰Cf. Mallamud, *supra* note 5.

media centrism which is the very occasion for complaint in the first place. The equation is surreal, and yet that is the nature of the exchange which the access doctrine offers.

The net effect of the proposals for an enforceable right of access to the press will not be to increase effective public debate in a meaningful way. On the contrary, as a practical matter, access will be enforced only in those cases in which the discussion is relatively "safe." What we will get will not be diversity; we will only get a somewhat broadened spectrum of essentially mainstream thinking. We will hear both sides—but only both sides of the conventional wisdom. Meanwhile, real dissent—the serious disaffections, the genuine calls for revolution—will routinely be excluded from the press for reasons already well-embedded in the law: obscenity, "clear and present danger" tests, and other similar grounds for perserving the established order intact.

And the result? Simply this: serious dissent, finding itself all the more isolated, will be all the more desperate to make itself felt. Meanwhile, the American people, whose deep suspicions concerning the mass media are not unfounded, may succeed in tricking themselves into believing that something meaningful has been accomplished—that the problems of imbalance are no longer substantial. What will in fact have been accomplished, however, is something very different: the potential establishment of a new American orthodoxy and the tyranny of a balanced centrism.

IV. SOME CONCLUDING OBSERVATIONS

It is clear, of course, that none of the more modest proposals for access will lead immediately to the extreme results just described. A reply statute of the sort upheld in *Tornillo*, for example, will not undo us by itself. Yet, for the reasons discussed earlier, the statute will have some "chilling effect" on newspaper discussion of political candidacies and will provide little measurable practical gain. Indeed, the lesson of the modest proposals for access is that practical gain cannot be measured at all. These proposals can be defended meaningfully only if one retreats to the more general ground of fairness and balance, as the court does in *Tornillo*. But that ground is treacherous. It proceeds from little more than intuition and is difficult to contain: if fairness is accorded to political candidates, for example, how can it be denied to others? Practically, it cannot, as the continuing evolution of broadcasting's fairness doctrine demonstrates. Yet if a fairness doctrine were eventually imposed on newspapers, even Professor Emerson, who apparently would accept the statute in *Tornillo*, would find the broader requirement in-

consistent with the first amendment.³⁵¹ The conclusion, then, in the case of newspapers, seems clear: even the modest proposals must be resisted in order both to avoid the "chilling effect" that they permit and to foreclose their expansion into wider and still more obvious first amendment encroachments.

The same objections might be offered to proposals for access to the broadcast media were it not for existing regulation. The fact of broadcast regulation, however, requires a different set of considerations. For the present, the decision in *Democratic National Committee* resolves the larger first amendment issues in a defensible fashion and leaves the practical issues arising from the access proposals in the hands of Congress and the FCC. An unqualified right of access to the broadcast media—a common carrier system, in other words—would be both unattractive and quite possibly unconstitutional for reasons previously discussed. Some limited right might be acceptable, but I think ultimately it would have to be defended on political, rather than practical, grounds. A limited right is unlikely to produce any distinct improvement over the fairness doctrine. It cannot be expected to produce either greater diversity or richer debate, and it seems likely in the long run to produce as much divisive disappointment as does the fairness doctrine. No doctrine which requires choices among competing ideas offered by individual spokesmen can prove very satisfactory. Since, in practice, a right of access may well raise administrative problems even more complex than the problems occasioned by the fairness doctrine,³⁵² the desirability of a right of access to the broadcast media is doubtful.

These observations may suggest less sensitivity to the legitimate claims of the access proponents than is meant. Insofar as the proponents of a right of access seek opportunities for members of the public to speak with a fair chance at persuasion, the search deserves support. The need for support, however, does not necessarily require direct intervention in the communications process or manipulation of first amendment doctrine. More directly, if access is unjustifiably denied because the poor cannot compete on economic grounds with the established media, the solution may more appropriately lie in a restructuring of the economy than in a rearrangement of traditional and independently valuable first amendment protections. However these broader economic issues ought to be resolved, there is little to recommend the proposition that

³⁵¹See text accompanying note 317, *supra*.

³⁵²See Jaffe, *supra* note 21, at 787-89.

all ideas must be expressed in the mass media. Abstractly the proposition is attractive; as a practical reflection of legal doctrine, it would destroy more than it would yield.

It is nonetheless possible to conclude this article with a degree of cautious optimism. In my earlier discussion, I have dealt with cable television only in passing. The most challenging issues posed by cable television are yet to be resolved and are substantially beyond the scope of an article addressed mainly to the question of access to the established mass media. Yet cable television is a new and quite different medium with almost intoxicating possibilities. Essentially an extensive variation on the familiar closed circuit television system, cable transmission depends on coaxial cables which are strung from house to house like telephone wires. No allocation from the electromagnetic spectrum is necessary; a cable system can expand as demand requires. Each cable itself can carry as many as sixty channels, and each channel can be separately and originally programmed; thus cable systems offer rich prospects for true diversity and real debate at incremental costs more nearly approximating the costs of pamphleteering than those typically associated with the mass media. Cable television's very capacity for diversity means that it will not guarantee an audience to those who simply demand the right to be heard.³⁵³ But for those who want the ability to speak with a fair chance to be heard by anyone who may be interested, cable television can truly prove to be the "television of abundance."³⁵⁴

³⁵³See J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* 258-59 (1973).

³⁵⁴REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATION, *ON THE CABLE: THE TELEVISION OF ABUNDANCE* (1971). For a more comprehensive review of the issues posed by access to cable television, see Botein, *supra* note 4; Note, *The Listener's Right to Hear in Broadcasting*, *supra* note 5, at 891-902. See also, Note, *Cable Television and the First Amendment*, *supra* note 5.

