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FREEDOM OF THE PRESS AND PUBLIC ACCESS: TOWARD A THEORY OF PARTIAL REGULATION OF THE MASS MEDIA

Lee C. Bollinger, Jr.†*

During the past half century there have existed in this country two opposing constitutional traditions regarding the press. On the one hand, the Supreme Court has accorded the print media virtually complete constitutional protection from attempts by government to impose affirmative controls such as access regulation. On the other hand, the Court has held affirmative regulation of the broadcast media to be constitutionally permissible, and has even suggested that it may be constitutionally compelled. In interpreting the first amendment, the Court in one context has insisted on the historical right of the editor to be free from government scrutiny, but in the other it has minimized the news director's freedom to engage in "unlimited private censorship"¹ and has exalted the "right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences."² The opinions in each area stand apart, carefully preserved through a distinctive core of precedent, analysis and idiom.

The purpose of this article is to examine critically these decisions and to explore whether there is any rational basis for limiting to one sector of the media the legislature's power to impose access regulation.³ The article takes the position that the Court has pursued the

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1. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

2. 395 U.S. at 392.

3. The term "access regulation" encompasses a variety of quite different forms of regulation. It can refer to a legal obligation to cover all points of view on any public issue as well as to a more modest rule that simply forbids discrimination in the acceptance of proffered advertisements. The underlying principle for the regulation can vary along with its scope and impact on the press. It may be designed to protect reputations, to equalize opportunities of citizens to present their points of view on certain issues, or to maximize the amount of information available to the public. See B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* ch. 2 (1976).

It is certainly not the purpose of this article to assert that all forms of access

right path for the wrong reasons. There is a powerful rationality underlying the current decision to restrict regulatory authority to broadcasting, but it is not, as is commonly supposed, that broadcasting is somehow different in principle from the print media and that it therefore is not deserving of equivalent first amendment treatment. As will be discussed in section I, the Court's attempt to distinguish broadcasting on the basis of its dependence on scarce resources (the electromagnetic spectrum) is unpersuasive; moreover, whatever validity the distinction may once have had is now being undercut by the advance of new technology in the form of cable television.⁴ Further, other possible points of distinction that may be raised, such as the broadcasting industry's high level of concentration and television's purported special impact on its viewers, do not presently justify the different first amendment treatment. For reasons that will be developed in section II, access regulation has been treated differently in the context of broadcasting than it has in that of the print media largely because we have long *assumed* that in some undefined way broadcasting is, in fact, different. Rather than isolate broadcasting from our constitutional traditions, however, the Court should now acknowledge that for first amendment purposes broadcasting is not fundamentally different from the print media. Such an admission would not compel the Court either to permit access regulation throughout the press or to disallow it entirely. There is, we shall see, an alternative solution.

There has recently been a dramatic outpouring of articles addressing the issues associated with access regulation in the press.⁵ This literature demonstrates the dual constitutional nature of regulation: It can be at once a valuable, indeed essential, means of redressing the serious inequality in speech opportunities that exists today within the mass media *and* a dangerous deviation from our historical commitment to a free and unfettered press. The problem, therefore, is formulating a constitutional approach that captures the benefits of access regulation yet still minimizes its potential excesses.

regulation are permissible; nor is it to specify which ought to be constitutionally sanctioned and which not. The assumption is made, primarily on the basis of the Court's holding in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), *discussed in* text at notes 14-34 *infra*, that access regulation in *some form* is constitutionally acceptable. The purpose of the article is to address the theoretical problems raised by the next question: the extent to which the Constitution ought to be construed as permitting such regulation within the mass media.

4. See text at notes 112-15 *infra*.

5. For an exhaustive listing of articles, see Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1, 2 n.5 (1973).

These first amendment goals, it will be argued, can be achieved by permitting legislative access regulation but sharply restricting it to only one segment of the mass media, leaving the choice of the area of regulation to Congress. Without adequately explaining or perhaps even comprehending its decisions, the Supreme Court has actually reached the constitutionally correct result in refusing to permit government regulation of the print media, but has done this only because Congress had already chosen to regulate the broadcast media.

I. THE FIRST AMENDMENT AS PORTMANTEAU

In 1974, when the Court considered the constitutionality of access regulation in the print media,⁶ it was able to turn to a long-standing constitutional tradition. Our society has generally been committed to the notion that, with a few narrow exceptions, the government should stay out of the business of overseeing editorial discretion in the press.⁷ Our historical experience has given rise to a hearty skepticism of the ability of officials to decide, for example, what is "fair" political debate. This skepticism recognizes the corruptibility of government and its seemingly innate desire to magnify whatever power over the press it might possess at a given time. The longstanding conception of the press as a "fourth branch" of government has seemed antithetical to the idea that the state should have power to affect its content. Even the most ardent advocates of access legislation have never sought to claim historical respectability for their proposals; theirs is the argument of changed circumstances.⁸

At issue in *Miami Herald Publishing Co. v. Tornillo*⁹ was a Florida statute requiring a newspaper in the state to publish without cost the reply of any candidate criticized in its columns.¹⁰ In a rela-

6. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

7. See, e.g., 2 Z. CHAFEE, *GOVERNMENT & MASS COMMUNICATIONS* 477 (1947).

8. See, e.g., Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). See also the Court's summary of the access proponents' arguments in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-54 (1974).

9. 418 U.S. 241 (1974).

10. The statute provided:

104.38 *Newspaper assailing candidate in an election; space for reply*—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 immediately 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

tively brief and conclusory opinion, the Court surveyed prior print media cases and found implicit in them the proposition that "any . . . compulsion [by the government on newspapers] to publish that which 'reason' tells them should not be published is unconstitutional."¹¹ Access regulation violates that principle because it intrudes "into the function of editors"¹² and because, as the Court assumed, although there was no evidence on the point, it also creates an impermissible risk of a chilling effect on news content.¹³

What seems so remarkable about the unanimous *Miami Herald* opinion is the complete absence of any reference to the Court's unanimous decision five years earlier in *Red Lion Broadcasting Co. v. FCC*.¹⁴ In that case, the Court upheld two component regulations of the Federal Communications Commission's "fairness doctrine,"¹⁵

this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

FLA. STAT. § 104.38 (1973). Enacted in 1913, Law of June 6, 1913, ch. 6470, § 12, 1913 Fla. Laws 274, the statute had slumbered peacefully until the 1970s. In the only other reported case, the statute was held unconstitutional. *State v. News-Journal Corp.*, 36 Fla. Supp. 164 (Volusia County Judge's Court, Fla. 1972). The Supreme Court noted that "in neither of the two suits, the instant action and the 1972 action, has the Florida Attorney General defended the statute's constitutionality." 418 U.S. at 247 n.7.

11. 418 U.S. at 256.

12. 418 U.S. at 258. As the Court said:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258.

13. The chilling effect was described in the following terms:

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate," *New York Times Co. v. Sullivan* . . .

418 U.S. at 257.

Justice Brennan wrote a concurring opinion in *Miami Herald*, in which Justice Rehnquist joined, expressing his understanding that the Court's decision indicated no "view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction," 418 U.S. at 258. Justice White also filed a concurring opinion that stated:

We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

418 U.S. at 259 (footnotes omitted).

14. 395 U.S. 367 (1969).

15. Developed over the years under the Commission's general power to promul-

one of which, the so-called personal attack rule,¹⁶ is almost identical in substance to the Florida statute declared unconstitutional in *Miami*

gate regulations consistent with the "public interest," 47 U.S.C. §§ 303, 307 (1970), the doctrine requires broadcasters to provide adequate and fair coverage of opposing viewpoints on controversial issues of public importance. The substance of these obligations was set forth in early Commission decisions. See *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929), *revd. on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930); *Trinity Methodist Church, South v. FCC*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933). However, the first official policy statement explaining the doctrines in detail was not issued by the Commission until 1949. See REPORT ON EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246 (1949). Congressional endorsement of the doctrine followed ten years later. Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315(a) (1958) (codified at 47 U.S.C. § 315(a) (1970)); see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-82 (1969).

Another well-known regulation of this genre is the equal time rule. A feature of the statutory scheme since the beginning, the rule provides that a broadcaster who permits a political candidate to "use" his station must "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." 47 U.S.C. § 315 (Supp. V 1975).

The broadcast media has, of course, been subject to extensive legal restraints beyond access regulation since the passage of the Radio Act in 1927. Radio Act of 1927, ch. 169, 44 Stat. 1162. Congress acted in that year in response to a massive problem of signal interference, which threatened the life of the new technology, and "under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Within the space of about a decade, radio had grown in popularity and social importance to such an extent that intervention was necessary to allocate the small number of available frequencies. Congress delegated this responsibility to the Federal Radio Commission, vesting it with authority to issue licenses and promulgate regulations consistent with the public "convenience, interest, or necessity." Radio Act of 1927, ch. 169, § 4, 44 Stat. 1163. The Federal Communications Act was passed in 1934, but aside from renaming the Commission, the essential nature of radio regulation was left unchanged. Communications Act of 1934, Tit. III, ch. 56, 48 Stat. 1081, *as amended by* 47 U.S.C. §§ 301-395 (1970). The professed object of the new enterprise remained to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide wire and radio communications service." 47 U.S.C. § 151 (1970).

16. The regulation covering personal attacks and political editorials provides as follows:

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for

Herald. That omission, however, is no more surprising than the absence of any discussion in *Red Lion* of the cases in which the Court expressed great concern about the risks attending government regulation of the print media.

Instead of scrutinizing government regulation of broadcasting in light of the print media cases and our traditional reservations about government oversight of the press, the Court in *Red Lion* regarded broadcasting as a "unique medium"¹⁷ that needed a distinctive first amendment analysis. Specifically, the Court plunged ahead to assert for the first time the incompatibility of a concentrated medium, which is how it characterized broadcasting, with the first amendment goals expressed in the Holmesian metaphor of the "market-place of ideas."¹⁸ The marketplace theme as developed in *Red Lion* states that when, as now, the channels of communication are effectively controlled by a few interests, there is the risk that many important voices will be excluded and that, as a consequence, the public will be seriously hampered in its efforts to conduct its affairs wisely. Unless the government intervenes to insure the widespread availability of opportunities for expression within the mass media, the objectives of the first amendment may be frustrated. Thus, the Court reasoned in a frequently quoted passage:

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.¹⁹

These constitutional principles are an elaboration of the "scarcity

the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however*, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

47 C.F.R. § 73.123 (1973).

17. 395 U.S. at 390.

18. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

19. 395 U.S. at 392.

doctrine" first articulated in *National Broadcasting Co. v. United States (NBC)*,²⁰ in which Justice Frankfurter argued that because radio was "inherently . . . not available to all" it was "unique" and therefore "subject to governmental regulation."²¹ Needless to say, the opinion in *Red Lion* reflects a far different attitude toward the relationship between editors and government than that in *Miami Herald*.

20. 319 U.S. 190 (1943). The broadcasters in *NBC* challenged on statutory and constitutional grounds the so-called chain broadcasting regulations, designed by the Commission to regulate various aspects of a network's relationship with its affiliated stations. See 319 U.S. at 198-209.

21. 319 U.S. at 226. Justice Frankfurter's discussion of the constitutional issues (he disposed of the statutory claims early in the opinion, 319 U.S. at 215-26) was to become the classic statement of the justification for government regulation in broadcasting:

We come, finally, to an appeal to the First Amendment. The regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently 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. Because it cannot be used by all, some who wish to use it must be denied.

319 U.S. at 226-27. The focus, ultimately, was to be on the public interest served by licensing:

The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices . . . is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

319 U.S. at 226-27.

Justice Frankfurter's analysis was hardly satisfying. It addressed the question whether the government could constitutionally deny a license to any applicant, an issue not raised by the broadcasters, and held that the scarcity of a major resource used in broadcasting (the electromagnetic spectrum), which is not sufficiently plentiful to supply all who wish to broadcast, justified a governmental licensing scheme. Justice Frankfurter completely failed to address other crucial questions: Why was the *method* chosen for allocation of licenses constitutional? If the method were constitutional, what limitations did the first amendment impose on its administration? And, why were these regulations not subject to those limitations? Perhaps the kindest comment on Justice Frankfurter's treatment of the constitutional issue was made by Professor Kalven, who observed that the "passage catches a great judge at an unimpressive moment." Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 43 (1967). See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 657 (1970). Nevertheless, the physical scarcity thesis became the principal rationale for distinguishing broadcasting from the print media and the basis for regulation in the "public interest," see 2 Z. CHAFEE, *supra* note 7, at 638, although other rationales occasionally surfaced. See, e.g., *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm. (CBS)*, 412 U.S. 94, 101, 126 (1973) (referring to "public domain" thesis that broadcasters could be regulated because they used the "publicly owned" airspace).

A comparison of *Red Lion* and *Miami Herald*, however, reveals more than different first amendment motifs. The tone and attitude manifested in these cases toward the proper limits of governmental intervention are entirely dissimilar. In *Miami Herald*, the Court clearly and firmly opposed any further experimentation with access legislation, while in *Red Lion*, the Court acted as if it were reviewing a decision of an administrative agency where great weight had to be paid to the agency's expertise in dealing with a "new technology of communication." Illustratively, the Court in *Red Lion* responded to the broadcasters' claim that the right-of-reply regulations created an impermissible chilling effect by displaying deference toward the FCC's determination that the possibility of such an effect was "at best speculative."²² This approach is in sharp contrast to the Court's later assertion in *Miami Herald* that access regulation "inescapably 'dampens the vigor and limits the variety of public debate.'"²³

An even more significant example of the Court's leniency towards governmental experimentation with access regulation in broadcasting is the Court's response in *Red Lion* to the broadcasters' claim that, although there once might have been technological scarcity, the situation had changed significantly.²⁴ The broadcasters' argument was hardly frivolous. The development of the UHF (ultra high frequency) portion of the spectrum had greatly expanded the total number of available channels, and when the Court considered the issue, a significant number were (and continue to be) unused.²⁵

22. See 395 U.S. at 393.

23. 418 U.S. at 257, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

24. 395 U.S. at 396.

25. In a footnote, the Court set forth the following table that had been prepared by the Commission as of August 31, 1968:

COMMERCIAL

Market Areas	Channels Allocated		Channels on the Air, Authorized, or Applied for		Available Channels	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10 _____	40	45	40	44	0	1
Top 50 _____	157	163	157	136	0	27
Top 100 _____	264	297	264	213	0	84

NONCOMMERCIAL

Market Areas	Channels Allocated		Channels on the Air, Authorized, or Applied for		Available Channels	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10 _____	7	17	7	16	0	1
Top 50 _____	21	79	20	47	1	32
Top 100 _____	35	138	34	69	1	69

1968 FCC Annual Report 132-35.

395 U.S. at 398 n.25.

On several occasions, moreover, the FCC had denied a license to a single applicant for a particular VHF (very high frequency) frequency because the applicant had failed to meet the Commission's programming requirements or because granting the license would have had an adverse *economic* impact on existing stations in the community.²⁶ In light of these facts, the broadcasters surely might have expected a Court concerned with freedom of the press to limit carefully the government's exercise of regulation to those situations consistent with the constitutional rationale adopted in *NBC*—that is, to instances where there was truly "physical scarcity."

This was not, however, the *Red Lion* Court's focus. Instead, the Court was primarily concerned with society's interest in establishing priorities for use of new technologies and was willing to affirm regulation that may not have been needed at that time to promote traditional first amendment interests:

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which *wise planning* is essential.²⁷

Instability would result, the Court surmised, if the Commission could only intervene when the demand suddenly exceeded the supply of frequencies in a community. In any event, it was thought, existing broadcasters had obtained such "advantages" by virtue of government selection that "[s]ome present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest."²⁸

The point of this comparative analysis of *Red Lion* and *Miami Herald* can be clarified by juxtaposing what the Court both articulated and failed to articulate in these decisions. The Court in *Red Lion* introduced a new principle into our first amendment jurisprudence. Essentially, that principle provides that when only a few interests control a major avenue of communication, those able to speak can be forced by the government to share. The initial logic

26. See, e.g., *Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962).

27. 395 U.S. at 399 (emphasis added).

28. 395 U.S. at 400.

supporting the principle is clear: If it is accepted that a principal objective of the first amendment is to assure the widespread dissemination of various points of view, then any serious constriction of the available methods of communication would seem to justify some remedial action. Applying this logic to broadcasting, the Court found that concentration there justified action *and* that access regulation is an appropriate legislative response.

Equally important, on the other hand, is what the Court has failed to say in its decisions on access regulation. It is clear that the Court has not made explicit just what is so "unique" about the broadcast media that justifies legislative action impermissible in the newspaper context. It is doubtful that the so-called scarcity rationale articulated in *NBC* and *Red Lion* provides an explanation. Certainly the scarcity rationale explains why Congress was justified in devising an allocation scheme to prevent the overcrowding of broadcasting frequencies. It may also serve to explain in part why the television industry is so concentrated.²⁹ The scarcity rationale does not, however, explain why what appears to be a similar phenomenon of natural monopolization within the newspaper industry does not constitute an equally appropriate occasion for access regulation.³⁰ A

29. See note 30 *infra*.

30. See, e.g., B. SCHMIDT, *supra* note 3, at ch. 4. It is difficult to compare effectively the extent of concentration in the broadcast and newspaper media. There are 8,760 broadcast stations, compared with 1,733 English language daily newspapers. See BROADCASTING, YEARBOOK 1975, at A-2; NEWSPAPER ENTERPRISE ASSOCIATION, 1975 WORLD ALMANAC 303 (1974). However, most of the broadcast outlets are radio stations (7,807), leaving 954 television stations (513 Commercial VHF, 198 commercial UHF, 95 noncommercial VHF and 147 noncommercial UHF). BROADCASTING, YEARBOOK 1975, at A-2. Other data, however, complicate the picture. A relatively recent assessment of the effects of media concentration noted:

From 1945 to 1970, the number of U.S. cities with competitive daily newspapers fell from 117 to 63, while the total number of dailies remained nearly constant. By 1973, only 55 competitive newspaper cities remained, and only the very largest cities such as New York and Chicago supported competitive morning or evening dailies. Moreover, 20 of the 55 cities retain daily newspaper competition only through joint operating agreements by which two newspapers share printing and business operations.

W. BAER, H. GELLER, J. GRUNDFEST, K. POSSNER, CONCENTRATION OF MASS MEDIA OWNERSHIP: ASSESSING THE STATE OF CURRENT KNOWLEDGE 35 (1974) (footnotes omitted). At a later point, the study further compares the national concentration of ownership in television and newspapers: "There are nearly 400 television station owners, but the fifty largest group owners serve 74 percent of the total daily audience. Among the more than 1,000 newspaper publishers, the fifty largest control 58 percent of all circulation." *Id.* at 57-58.

The point here is not to establish a methodology for measuring comparatively the risks of concentration in the electronic and print media but rather to support the less controversial proposition that the evils of concentration—to the extent that they exist—would appear to be a problem within the newspaper context as well as the broadcast media. See Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 156-59 (1967).

difference in the cause of concentration—the exhaustion of a physical element necessary for communication in broadcasting as contrasted with the economic constraints on the number of possible competitors in the print media—would seem far less relevant from a first amendment standpoint than the fact of concentration itself. Thus, it might be argued that a person “attacked” in the *Washington Post*, or one who holds a different viewpoint than that expressed in that newspaper, is able to publish a pamphlet or his own “newspaper” in response. But does this have any more appeal than a similar argument with respect to the Columbia Broadcasting System?

It is true, of course, that a person with the requisite capital and inclination could, theoretically, always establish his own newspaper if the local print media refused to publish his point of view, whereas it is highly unlikely that he could establish his own broadcast station if the local stations refused to cover his viewpoint. But this seems a slim basis on which to predicate such dramatically different constitutional treatment. Even if we assume greater ease in entering the print media, however, the question remains why the purported openness of the newspaper market should not be considered an important factor in assessing the significance of concentration in the broadcast media. Why, this analysis asks, did the Court in *Red Lion* treat the broadcast media as separate and discrete? Why did the Court, in an exercise similar to defining the “relevant market” in an antitrust case, narrow its focus to a particular segment of the mass media? Why did the Court not say that, so long as people can gain access somewhere within the mass media, there is no need for legislative action in any concentrated branch? The treatment of the broadcast media as discrete constitutes at least implicit acknowledgement that the newspaper and other major print media are also highly restricted. If anyone could set up a major newspaper, would we really care if entry into the broadcast media was physically precluded? Or is the explanation somehow hinged to the nature of the regulatory scheme itself?

The fact is that the Court has never sought to answer the difficult questions relating to the scope of the new constitutional principle.³¹

31. In a concluding footnote to the *Red Lion* opinion, the Court seemed to leave open the question whether the cause of concentration could ever be important:

We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not

The Court in *Miami Herald* acknowledged the argument that the increased concentration within the newspaper industry constituted changed circumstances justifying affirmative governmental action but offered little in the way of satisfactory explanation.³² Instead of exploring the relevance for the print media of the new principle developed in broadcasting, the Court merely reiterated the opposing, more traditional, principle that the government cannot tell editors what to publish.³³ It thus created a paradox, leaving the new principle unscathed while preserving tradition.³⁴

There thus now exists an unresolved tension between the constitutional themes that have been drawn in the electronic and print media. As will be shown below, however, this does not mean that the tension cannot be resolved.

II. TOWARD A FIRST AMENDMENT THEORY

. . . a law of inherent opposites, Of essential unity, is as pleasant as port³⁵

The preceding section has attempted to demonstrate the unpersuasiveness of the scarcity argument: Concentration is not unique to broadcasting and, in any case, the scarcity rationale has no application to the cable technology³⁶ where questions of access regulation are now brewing. Thus, even for those who have embraced it, the rationale is at best a short-term answer to what appears to be a long-term problem. It is, therefore, now important to inquire whether there is any basis other than the scarcity doctrine for denying Con-

abridge freedom of speech or press by legislation directly 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.
395 U.S. at 401 n.28.

32. 418 U.S. at 249-51.

33. 418 U.S. at 258.

34. One possible key to understanding *Miami Herald* might lie in the fact that the case involved a *state* attempt to impose access regulation on the press. It is possible, in other words, that the Court was moved to reach the result it did because it thought it would be too difficult to supervise regulatory experiments in 50 states or that, for somewhat different reasons, this area of access regulation has become a matter exclusively of federal concern. For reasons that will be developed later, I believe that *Miami Herald* would have—and should have—been decided the same way if the regulations had been of federal origin. See text at notes 82-102 *infra*. That is not to say, however, that in circumstances where it is thought to be constitutionally appropriate to impose access regulation, Congress, in contrast to the states, would not have a special role to play in seeking to implement first amendment goals. Cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

35. W. STEVENS, *Connoisseur of Chaos*, in COLLECTED POEMS OF WALLACE STEVENS 167 (1954).

36. See note 112 *infra*.

gress the authority to extend access regulation beyond the already-regulated electronic media.

A. *Comparison of the Electronic and Print Media*

The customary approach to the problem of disparate treatment of the electronic and print media has been to line them up side by side and see whether there are any differences between them that justify the result. It is implicitly assumed that if broadcasting cannot be distinguished from the print media, it must be treated similarly; if it is different, then it can be regulated to the extent that the differences allow. The scarcity analysis, which focuses exclusively on broadcasting without making express comparisons and which argues that this branch of the communications media possesses a "unique" characteristic of concentration, is one such attempt to isolate a difference that would permit separate treatment. Although that difference apparently should fail the test of materiality, there may be more appropriate distinctions, such as a possible qualitative difference of degree in levels of concentration and a reputed special impact of television on its viewers.

Irrespective of the cause of concentration within each branch of the media, television is in some respects more concentrated than any segment of the print media. There are fewer television stations, for example, than daily newspapers,³⁷ but even more significantly, fewer interests control the content of television broadcasting than is true within the newspaper industry. In television an oligopoly of three networks commands the attention of a vast percentage of the television audience, while in newspapers the concentration is more dispersed, with monopolization on a local, regional, or more limited, national level.³⁸

This might not be regarded as very significant if few people watched television, but, of course, the situation is quite the reverse. In many important respects, television is today the most pervasive medium of communications in our society. Not only does virtually everyone have access to a television set, but more people watch it, even for purposes of obtaining news, and for longer periods, than read the publications of the print media.³⁹ In addition, television is frequently considered to have a "special impact" on its audience. Thus, many

37. See note 30 *supra*.

38. See Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 VA. L. REV. 515, 530 (1975).

39. See E. EPSTEIN, *NEWS FROM NOWHERE* 9 (1973); B. SCHMIDT, *supra* note 3, at 120.

courts and commentators believe television is today the dominant means of influencing public opinion, not only because more people watch it than read newspapers, but also because it possesses some undefined and unquantifiable, but nevertheless unique, capacity to shape the opinions of the viewers in ways unrelated to the merits of the arguments presented.⁴⁰ The television medium, it is also said, offers the opportunity to thrust information and ideas onto the audience. Unlike printed publications, which can be avoided by "averting the eyes,"⁴¹ television provides the opportunity to force extraneous messages onto audiences gathered for other purposes.⁴² This medium, in short, may be the preeminent forum for the discussion of ideas and viewpoints in the society and it may offer opportunities to persuade that cannot be matched elsewhere within the system of expression. The greater concentration of power in television, therefore, may arguably represent more serious social and first amendment problems than the situation in the print media.⁴³

This line of argument, promising though it may seem, contains several serious problems. First, the analysis fails to explain why the current level of concentration in newspapers, even assuming that it is not as high as that in television, is not sufficiently troublesome by itself to justify governmental intervention. The monopoly status of so many of our community newspapers does not present a happy prospect for the first amendment. Beyond some point, the level of concentration seems to become irrelevant to constitutional doctrine. The question to be asked, therefore, is not whether broadcasting is more concentrated than the print media, but whether both have passed beyond the point of safety for first amendment purposes.

It seems reasonable to believe that, if concentration in broadcasting has passed an acceptable level, concentration in newspapers has also reached a similar level. Are the abuses of journalistic power and one-sidedness more likely in the electronic than in the print media?

40. See, e.g., *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 n.77 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969).

41. *Cohen v. California*, 403 U.S. 16, 21 (1971).

42. *Cohen v. California*, 403 U.S. 16, 21 (1971). The Supreme Court has also noted the "captive" nature of the broadcast audience. See *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94, 127-28 (1973).

43. Cf. L. TRIBE, *CHANNELING TECHNOLOGY THROUGH LAW* 29 (1973):

Almost as difficult as conceiving of cumulative trends is imagining the effects of scale. Barely 100,000 television receivers were in use in the United States in 1948. In the next year there were a million. A decade later there were 50 million. The social and psychological consequences of such phenomenal growth are hard even to contemplate, let alone predict. Indeed, in the case of television these effects are still a matter of debate, and apparently adequate research tools for measuring or evaluating them do not yet exist.

Is the access for new ideas more problematical in the broadcast than in the print media? Certainly there is no empirical evidence supporting affirmative answers to these questions, and their validity as intuitive propositions is subject to doubt. Television is characterized more by its placidity than by its politicization.⁴⁴ Moreover, newspapers are a primary source of news for television, and the print media may instead prove to be the first line of defense against new ideas.⁴⁵ Further, it is significant that in television there are three independently owned national networks vying for viewers, a potentially important systemic check against distortion that is lacking in communities with only a single newspaper. Finally, the major networks do control the content of prime-time television, but the major wire services, such as Associated Press and United Press International, similarly control much of the national news reported in newspapers throughout the country, although perhaps to a somewhat lesser degree.

Even more problematical, however, is the alleged special impact of television. Quite apart from any natural suspicions concerning the validity of the claim, given the frequency with which it seems to confront each new medium of communications,⁴⁶ the impact thesis is a dangerously amorphous justification for regulation. It provides no clear limits to official authority and invites censorship as well as affirmative regulation. Further, in so far as the thesis rests upon the premise that regulation is more acceptable the greater the audience and the impact, it seems inconsistent with the underlying purpose of the first amendment, which presumably is to protect effective as well as ineffective speech. A comparison of the gross audience figures is, in any event, a clumsy basis on which to gauge the differing effects of various media on the formation of public opinion or policy. Use of such data alone completely ignores the insights of political scientists into the complexity of cognition and decision-making.⁴⁷ Finally, there is simply no evidence at the present time to support the proposition that television shapes attitudes and ideas in ways so unprecedented as to require urgent remedial regulation. Thus, until more evidence exists to support the theory, or perhaps until a much wider consensus is formed in its support, it seems wise to avoid relying on the special impact theory.

44. See generally E. EPSTEIN, *supra* note 39.

45. See generally *id.*

46. See, e.g., *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961) (motion pictures).

47. See generally R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967).

This discussion does not mean to suggest that the line of analysis focusing on the potential differences between television and newspapers and magazines is unworthy of further investigation. On the contrary, the issues raised are highly important and should continue to command attention. On the whole, however, the arguments presently contain too many doubtful underlying assumptions to support a conclusion that the media are fundamentally different. Differences indeed exist, but they are either too insignificant to justify momentous distinctions in treatment under the first amendment or too broad and vacuous to be persuasive. We must, therefore, conclude that they are the same.⁴⁸

It is at this point that conventional thinking about broadcast regulation largely stops. Once it is determined that the broadcast and print media are constitutionally indistinguishable, then it is concluded that the Court's theory of access regulation is without rational foundation and should be discarded at the earliest opportunity.⁴⁹ Such a conclusion possesses a certain legalistic appeal, but it also may be an oversimplification. The very weakness of the scarcity rationale suggests that there is something more here than first meets the eye. The dual treatment of the press has been so long accepted, even by persons known for their sensitivity to first amendment values,⁵⁰ that the scarcity rationale may in fact be a convenient legal fiction covering more subtle and important considerations.

It is helpful, therefore, to adopt a less formalistic approach to the problem and to probe beyond normal legal analysis to account for this remarkable constitutional development. For even if broadcasting and the printing press are essentially the same, they nevertheless have different origins, have existed for different periods of time, and one has been controlled from its beginnings while the other has been left unrestricted. It is important, in short, that our analysis be sensitive to the historical process through which the present system has developed.

Such an approach reveals two closely interrelated factors that help reconcile the divergent traditions within the press. First, society has long considered broadcasting to be meaningfully different

48. The following discussion would still be important even if there existed a serious possibility of a material difference justifying regulation only of the electronic media. If regulation is properly limited on a basis other than the differences suggested above—as is argued in the text below—the Court need not undertake the troublesome and frequently ephemeral task of making comparisons as the bases for their decisions.

49. See *Lange*, *supra* note 5.

50. See, e.g., 2 Z. CHAFEE, *supra* note 7, at 640-41.

from the print media, and this perception has greatly influenced the decision to allow regulation only in the former. Understanding this perception and its effects is necessary for an appreciation of the complex way in which first amendment theory is implemented and developed. Second, broadcast regulation involves only a *part* of the press; this fact provides not only an explanation for past treatment by the courts but also offers the most rational basis for future constitutional adjudication in this area.

B. *Divergent Societal Perceptions of Broadcasting
and Print Media*

The phenomenon of broadcast regulation has, in many respects, the qualities of an historical accident. An examination of its origins and development reveals the striking ease with which it slid into our political and constitutional system. One stark fact is apparent: Society obviously has *thought differently* about broadcasting than it has about the print media. Certainly doubts and objections have been raised periodically,⁵¹ but on the whole there have not been the outcries against censorship that would undoubtedly have occurred if regulation had been imposed on newspapers.⁵² Broadcasters, although often lamenting what they considered to be public insensitivity to their first amendment rights, have been conspicuously unassertive of their rights.⁵³ Even the scholarly community has tended to overlook the significance of the constitutional treatment of broadcasting. Major casebooks published as late as 1965, for example, did not even mention either the existence of broadcast regulation or the seminal *NBC* decision.⁵⁴ Even after *Red Lion*, major casebooks did not present broadcast regulation as posing a significant constitutional dilemma; broadcast decisions were merely described briefly in a note format.⁵⁵ A recently published major casebook continues to describe the broadcast decisions in a long note, does not address the broader first amendment significance of the decision to regulate, and

51. See, e.g., Kalven, *supra* note 21; Robinson, *supra* note 30.

52. "In brief, we all take as commonplace a degree of government surveillance for broadcasting which would by instant reflex ignite the fiercest protest were it found in other areas of communication." Kalven, *supra* note 21, at 16. See also 2 Z. CHAFEE, *supra* note 7, at 637.

53. Writing before *Red Lion*, Professor Kalven suggested that "the [broadcasting] industry has under-estimated its legal position and given up too soon." Kalven, *supra* note 21, at 24.

54. See N. DOWLING & G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (7th ed. 1965).

55. See the two-page note on *Red Lion* in G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1225-26 (8th ed. 1970).

provides no cross reference to *Miami Herald* in connection with the discussion of libel.⁵⁶ If the scholars who formulate and organize for study the most pressing issues under the first amendment fail to find any particular significance in broadcast regulation other than as a minor exception to the general rules, it is not surprising that society generally has apparently failed to recognize the broadcast cases as a major departure from first amendment principles.

Furthermore, one of the more striking pieces of evidence of a general perception that broadcasting is somehow "special" is the fact that, during the past half century of regulation, there have been remarkably few attempts to expand any part of the rather extensive regulatory structure into the print media.⁵⁷ Broadcast regulation has been an isolated phenomenon, not a basecamp for incursions into the print media.

A search for explanations as to why the electronic media have been regarded as distinct from the print media should begin with the Supreme Court decisions. After all, the Court in an early case appeared to dismiss the broadcasters' first amendment arguments as being unworthy of serious discussion and officially embraced the physical scarcity rationale.⁵⁸ The *Red Lion* opinion, moreover, is written as if the result were inexorable, and gives no hint that the Court is troubled by its earlier analysis in *NBC*. These decisions undoubtedly reinforced the view that regulation in the "public interest" was somehow appropriate in this "unique" medium. Like the

56. See W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 975-79, 1201-10 (4th ed. 1975). In the ninth edition of the Gunther casebook, published in 1975, *Red Lion* and *CBS* are described in a three-page textual comment and *Tornillo* immediately afterwards in a two-page note. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1230-34 (1975).

57. Although in the past half century there have been numerous proposals advanced for some form of access regulation, see, e.g., 2 Z. CHAFEE, *supra* note 7, at 694-95; Barron *supra* note 8, few seemed to have reached even the stage of serious legislative debate and far fewer have been enacted. A Mississippi right-of-reply statute, Miss. CODE ANN. § 3175 (1942) (now Miss. CODE ANN. § 23-3-35 (1972)), was essentially overturned in *Manasco v. Walley*, 216 Miss. 614, 63 So.2d 91 (1953). In 1969, Nevada repealed its right-of-reply statute, Law of April 14, 1969, ch. 310, § 10, [1969], repealing NEV. REV. STAT. § 200.570 (1963). As already noted, see note 7 *supra*, the Florida statute considered in *Miami Herald* had lain dormant since its enactment in 1913.

In 1970, Congressman Farbstein introduced a bill in the House of Representatives which would have authorized the Federal Communications Commission to apply fairness doctrine concepts to newspapers. H.R. 18927, 91st Cong., 2d Sess. (1970). The bill was never reported out of Committee. In 1973, the Massachusetts Supreme Judicial Court issued an Opinion of the Justices to the Senate, — Mass. —, 298 N.E.2d 829 (1973), in which it advised against the constitutionality of a right-of-reply statute then under consideration in the Massachusetts General Assembly.

58. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), discussed in note 21 *supra*.

legerdermain of the pornography decisions to the effect that obscenity is not "speech" and therefore not constitutionally protected,⁵⁹ the Court's reliance on the physical scarcity rationale may have provided an intellectual construct that facilitated ignoring the logical ramifications of the decision.

It would be misleading, however, to attribute too much weight to the Court's role. There is considerable evidence of a widespread societal predisposition to broadcast regulation. For example, although no one has ever questioned the government's decision to take some action to alleviate the problems of interference caused by overcrowding of the spectrum, there were several alternative methods of allocation that would have involved far less governmental intervention into traditional journalistic functions, but which were not seriously considered. Illustratively, Congress could have allocated frequencies on a first-come-first-served basis, relying primarily on chance to determine the composition of the medium.⁶⁰ Or it could have awarded licenses to the highest bidders in an auction, or to winners in a lottery, following the more traditional laissez-faire path of permitting a mixture of chance and market pressures to determine the shape of the medium.⁶¹ Rather than selecting any of these methods, however, Congress opted for the extraordinary choice of regulating a branch of the communications industry in the "public interest."⁶² What is startling about this decision is not the form of public control selected, which was the prevailing response of the time to economic concentration, but the fact that it was adopted so easily in the first amendment context.

Satisfactory explanations for developments such as this are always elusive, but at least several can be suggested. Our society has generally perceived the electronic media as more entertainment-oriented than the print media. Although the Court held in *Joseph Burstyn, Inc. v. Wilson*⁶³ that the first amendment protected non-political speech, that case was not decided until long after broadcast regulation had been instituted and approved in *NBC*. By the

59. See, e.g., *Roth v. United States*, 354 U.S. 476, 481-85 (1957).

60. See 395 U.S. at 390-91.

61. This approach is urged in Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 J. LAND & P.U. ECON. 161 (1965). See also, *Kalven*, *supra* note 21, at 30-32.

62. "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

63. 343 U.S. 495, 499-502 (1952).

time *Burstyn* was decided, regulations in broadcasting had received widespread acceptance, so that even after that decision our society may have continued to be less sensitive to restrictions on nonpolitical speech.⁶⁴ Further, the different treatment accorded broadcasting may in part be attributable to the unknown nature of the medium at the time regulation was imposed. The features of broadcasting technology have long been embryonic and, consequently, the problems broadcasting *might* present have seemed so unpredictable as to warrant regulation as a precautionary measure. Finally, since the government was virtually compelled to intervene in broadcasting in order to alleviate the problem of signal interference, that justifiable intervention may well have eased the path for more extensive attempts to structure the medium. The brute fact of governmental licensing served to isolate the medium from our tradition of nonregulation. Broadcasting was emphatically *not* the same as the print media, and it may not have been important that the difference did not justify everything done to it.

An explanation for the phenomenon is, however, of secondary importance to the fact of its existence. Crucial here is not that broadcasting is in fact different in principle from the print media, but that it has been believed to be different. This difference in perception goes a long way in explaining the contrasting first amendment protections afforded both branches of the media. In the area of first amendment rights, there has been a perennial concern over the political consequences of oversight, which is reflected in the idea that regulation lets the "camel's nose in the tent."⁶⁵ It has rightly been thought necessary to maintain a firm line against governmental intrusion (the camel's nose) into freedom of speech and press in order to avoid continual disputation over the scope of those freedoms, which may itself snuff out the vitality of those rights. Speaking in the late 1940s of proposals to regulate newspapers, Professor Chafee argued:

The First Amendment embodied a very strong tradition that the government should keep its hands off the press. Every new governmental activity in relation to the communication of news and ideas, however laudable its purpose, tends to undermine this tradition and render further activities easier. "If we do this, why can't we do that?" Appetite grows by what it feeds on. Legal barriers can of course be erected, but it takes constant effort to prevent them from being nibbled away. Therefore, no proposal for governmental action

64. Cf. Kalven, *supra* note 21, at 30.

65. See *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94, 154 (Douglas, J., concurring).

should be judged in isolation. It must be considered in relation to other possible state controls over the press, which have not yet been suggested.⁶⁶

Indeed, this prospect of expanding intervention by the state is a troublesome aspect of access regulation, which has many different faces and only a broadly stated purpose that contains no sharp limitations on governmental authority. Even if a decision to allow access regulation would not unleash an irresistible drive for impermissible controls, the substantial public debate that might well be generated over more intrusive regulation could itself serve to chill the independent function of the press.⁶⁷

These concerns have had much greater significance in the context of the print media than in that of the broadcasting industry because of the differences society has perceived in them. It is noteworthy, for example, that Professor Chafee made his argument only in the newspaper context.⁶⁸ While it is true that Chafee thought regulation of broadcasting was constitutionally appropriate because of the physical limitations on access, the fact that regulation has merit does not, of course, render the camel's-nose-in-the-tent argument inapposite in that area. Instead, the real reason for not raising the argument in the broadcasting context is suggested by the reference in the quotation to the longstanding "tradition that the government should keep its hands off the press."

Access regulation in the print media would have immediately signified a pronounced break with traditional first amendment theory. If the Court had, for instance, approved the creation of a Federal Newspaper Commission to administer a fairness doctrine, a spontaneous national debate over the wisdom and implications of the decision would almost certainly have erupted. The constitutional law casebooks would have prominently displayed the decision, supplementing it with text asking probing questions about the holding. What before had seemed unthinkable would then have become thinkable; the free, autonomous press long symbolic of the first

66. 2 Z. CHAFEE, *supra* note 7, at 683. Chafee added at a later point:

Once government becomes active in the communications field, it can go on indefinitely. Zealous officials will keep thinking up new ways for improving the press according to their own ideals. And there is no bright line between encouragement and repression If officials can tell newspapers what to put into their editorial pages, as is proposed for the Free Press Authority, it is only a step to tell them what to leave out.

Id. at 709-10.

67. This is a danger that has found frequent expression in the state-aid-to-religion cases, *see, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971), but whose relevance is not limited to that branch of the first amendment.

68. *See* note 66 *supra*.

amendment would have been put on a leash.⁶⁹ No longer would the Court be seen as merely sanctioning an aberrant regulatory system limited to a distinct, novel technology of communication, but instead would be seen as pursuing a major policy change with respect to the first amendment.

Thus, the way our society has thought about the two branches of the media has deeply affected the issue of whether to permit access regulation in either area.⁷⁰ Regulation has been more tolerable in the broadcast sector because circumstances there have confined its implications. This is not, it should be noted, an isolated phenomenon. It is rather typical of a general tendency revealed in the case law to permit the government greater leeway in controlling the development of new technologies of communication. An interesting analogy to the broadcast regulation cases are the Supreme Court decisions involving motion pictures.

Treated as a suspicious newcomer to the system of expression, motion pictures were first assigned an inferior status, almost as if there were a first amendment initiation rite. In 1915, the Supreme Court ruled that the medium was not entitled to any first amendment protection,⁷¹ and, although this anomaly was readily apparent, the

69. In his last book, *The Morality of Consent*, the late Alexander Bickel seems to express a similar idea in connection with the *Pentagon Papers* case, *New York Times Co. v. United States*, 413 U.S. 713 (1971). Part of the significance of that case, as Bickel notes, was that it signified the first instance in our history in which the federal government sought "to censor a newspaper by attempting to impose a restraint prior to publication, directly or in litigation." A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975). Thus, even though the Supreme Court ultimately vindicated the right of the *New York Times* to publish the material, the "spell was broken, and in a sense freedom was thus diminished." *Id.* Bickel went on to say: "The conflict and contention by which we extend freedom seem to mark, or at least to threaten, a contraction; and in truth they do, for they endanger an assumed freedom which appeared limitless because its limits were untried. Appearance and reality are nearly one. We extend the legal reality of freedom at some cost in its limitless appearance. And the cost is real." *Id.* Thus, the first perceived break with tradition, and the very fact of having seriously considered the proposition asserted by the government, served to undercut our sense of freedom from this type of governmental activity and to highlight the possibilities for future action for those interested in trying again.

70. This thought may be in part what Professor Emerson had in mind when, after concluding that access regulation in the broadcast media can be justified "out of affirmative concepts of the First Amendment," he stated:

Such a doctrine of First Amendment power and limitation is far-reaching and entails obvious dangers. Applied to the press, for example, it might authorize controls over newspaper coverage that would be highly questionable. In the area of radio and television, however, *the government is already heavily involved with the task of preventing electrical interference and solving similar engineering problems. Thus, the regulations have a different substantive and administrative impact* and would not necessarily constitute an abridgment of free expression in the same way as comparable regulations in other areas not already heavily weighted by government controls.

T. EMERSON, *supra* note 21, at 665 (emphasis added).

71. *Mutual Film Corp. v. Industrial Comm.*, 236 U.S. 230 (1915). Interpreting a

Court did not lift the yoke of censorship until its 1952 decision in *Joseph Burstyn, Inc. v. Wilson*.⁷² In that case the Court extended first amendment protections to motion pictures, although it was quick to caution that it did not "follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression."⁷³ The constitutional principles that permitted motion pictures to be treated differently were not specified, and the issue of different treatment soon arose in 1961 in *Times Film Corp. v. Chicago*⁷⁴ and again, in 1965, in *Freedman v. Maryland*.⁷⁵ In those cases, the Court sanctioned local laws permitting blatant prior censorship of motion pictures.⁷⁶ Although the Court has never

provision of the Ohio constitution comparable in scope to the first amendment, the Court stated: "It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion." 236 U.S. at 244.

72. 343 U.S. 495 (1952). The Court struck down as an invalid prior restraint a New York statute that authorized the department of education to deny a license to show a film if it was "sacrilegious".

73. 343 U.S. at 503.

74. 365 U.S. 43 (1961).

75. 380 U.S. 51 (1965).

76. At issue in *Times Film* was a Chicago ordinance requiring that prior to exhibition all films had to be submitted to the commissioner of police, who was authorized to refuse a permit if various standards were not met. Certain punishments were provided for showing a motion picture without a permit. The petitioner had refused to submit its film "Don Juan" for prior screening, and the commissioner of police had accordingly refused to issue a permit. Petitioner then sought injunctive relief against enforcement of the ordinance on the ground that it violated the first and fourteenth amendments.

When the case reached the Supreme Court, the majority interpreted the petitioner's claim as an assertion that the state could never, for any reason, restrain any motion picture prior to exhibition. The Court rejected this position noting that in *Near v. Minnesota*, 283 U.S. 697 (1931), it had specifically listed certain areas (including obscenity) as being legitimately within the reach of prior restraints. But the *Times Film* Court seemed to say more, to extend "its blessing," as Chief Justice Warren noted in dissent, 365 U.S. at 65 (Warren, C.J., dissenting), to the procedure embodied by the Chicago ordinance that required all motion pictures to be submitted to a censor before exhibition so that the city could exclude those that were obscene. Aside from a cryptic reference to the need to consider in each case the "capacity for evil" in determining the "permissible scope of community control," the Court made no attempt to distinguish movies from other forms of expression. 365 U.S. at 49-50. At the very end of the opinion, Justice Clark observed simply: "At this time we say no more than this—that we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record." 365 U.S. at 50.

The dissent in *Times Film* attacked the majority on the ground that it had failed to explain "why moving pictures should be treated differently than any other form of expression, why moving pictures should be denied the protection against censorship—a form of infringement upon freedom of expression to be especially condemned." 365 U.S. at 50, 76 (Warren, C.J., dissenting), quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). As to the suggestion that censorship of movies is appro-

explicitly so held, presumably it would be unconstitutional to require that all *books* be submitted to an official body before publication so that obscene material could be censored.⁷⁷ Yet the Court has essentially authorized this procedure for films without, it should be added, articulating why movies are different from books in any important respect.

The film and broadcasting cases seem to demonstrate that new technologies of communication are both new battlegrounds for renewed fighting over old first amendment issues and focal points for reform efforts.⁷⁸ As a result, the actual implementation of first

priate because movies have a special "impact," the dissent argued that there was no evidence of an extraordinary impact and that, even if there were, the first amendment still forbade such prior censorship. 365 U.S. at 77.

In *Freedman v. Maryland* the Court held that the Constitution required various procedural protections in any censorship system that requires prior submission of films. As to why such a system is constitutional at all, the Court stated simply that "[t]he requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression." 380 U.S. at 60-61. Justice Douglas, with whom Justice Black joined, stated merely that "[i]f censors are banned from the publishing business, from the pulpit, from the public platform—as they are—they should be banned from the theatre." 380 U.S. at 62 (Douglas, J., dissenting).

77. *Cf. Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957).

78. The so-called loudspeaker cases constitute another line of decisions that illustrates the Court's efforts to accommodate both the government's regulatory interest in the context of a new technology of communication and traditional first amendment interests. Permeating the cases are issues of access, privacy, and the scope of governmental regulation. In the first such case, *Saia v. New York*, 334 U.S. 558 (1948), the Court held invalid a city ordinance that prohibited the use of sound amplifying equipment unless the user had first obtained permission from the chief of police. Since the ordinance provided no standards for the issuance of permits, the Court said it constituted an unconstitutional prior restraint. Writing for the majority, Justice Douglas said that, while loudspeakers could be regulated as to time, place and manner, they could not be completely banned simply because they could be abused. 334 U.S. at 562. Justice Frankfurter dissented, arguing that the problem of preserving privacy in the face of new technologies which could greatly amplify the human voice was so important and so intractable that local communities should be afforded considerable latitude in devising solutions. 334 U.S. at 566 (Frankfurter, J., dissenting). Justice Jackson also dissented, stating that "society has the right to control, as to place, time and volume, the use of loud-speaking devices for any purpose, provided its regulations are not unduly arbitrary, capricious or discriminatory." 334 U.S. at 569 (Jackson, J., dissenting).

In *Kovacs v. Cooper*, 336 U.S. 77 (1949), although no one opinion commanded a majority of the justices, the court upheld a conviction for violation of an ordinance that forbade the use on public streets of a "sound truck" that emits "loud and raucous noises." Three justices held that the ordinance did not completely prohibit sound trucks but only permissibly barred those that emitted "loud and raucous noises." Justice Frankfurter concurred speaking generally of the idea that freedom of speech has a "preferred position" in the Constitution. At the end of his opinion, however, he objected to the argument that all forms of communication must be treated alike. Referring rather vaguely to movies and broadcasting, he asserted that both media had presented special "problems" that permitted their different first amendment treatment. As for loudspeakers, Justice Frankfurter said that "only a disregard of vital differences between natural speech . . . and the noise of sound trucks would give

amendment theory is much more complex than commonly supposed. The traditional areas of communication, generally the primary focus of attention, retain their purity while new technologies of communication are treated as analytically discrete and are subjected to various social controls.

This first amendment development process is not wholly undesirable. For a dynamic social system in which new problems continually arise, this process of juxtaposing innovation in a new technology of communication against tradition may offer a highly effective and useful mode of adaptation. The opportunity to implement change without the appearance of change can, in this respect, be a disguised blessing brought by the new technologies.

As the movie cases illustrate, however, there are significant risks associated with hidden regulation. Improper regulation, for example, may fester longer because it is not subjected to comprehensive analysis. Further, those persons within the regulated medium can, over time, lose an awareness that their constitutional rights are being violated. If courts and political institutions appear to be insensitive to their first amendment freedoms, and if the public and their

sound trucks the constitutional rights accorded to the unaided human voice." Since they posed greater dangers to the countervailing right of privacy, it was not for the "Court to devise the terms on which sound trucks should be allowed to operate, if at all." 336 U.S. at 96-97 (Frankfurter, J., concurring).

Justice Jackson also filed a concurring opinion, in which he indicated that complete prohibition would be permissible. The only limit he would place on state authority is that it not "censor the contents of the broadcasting." He then added:

I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of "communication of ideas." The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.

336 U.S. at 47 (Jackson, J., dissenting).

Interpreting the ordinance as completely enjoining the use of loudspeakers, Justice Black wrote a strongly worded dissent in which Justices Douglas and Rutledge joined. 336 U.S. at 98 (Black, J., dissenting). Justice Black said the decision of the majority "would surely not be reached by this Court if such channels of communication as the press, radio, or moving pictures were similarly attacked." 336 U.S. at 102. He opined that such arbitrary treatment of *means* of communication carried the evil of giving "an overpowering influence to views of owners of legally favored instruments of communication." 336 U.S. at 102. Moreover, he appeared to suggest that, since loudspeakers are often used by persons without the money to operate newspapers or publish books, and since such persons often have different views than those who operate more traditional channels of communication, a restriction on the use of loudspeakers may deprive the public of access to important views. 336 U.S. at 103.

The tendency to treat new means of communication as analytically discrete may contain more than a bald refusal to account for differences between new and traditional methods of expression. It may also reflect an unwillingness to restrict everywhere within the system of expression the government's interest in regulation. As new media enter the system, the state's interests in regulation may become more legitimate as the effects of the regulation are more limited.

professional counterparts in other branches of the media consistently fail to support them,⁷⁹ these persons might well become discouraged and less assertive of their rights against the government.⁸⁰ For the Court, therefore, to rely on fictional differences between new and traditional media may ultimately be counterproductive. It serves unnecessarily to isolate important means of communication from our first amendment traditions, and the Court abdicates its important role of instilling in those communicating within the society a full sense of their constitutional rights.

With respect to broadcasting, moreover, the perception of the medium as "different" will eventually fade, as appears to be already happening.⁸¹ When all the communications media finally are perceived as the same in principle, the Court will then be pressed to justify its different treatment. By that time it may be thought appropriate to say what is apparently said about some other anomalies, like the powers of the grand jury or the special status of the insanity defense,⁸² that the explanation is to be found in the legitimacy that time itself can give. But in the case of access regulation in the press, the Court can say much more.

C. *The Rationality of Partial Regulation*

Ultimately, the Court's decisions on the question of access regulation exhibit fundamental good sense. The good sense, however, derives not from the Court's treatment of broadcasting as being somehow special, but rather from its apparent desire to limit the

79. It is interesting that in none of the Supreme Court's three major decisions on broadcast regulation did any newspaper or newspaper association file an amicus curiae brief.

80. Cf. *Kalven*, *supra* note 21, at 15-17.

81. One of the more interesting aspects of the *Red Lion*-*CBS* decisions is the shift in idiom used in discussing the first amendment rights of broadcasters. As described previously, *see* text at notes 17-22 *supra*, *Red Lion* placed heavy emphasis on the right of the public to receive different viewpoints and seemingly little weight on the journalistic freedom of the broadcasters. *See* 395 U.S. at 386-90. The focus was on broadcasters *qua* "licensees" and not *qua* "journalists." In contrast, the *CBS* opinion reflects a significant shift in tone. The Court for the first time referred to broadcasters as a part of the "press," as is illustrated by the following excerpt:

Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.

Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm., 412 U.S. 94, 124-25 (1973).

82. *See* Henkin, *On Drawing Lines*, 82 HARV. L. REV. 63, 72 (1968).

over-all reach of access regulation. The Court need not, however, isolate the electronic media to achieve this result. Although it is uncertain whether the Court in *Miami Herald* saw it as such, the critical difference between what the Court was asked to do in *Red Lion* and what it was asked to do in *Miami Herald* involved choosing between a partial regulatory system and a universal one. Viewed from that perspective, the Court reached the correct result in both cases.

The central problem in this area results from the complexity of the access issue. The truth of the matter is, as the Court's opinions so plainly, if unintentionally, demonstrate, that there are good first amendment reasons for being both receptive to and wary of access regulation. This dual nature of access legislation suggests the need to limit carefully the intrusiveness of the regulation in order safely to enjoy its remedial benefits. Thus, a proper judicial response is one that will permit the legislature to provide the public with access *somewhere* within the mass media, but not throughout the press. The Court should not, and need not, be forced into an all-or-nothing position on this matter; there is nothing in the first amendment that forbids having the best of both worlds.

Access regulation both responds to constitutional traditions and cuts against them. On the one hand, it helps to make possible the realization of first amendment goals. Unlike attempts to censor types of speech, an access rule is designed to operate in the service of the first amendment. It seeks to neutralize the disparities that impede the proper functioning of the "market-place of ideas," to equalize opportunities within our society to command an audience and thereby to mobilize public opinion, and in that sense to help realize democratic ideals.

That unrestrained private interests can, at times, hamper the free exchange of ideas as seriously as governmental censorship has been apparent with painful clarity within the past half century. Chafee wrote several decades ago about the need to define a new theoretical structure for governmental involvement in the implementation of first amendment rights in response to the problems of private censorship:

[W]hat is the use of telling an unpopular speaker that he will incur no criminal penalties by his proposed address, so long as every hall owner in the city declines to rent him space for his meeting and there are no vacant lots available? There should be municipal auditoriums, schoolhouses out of school hours, church forums, parks in summer, all open to thresh out every question of public importance, with just as few restrictions as possible; for otherwise the subjects that most

need to be discussed will be the very subjects that will be ruled out as unsuitable for discussion.

We must do more than remove the discouragements to open discussion. We must exert ourselves to supply active encouragements.⁸³

Chafee's articulation of the seeds of an "affirmative" theory of freedom of speech constituted an important qualification of the thinking of laissez-faire theorists such as John Stuart Mill and John Milton. Many commentators since Chafee have elaborated on his idea.⁸⁴ The debate that has been generated unquestionably involves the most vital first amendment issues of our time.

The Supreme Court has, through its actions, occasionally demonstrated that it recognizes the serious problems posed by unregulated private interests operating in areas that affect the first amendment. In a seminal decision in *Associated Press v. United States*,⁸⁵ the Court approved a governmental order directing a national wire service to make its news available on a nondiscriminatory basis, stating that "[f]reedom of the press from governmental interference under the first amendment does not sanction repression of that freedom by private interests."⁸⁶ In another well-known line of cases the Court held that a private company town and a shopping center were prohibited under the first amendment from excluding certain speech that the private owners would have preferred to censor.⁸⁷ These decisions, together with *Red Lion*, outline a still tentative approach to removing the inequalities in speech opportunities.⁸⁸

Of all the efforts thus far to restructure private arrangements that impinge on the "market-place of ideas," access regulation represents the most direct assault, and, consequently, the most dangerous.⁸⁹ Al-

83. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 559 (1941).

84. See T. EMERSON, *supra* note 21, at ch. xvii; Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

85. 326 U.S. 1 (1945).

86. 326 U.S. at 20.

87. See *Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). But see *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

88. An interesting response to the problem of access in the mass media has been the noticeable solicitude for minor modes of communication. Judicial opinions and scholarly commentary have emphasized the need for protection of these methods of communication precisely because of the restricted nature of the press. See, e.g., *Martin v. Struthers*, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people"); *Kovacs v. Cooper*, 336 U.S. 77, 98 (1949) (Black, J., dissenting). See also Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 233-34. Though important, this is hardly an adequate response to the problem of concentration in the mass media.

89. Other major attempts at reform have come primarily in the area of antitrust law. The Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466 (1970) (co-

though its aims conform to those of the first amendment, the methods of access regulation constitute a significant departure from our traditional constitutional notions concerning the need to maintain a distance between the government and the press, especially on matters directly touching news content. Access regulation carries the greatest potential for altering the press as we have known it and for exposing us to grave risks.

In general, access regulation may have three adverse consequences for the marketplace of ideas. The first is a commonly identified cost of access regulation: It may have a depressing effect on journalistic motivation to engage in discourse on social issues.⁹⁰ This cost is presumably greater with some forms of access regulation than with others. The chilling effect associated with the right-of-reply rules is likely much greater than that associated with the requirement that editors publish all advertisements on a nondiscriminatory basis. Even where the chilling effect is thought to be a problem, however, no data exist as to the extent to which the regulation does, in fact, have an inhibiting effect. Nevertheless, in those cases where a significant chilling effect may predictably occur, there is cause for concern, given our general commitment to the idea that debate is most likely to be fruitful if it is "uninhibited, robust, and wide-open."⁹¹ The prospect that some regulated editors will choose to forego coverage of some political discussion because of reply requirements need not necessitate rejection of access regulation; its benefits may still outweigh this cost. Such a cost, however, remains a matter of concern, and should be minimized as much as possible.

A second general concern associated with access regulation involves the risk that the administrative machinery required to implement it will be used to force the press into some official line and

dified at 15 U.S.C. §§ 1801-1804 (1970)), is a recent example of the use of the anti-trust laws to foster opportunities for debate within the press. However, it also represents a recognition that the antitrust laws themselves are not likely to achieve more diversity of outlets since the high economies of scale in the newspaper industry seem to lead to the creation of natural monopolies. See B. SCHMIDT, *supra* note 3, at 51-54.

On a private level one might note the recent formation of the National News Council. The Council is a mediating organization with no powers of enforcement. For a description of its operation and an analysis of the effectiveness of this and other press councils, see Ritter & Leibowitz, *Press Councils: The Answer to Our First Amendment Dilemma*, 1974 DUKE L.J. 845.

90. For an evaluation of the chilling effect of access regulation, see Lange, *supra* note 5, at 70-71; Kalven, *supra* note 21, at 19-23; Robinson, *supra* note 30, at 136-40. It will be recalled that the Court in *Red Lion* dismissed the broadcaster's chilling effect argument as speculative, while in *Miami Herald* it relied on the argument in striking down the regulation. See text at notes 11-19 *supra*.

91. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

will undermine its role as a critic and antagonist of government. Although neither *Red Lion* nor *Miami Herald* discussed this risk, the possibility of official misbehavior has been a traditional reason for withholding approval of governmental schemes to "improve" the press.⁹² It is a consideration that reflects the sum of our experience and should not be lightly disregarded. Evidence that this risk is still vital may, regrettably, be found in an examination of our recent upheaval in presidential politics.

In the course of the revelations about Watergate, it became known that the executive branch, angered by unflattering remarks, criticisms and disclosures of government secrets, embarked on an extensive campaign to harass the press. A substantial part of the attack apparently involved using administrative machinery to apply pressure on journalists.⁹³ There were also serious allegations that the executive branch had sought to apply pressure directly on the *Washington Post* by creating difficulties for the *Post's* subsidiary radio stations with the Federal Communications Commission.⁹⁴ If there is a Watergate lesson for the first amendment, therefore, it is that we should continue to be extremely wary of making available official

92. See, e.g., 2 Z. CHAFEE, *supra* note 7, at 476-77.

93. One of the impeachment charges leveled by the House Judiciary Committee was that officials of the Nixon administration had induced, or had suggested inducing, tax audits of troublesome members of the media. See CONGRESSIONAL INFORMATION SERVICE (1974), H521-34, at 16, 18, 21.

The willingness of the administration to employ federal machinery to silence the press was most vividly reflected in the events surrounding the creation of the "enemy list." John Dean, then the President's legal counsel, stated in one memorandum: "This memorandum addresses the matter of how we can maximize the fact of our incumbency in dealing with persons known to be active in their opposition to our administration. Stated a bit more bluntly—how we can use the available federal machinery to screw our political enemies." CONGRESSIONAL INFORMATION SERVICE (1973), S961-4, at 1689. Dean went on to suggest that "grant availability, federal contracts, litigation, prosecution, etc." should all be considered in determining how most effectively to "screw" opponents. *Id.* The enemy list as compiled contained a total of 57 reporters, editors, columnists and television commentators. *Id.* at 1716-18. The *Washington Post*, the *New York Times* and the *St. Louis Post Dispatch* were among the institutions included. *Id.* at 1716. See also *Washington Post*, Dec. 3, 1973, section A, at 24, col. 4 (documents disclosed by Senator Lowell Weicker); THE WHITE HOUSE TRANSCRIPTS 57-58, 63, 404, 782-84 (Bantam Books, Inc. 1974).

94. In January 1973, the Associated Press and United Press International reported that the broadcast licenses of two Florida television stations, both owned by the *Washington Post*, were being challenged before the Federal Communications Commission by a group which included long-time friends and political associates of President Nixon. *N.Y. Times*, Jan. 4, 1973, at 21, col. 1; *Washington Post*, Jan. 3, 1973, section A, at 6, col. 1. It was subsequently revealed that Glenn J. Sedam, Jr., general counsel to the Committee for the Re-Election of the President, had advised some of the Nixon associates involved in the challenges. *Washington Post*, Jan. 9, 1973, section A, at 6, col. 1. Only the *Post's* two stations, out of 36 stations in the state, had their licenses contested. It should be noted, however, that the administration and all the principals involved in the challenges denied any political motivation. *Washington Post*, Jan. 9, 1973, section A, at 6, col. 1.

machinery for the regulation of the press. Such a regulatory structure would stand as a constant temptation to governmental officials—a source of leverage with which to compel obedience within the press and, in more subtle ways, to manipulate the content of public debate.

The third potential adverse consequence of access regulation is that it may result in an escalation of regulation, the camel's-nose-in-the-tent phenomena mentioned earlier.⁹⁵ This criticism is one of those stock arguments that suffers badly from overuse. It is easy to dismiss the claim because it is advanced so often in circumstances where it carries no conviction. With respect to access regulation, however, the argument has powerful force and should not go unheeded.

The problem is not simply that regulation will induce irresistible pressure for censorship. The dangers are more subtle and complicated. Access regulation comes in a variety of shapes and sizes. Some forms, like a vigorously enforced fairness doctrine, may lead to utter blandness of content and in this way may permit official manipulation of the news. In addition, it is virtually impossible for the Court to articulate in advance unambiguous standards. Experience with a particular regulation will often be necessary to judge its desirability and constitutionality. It is important to know, for example, how frequently the government will be drawn into conflict with the editors,⁹⁶ what financial burdens the administrative procedures will impose on those that are regulated, and whether the administering officials will be prone to misconduct or will exhibit a healthy respect for first amendment freedoms.⁹⁷

By sanctioning the concept of access regulation, the Court can expect administrative experimentation with the various types of regulation. And since clear guidelines cannot be established, there may be constant pressure to expand the regulatory power into impermissible areas. The clamour for greater regulation may itself be used as a weapon to bend the press into line. If what turns out to be improper regulation is imposed, irremediable harm may have already occurred before the Court acts. Similarly, the difficulties in assessing the future consequences of the regulation may lead the

95. See text at note 65 *supra*.

96. Such data has been available with respect to broadcast regulation. We know, for example, that in fiscal 1973, the Commission received about 2,400 fairness doctrine complaints and forwarded 94 to broadcasters for comment. 39 Fed. Reg. 26,375 (1974).

97. For an indication that consideration of the type of person likely to assume the administrative role is relevant here, see *Times Film Corp. v. Chicago*, 365 U.S. 43, 69-73 (Warren, C.J., dissenting). See also J. MILTON, *AREOPAGITICA* 210 (3 Harvard Classics (1909)).

Court to sanction conduct that is ultimately very harmful.⁹⁸ In both instances, it must be remembered that "[l]egal experiments, once started, cannot be stopped the moment they show signs of working badly."⁹⁹

Viewed in its entirety, therefore, access regulation is both desirable and dangerous. That it raises a constitutional problem of enormous difficulty is reflected in the schizophrenic nature of *Red Lion* and *Miami Herald*. In light of the double-edged character of access regulation, the Court's appropriate response is to affirm congressional authority to implement only a *partial* regulatory scheme. Only with this approach, with a major branch of the press remaining free of regulation, will the costs and risks of regulation be held at an acceptable level. Or, put another way, only under such a system can we afford to allow the degree of governmental regulation that is necessary to realize the objectives of public access.

One advantage of a partial regulatory system is that the unregulated sector provides an effective check against each of the costs of regulation. A partial scheme offers some assurance that information that might not be disseminated by the regulated sector of the press will nevertheless be published by the unregulated press. If, for example, a local broadcast station chooses not to cover a debate between two prominent mayoral candidates because of equal time obligations, then the public will still be informed of the event by the local newspaper. Second, a partial scheme offers some assurance that governmental use of the regulatory authority to bludgeon the press into an official line will not suppress the truth. If, for example, the *Washington Post* had curtailed its Watergate investigations to ward off what it might reasonably have perceived to be governmental pressure to have the licenses of its subsidiary radio stations revoked, other newspapers free of governmental entanglements, such as the

98. As one commentator has argued:

Any widespread governmental action is likely to produce unexpected results. England, early in the eighteenth century, sought to strengthen her long-standing alliance with Portugal by admitting Portuguese wines at a very low rate of duty. This encouraged the drinking of port rather than French claret. The result was to afflict two centuries of Englishmen with gout Similar surprises can take place when the government concerns itself with communications industries.

2 Z. CHAFEE, *supra* note 7, at 475. Perhaps an example of an unforeseen effect of broadcast regulation is the apparent political abuse surrounding the fairness doctrine. See F. Friendly, *What's Fair on the Air?* N.Y. Times Magazine, March 30, 1975, at 11. Professor Friendly charges, *inter alia*, that during the early 1960s officers of the Democratic National Committee organized and funded "private" organizations that would demand of radio and television stations an opportunity to reply to any coverage of right-wing positions in order to discourage media coverage of anti-administration viewpoints.

99. 2 Z. CHAFEE, *supra* note 7, at 699-700.

New York Times, would still have continued the investigation. Finally, such a system gives some assurance that the pressures for and effects of harmful regulation will be cushioned. If, for example, a Vice-President were to urge much more vigorous access regulation in order to ward off criticism of the President, and as a result the regulated sector were to tone down its criticism, the unregulated press would remain active.

Restricting regulation to only a part of the press, however, offers more than a check against these costs. It provides, again through the presence of the unregulated media, a beneficial tension within the system. The unregulated sector can operate to minimize the three costs of regulation. Consider, for example, the chilling effect problem. The publication of news in the unregulated press serves as a competitive prod to the regulated press to publish what it might otherwise omit.¹⁰⁰ Thus, broadcasters may initially have been reluctant to cover Watergate events because of fears of official reprisals and access obligations, but a decision not to cover the story would have been impossible once the print media began exploiting it.¹⁰¹

The most significant aspect of a partial regulatory scheme, however, is that it preserves a benchmark—an important link with our constitutional traditions as the Court permits experimentation with regulation. The continuing link with traditional first amendment theory conveys the message that old principles have not been abandoned, and it forces every departure to be more carefully scrutinized and justified. The message is one of adjustment rather than wholesale revision.¹⁰²

One of the more interesting features of our experience with broadcast regulation has been the absence of egregious abuses of power by the FCC. The Commission has, on the whole, been extraordinarily circumspect in the exercise of its powers.¹⁰³ It is

100. Cf. E. EPSTEIN, *supra* note 39, at 150.

101. It is also likely that the principles represented by the regulations themselves will have an effect throughout the entire media system. Representing the public's pronouncement of proper journalistic behavior, the principles may over time filter into the unregulated sphere, in much the same way that we occasionally see the constitutional due process requirements voluntarily adopted by private institutions. Thus, under a partial regulatory system a fruitful symbiotic relationship may be expected to develop.

102. The process resembles that which is observed in other areas of constitutional law, for example, the applicability of criminal procedure rules to the juvenile justice system. Cf. *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

103. 1 Z. CHAFEE, *supra* note 7, at 11-12; 2 *id.* at 476-77; Kalven, *supra* note 21, at 18, 19-20. The only area, it seems, where the Commission can perhaps be charged with having seriously ignored important free speech interests is indecent

reasonable to assume that this self-restraint is explained in large part by the constant juxtaposition of the autonomous print media, representing our continued respect for the ideal of a free press, against the regulated broadcasting media. By preserving the unregulated print media, the benchmark against which the reform must continually be measured, even if not explicitly, the Court has furnished a built-in restraint against excesses in regulation. Those representing the interests of broadcasters have been able to point to the practices of the print media as concrete illustrations of traditional constitutional principles rather than to some abstract principle of freedom of the press, thus making more explicit any departure from nonregulation. The effect of this process can be readily observed in more recent court decisions, where frequent references to the print media demonstrate the force of the newspaper analogy.¹⁰⁴

In an article on broadcast regulation written in 1967, Professor Kalven observed that "[l]aw . . . is determined by a choice between competing analogies."¹⁰⁵ What had been "sorely needed" in the broadcasting area was "the competing analogy to set against the claims for control."¹⁰⁶ There had never been "a precedent setting the *outer boundaries* of [FCC] control"¹⁰⁷ The absence of an explicit limit on Commission authority has been unfortunate, but the problem has been less significant than it otherwise would be precisely because the unregulated print media has provided a "competing analogy."

It is from this perspective that the *Miami Herald* decision begins to make some sense. On the surface, the decision seems singularly inattentive to the parallel broadcasting cases, yet in fact it speaks directly to them. *Red Lion* had given the impression that editorial rights were to be subordinated to the "public's right to hear." It spawned a political and legal movement, spearheaded by Professor Jerome Barron,¹⁰⁸ plaintiff's counsel in *Miami Herald*, for more

speech. See, e.g., *In re Pacifica Foundation*, 36 F.C.C. 147 (1964); *In re WUHY-FM Eastern Educ. Radio*, 24 F.C.C.2d 408 (1970). See Kalven, *supra* note 21, at 18.

104. See, e.g., *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94 (1973); *National Broadcasting Co. v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976).

105. Kalven, *supra* note 21, at 38.

106. *Id.*

107. *Id.* at 37.

108. See Barron, *supra* note 8; Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access—The Only Choice for the Media?*, 48 TEX. L. REV. 766 (1970). Other articles on access are collected in Lange, *supra* note 5, at 2 n.5.

The movement for a first amendment right of access to the broadcast media has

extensive regulation. In its reaffirmation of fundamental first amendment principles, the *Miami Herald* Court's opinion urges caution and restraint, and sharply limits regulatory reform. To be sure, the opinion represents a lowpoint in judicial craftsmanship, but it is nevertheless explicable.

It must be admitted that the proposed partial theory of regulation is unique in its specific formulation. Nowhere else has the Court interpreted the Constitution to allow Congress such a discretionary regulatory role. The theory is, however, no less valid for this reason. It can satisfy the test of legitimacy applied to new constitutional pronouncements. As discussed above, the Court is able to present reasoned arguments for both allowing regulation and restricting it as a way to further the purposes and values underlying the first amendment.

It has long been recognized that the Constitution is not a static instrument. Old constitutional principles are continually being discarded or revised as they are discovered to be ineffective in protecting fundamental values or to hamstring unduly the achievement of legitimate social aims; new principles are continually being devised to meet the exigencies of an ever-changing reality. A part of this process, as the access question demonstrates, involves deciding to what extent new principles are to overtake traditional approaches. It is a major part of the Court's most vital function of carrying forward and reinterpreting constitutional values in light of changed circumstances.

The theory of partial regulation mandates, in effect, a system in which the burdens of regulation will be allocated unequally among the various institutions of the press. Those associated with the institution that Congress chooses to regulate may claim that it is unfair for them to bear the burdens of regulation when their similarly situated counterparts do not. Their claim would be that the scheme of classification is "underinclusive." This claim of unequal treatment may be a factor to be considered in deciding whether to mandate a partial system, but it ought not be determinative for several reasons. First, courts and commentators generally give greater constitutional leeway to an underinclusive rather than an "overinclusive" approach to a general problem, since in underinclusive classifications "all who are included in the class are at least tainted by the mischief at which the law aims . . . while over-inclusive classifications reach out to the innocent bystander, the hapless

been arrested by the Court's decision in *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94 (1973).

victim of circumstances or association."¹⁰⁹ Second, the trait that defines the class would not be the content of speech and it would not reflect an official animus against a particular group of people because it would be directed at *institutions* and not individuals. That is, the classifying trait would be the neutral factor of technology, and not a suspect factor such as race. This means that those individuals indirectly affected would be able to shift to the unregulated media and escape the burden imposed should they find it offensive, and that the opportunity for government to pursue solely political or discriminatory purposes under the guise of the first amendment is minimized.

In seeking to advance first amendment goals, the Court should not be precluded from deciding on a rational basis to limit congressional powers of regulation. There may be more than one claim to "equality" to be considered. Those persons excluded from public debate because of private ownership also have a claim to "equality" in the sense of obtaining an equal opportunity to speak.¹¹⁰ If a full restructuring of the press to accommodate those claims is too dangerous, then the Court must balance the interests of those excluded from the media against the interests of those members of the press whom Congress will ultimately select to bear the burden of regulation in a partial system. Phrased somewhat differently, it is the *first amendment itself* that justifies this differential treatment of mass communication technologies.

The analysis of *Red Lion* and *Miami Herald*, therefore, demonstrates the need to maintain a partial regulatory structure *for its own sake*. What the Court has never fully appreciated is that the very similarity of the two major branches of the mass media provides a rationale for treating them differently. By permitting different treatment of the two institutions, the Court can facilitate realization of the benefits of two distinct constitutional values, both of which ought to be fostered: access in a highly concentrated press and minimal governmental intervention. Neither side of the access controversy emerges victorious. The Court has imposed a compromise—a compromise, however, not based on notions of expediency, but rather on a reasoned, and principled, accommodation of competing first amendment values.

There is, it is true, something to be said in favor of limiting legis-

109. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 351 (1949).

110. See Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43-52 (1975).

lative experimentation with access to the electronic media and precluding Congress from choosing any segment of the mass media to regulate. This is a product of the different treatment long accorded broadcasting: What seems possible in broadcasting seems unthinkable for newspapers. It is, however, unwise to maintain separate traditions for separate branches of the media; it is, in the end, counter-productive to first amendment interests. Instead, the Court ought to acknowledge broadcasters as full-fledged participants in our first amendment traditions and yet permit Congress to engage in *some* experimentation with press freedom to facilitate public access, allowing Congress to choose the medium to be regulated. This means, of course, that eventually the legislative branch may shift the target of its regulatory scheme to other segments of the media, provided it abandons its earlier target. Thus, it ought theoretically to be possible for Congress to abandon its regulation of the electronic media and choose instead to provide access within the confines of the newspaper industry. The extent to which it ought to be able to regulate the print media is problematical. The answer to that question, however, must ultimately depend on a contemporary evaluation of the factors that justify partial regulation.

III. A CONSTITUTIONAL ASSESSMENT OF CABLE TECHNOLOGY

*Madame Sosotris, famous clairvoyante, had a bad cold . . .*¹¹¹

An interpretation of the first amendment that permits Congress to impose access regulation, but only within a limited segment of the press, has important implications for the emerging technology of cable television. It is frequently argued that, since *Red Lion* predicated its approval of access regulation upon the limited channel space of the electromagnetic spectrum, the shift to the virtually unbounded channel capacity of coaxial cables will eliminate the constitutional justification for regulation.¹¹² This argument, however,

111. T.S. Eliot, *The Waste Land*, THE DIAL (Nov. 1922).

112. See, e.g., Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971); Note, *The Proposed Cable Communications Act of 1975: A Recommendation for Comprehensive Regulation*, 1975 DUKE L.J. 93, 112-13.

Similar thinking appears to underlie the 1974 report of the Cabinet Committee on Cable Communications, which recommended the immediate end of access regulation with respect to cablecasting. THE CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT 37-38 (1974). The Office of Telecommunications Policy (OTP) has prepared legislation embodying this and other policies for submission to Congress. Section 401 of the Proposed Act provides as follows:

No executive agency of the United States . . . and no State or political subdivision or agency thereof . . . shall:

(a) require or prohibit program originations by a cable operator or channel programmer, or impose upon such operator or programmer any restrictions or

misconceives the scarcity rationale as the true, or at least the only, explanation for the disparate treatment of the electronic media. A theory of partial regulation better explains *Red Lion* and *Miami Herald*, and that thesis would permit access regulation within television even if there were an unlimited number of channels.

That is not to say that the cable technology may not affect the existing structure of the television industry, and hence congressional perception of the urgency of regulation. By increasing the available number of channels, thereby easing the costs of entry into the television market, cable may create a much more atomized system of programming with each channel claiming only a relatively small portion of the viewing audience.¹¹³ It is even possible that the increased competition could result in the breakdown of the presently gargantuan networks.

It is not at all certain that this will be the result. Indeed there are good reasons for thinking that the present structure will remain largely unchanged for the foreseeable future.¹¹⁴ In any case, it is virtually impossible at this time to predict precisely what transformation, if any, will occur, because it is difficult to determine what economic advantages present broadcasters will have acquired, the extent to which audience tastes will change or remain the same, and the interplay of a host of other factors that will undoubtedly play a role.

The potential of cable television to increase substantially the number of competing television outlets, however, should not change

obligations affecting the content of such program originations, including rights of response by any person, opportunities for appearances by candidates for public office, or requirements for balance and objectivity

For commentary on the proposed bill, see Note, 1975 DUKE L.J. 93, *supra*. The present status of the bill is uncertain. It has thus far failed to pass the executive clearance process, and the OTP is studying various objections raised against the bill. It is unclear what the change in administration portends for the proposed legislation.

Instead of using the circumscribed electromagnetic spectrum as a means of transmitting television signals, cable television relies on coaxial cables laid underground or strung aboveground like telephone wires. No physical law limits the number of cables that can be connected. Thus, while the available frequencies in the VHF portion of the spectrum permit only 12 channels, cable can carry as many as 80 channels. Through interconnection devices and the use of satellites, the potential exists for a vastly expanded national and local network of television channels. Broadcasting as a mode of transmission could become obsolete. For a detailed discussion of the nature and uses of coaxial cable, see THE SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 11-16 (1971) (hereinafter SLOAN REPORT). It is important to realize, however, that cable has not yet developed to this stage. Cable systems presently reach only approximately 12.5 per cent of the nation's television households and offer between 8 and 12 channels. See BROADCASTING, CABLE SOURCEBOOK 1975, at 5.

113. See, e.g., R. SMITH, THE WIRED NATION (1972).

114. See, e.g., SLOAN REPORT 78-81, 118, 169; LaPierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25, 119-24 (1973).

the constitutional determination permitting Congress to impose access regulation on television. Even if eventually there are ten channels more or less evenly dividing the nation's audience, a rather remote possibility, Congress ought still to be permitted to provide that the opportunity to reach the television audience will not depend entirely on private ownership. As is true now, the government should be able in one forum to balance the freedom of press interests of those owning established channels of communication against the interests of those effectively excluded from major avenues of communication.

Nevertheless, cable technology does mean that a *legislative* crossroad has been reached on the matter of access regulation. The emergence of cable makes more possible than ever before reliance on the interplay of private interests to assure an effective marketplace of ideas. As a result, cable offers a new context in which to rethink questions relating to the scope and types of access regulation. It may be thought wiser, for example, to limit regulation to selected mass audience channels than to impose access regulation throughout television. Certain types of access regulation, moreover, may be considered either more or less appropriate than they were previously. Furthermore, the desirability of avoiding certain forms of access regulation that might affect the development of cable may be affirmed. A broad application of the fairness doctrine, for example, could inhibit the entry of programmers who desired to program with a strong ideological bias aimed at a limited and politically homogeneous audience. While this has been a cost of regulation in the past, its dimensions have been much more confined because the number of potential entrants so affected was much smaller.

Cable, therefore, raises important questions for the current regulatory scheme. Currently, it is the FCC that provides answers to these questions. The Commission has chosen to impose access regulation within a cable, although thus far only on channels originating with the cable owner.¹¹⁵ Whether it will choose to apply access

115. In 1972, the Commission after several years of study announced a highly elaborate and intricate body of regulations covering cable television reflecting a shift in Commission attitude from containment of cable to mild encouragement. FCC, CABLE TELEVISION REPORT AND ORDER ON RULES AND REGULATIONS RELATIVE TO CATV SYSTEMS, 36 F.C.C.2d 143 (1972), *stays denied*, 34 F.C.C.2d 165, 170, 172, 174, 176, 178, 180, *reconsideration denied*, 36 F.C.C.2d 326. See LaPierre, *supra* note 114, at 87.

The most significant provisions are those that relate to the potential expansion of the total number of television channels available. Under the present regulations, cable systems must have a minimum capacity of 20 channels. 47 C.F.R. § 76.251(a)(1) (1975). For each broadcast signal carried, the operator must make available one channel for nonbroadcast programming. 47 C.F.R. 76.251(a)(2) (1975). Of the

regulation to leased channels operated by independent programmers is still uncertain.

The question likely to confront the Court in the near future is whether the Commission has the statutory authority under the Communications Act of 1934 to impose access regulation on cable television. When that case does arise, the Court ought to rule against the Commission for at least two reasons. First, given the potential of cable technology to alter significantly the television medium, together with the important first amendment interests at stake in the access question, the Court should find that the imposition of access regulation on cable is beyond the scope of the Communications Act. The access problems that brought about the remedial efforts of the 1934 Act are not comparable to those in cable technology. Second, the history of the Commission's treatment of cable does not inspire confidence in its judgments in this area. There is considerable evidence that the Commission has been more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology.¹¹⁶ Thus, the Court ought to require Congress to make the decision on access in the first instance.

This approach to the question of access regulation in cable is not precluded by the Court's decision on two occasions upholding the authority of the Commission under the Communications Act to impose various regulations on cable. The question whether the Commission has the power to regulate cable at all is separate from the question whether it has the authority to issue a particular rule. For our purposes, it is significant that neither of the Court's cable decisions involved an issue as important from a first amendment perspective as that of access regulation. Further, in both cases the Court seemed to recognize the need for congressional reevaluation of the need for regulating cable. In *United States v. Southwestern Cable Co.*,¹¹⁷ its first cable decision, the Court approved FCC

latter channels, one each must be available for use by the public on a first-come first-served basis, 47 C.F.R. § 76.251(a)(4) (1975), by educational authorities, 47 C.F.R. § 76.251(a)(5) (1975), and by local government, 47 C.F.R. § 76.251(a)(6) (1975), and the remainder must be open for lease on a common carrier basis to independent programmers, 47 C.F.R. § 76.251(a)(7) (1975). The rules further provide that the equal time and fairness doctrine rules are applicable to all origination cablecasts. 47 C.F.R. §§ 76.205, 76.209 (1975). Other limitations relating to lotteries, obscenity, and sponsorship identification, which are regularly imposed on broadcasters, are also extended to cablecasters. 47 C.F.R. §§ 76.213, 76.215, 76.221 (1975).

The Commission's future regulatory role with respect to cable is, apparently, still a matter of considerable doubt within the agency. See Price, *Requiem for the Wired Nation: Cable Rulemaking at the F.C.C.*, 61 VA. L. REV. 541, 544 (1975).

116. See, e.g., LaPierre, *supra* note 114.

117. 392 U.S. 157 (1968).

action under the Commission's "local carriage" rule,¹¹⁸ which forbade certain cable systems from importing broadcast signals without Commission approval, and thereby served to protect the market of local broadcasters. The Court, speaking of a need to provide for the "orderly development" of an appropriate system of local television broadcasting,¹¹⁹ upheld the rule as "reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting."¹²⁰

In a subsequent decision in *United States v. Midwest Video Corp.*,¹²¹ the Court considered the Commission's "program origination" rule requiring nonbroadcast programming on some cable systems. The rule provided that "no CATV [cable] system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services."¹²² The Court was deeply divided on the issue of the statutory validity of the rule. In finding the regulation consistent with the "public interest" and thus within the power of the Commission, Justice Brennan, representing a plurality of four justices, said:

The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming—the same objective underlying regulations sustained in *National Broadcasting Co. v. United States* . . . , as well as the local-carriage rule reviewed in *Southwestern* and subsequently upheld.¹²³

A dissenting opinion joined by four justices argued that the regulation was invalid on the ground that the Communications Act nowhere accorded the FCC the power to compel anyone "to enter the broadcasting field."¹²⁴ With obvious reluctance, Chief Justice Burger cast the deciding vote for the Commission but observed that the

118. The regulation as quoted in the Court's opinion provided that

[n]o CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area.

392 U.S. 157, 159 n.2.

119. 392 U.S. at 177.

120. 392 U.S. at 178.

121. 406 U.S. 649 (1972).

122. 47 C.F.R. § 74.1111(a), revised as 47 C.F.R. § 76.201(a) (1973). This regulation was suspended for most of its life and then abandoned by the Commission in 1974. 39 Fed. Reg. 43,302 (1974).

123. 406 U.S. at 649, 669.

124. 406 U.S. at 677, 679 (Douglas, J., dissenting).

"almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts."¹²⁵

As the Commission seeks to extend its authority over cable television, the Court ought to be sensitive to the need for congressional guidance in an area that so plainly involves first amendment interests.¹²⁶ The suggestion of Chief Justice Burger should be the basis for decision. A considered legislative judgment on matters relating to access regulation in cable television is important and overdue, but it should also be recognized that this is an appropriate juncture to pause and reassess the costs and benefits of the entire experiment.

Most importantly, perhaps cable offers the Court an appropriate occasion for discarding the shibboleth of the scarcity rationale. The Court should begin the process of defining a rationale for regulation that recognizes the limited power of Congress to impose access regulation within the mass media. At the same time the Court can openly recognize the link between broadcasting and our constitutional traditions and begin to create a heightened sensitivity to the first amendment rights of broadcasters.

IV. CONCLUSION

What appears on the surface to be the paradox of *Red Lion* and *Miami Herald* turns out on close inspection to be a rationally defensible regime. The different treatment accorded the broadcasting and print media is an especially intriguing illustration of the implementation of new first amendment principles. The substance of the constitutional solution that has been devised, or, more accurately, to which the decisions point, is both acceptable and sound. In the end, it is the first amendment itself that requires different treatment of these institutions, accommodating both the will of the legislature to participate in the realization of first amendment goals and the role of the Court as the ultimate guarantor of those goals. The impact of a new technology like cable is not so much that it alters the accommodation, but that it permits the Court to take a fresh and unblinking view of it.

125. 406 U.S. at 676 (Burger, C.J., concurring).

126. Cf. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).