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Source: *Harvard Law Review*, Vol. 80, No. 8 (Jun., 1967), pp. 1641-1678

Published by: Harvard Law Review Association

Stable URL: <http://www.jstor.org/stable/1339417>

Accessed: 01-01-2016 23:58 UTC

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ACCESS TO THE PRESS – A NEW FIRST AMENDMENT RIGHT

*Jerome A. Barron **

The press, long enshrined among our most highly cherished institutions, was thought a cornerstone of democracy when its name was boldly inscribed in the Bill of Rights. Freed from governmental restraint, initially by the first amendment and later by the fourteenth, the press was to stand majestically as the champion of new ideas and the watch dog against governmental abuse. Professor Barron finds this conception of the first amendment, perhaps realistic in the eighteenth century heyday of political pamphleteering, essentially romantic in an era marked by extraordinary technological developments in the communications industry. To make viable the time-honored "marketplace" theory, he argues for a twentieth century interpretation of the first amendment which will impose an affirmative responsibility on the monopoly newspaper to act as sounding board for new ideas and old grievances.

There is an anomaly in our constitutional law. While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression. Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the "marketplace of ideas" is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist. The mass media's development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum — unorthodox points of view which have no claim on broadcast time and newspaper space as a matter of right are in poor position to compete with those aired as a matter of grace.

The free expression questions which now come before the courts involve individuals who have managed to speak or write in a manner that captures public attention and provokes legal reprisal. The conventional constitutional issue is whether expression already uttered should be given first amendment shelter or whether it may be subjected to sanction as speech beyond the constitutionally protected pale. To those who can obtain access to the media of mass communications first amendment case law furnishes considerable help. But what of those whose ideas are too unacceptable to secure access to the media? To them the

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mass communications industry replies: The first amendment guarantees our freedom to do as we choose with our media. Thus the constitutional imperative of free expression becomes a rationale for repressing competing ideas. First amendment theory must be reexamined, for only by responding to the present reality of the mass media's repression of ideas can the constitutional guarantee of free speech best serve its original purposes.

I. THE ROMANTIC VIEW OF THE FIRST AMENDMENT: A RATIONALE FOR REPRESSION

The problem of access to the press is not a new one. When the Newspaper Guild was organizing in the late 1930's, a statement opposing that organization was prepared by the American Newspaper Publishers Association. Not surprisingly that statement was given publicity in almost all the newspapers in the United States. Mr. Heywood Broun, a celebrated American journalist, prepared a two hundred word reply for the Guild organizers and asked the hostile newspapers to print it:¹ "A very large number of newspaper owners who had beaten their breasts as evidence of their devotion to a 'free press' promptly threw the Guild statement into the waste basket and printed not a line of it."

Mr. Broun's experience illustrates the danger posed by the ability of mass communications media to suppress information, but an essentially romantic view of the first amendment has perpetuated the lack of legal interest in the availability to various interest groups of access to means of communication. Symptomatic of this view is Mr. Justice Douglas's eloquent dissent in *Dennis v. United States*:²

When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Full and free discussion has indeed been the first article of our faith.

The assumption apparent in this excerpt is that, without government intervention, there is a free market mechanism for ideas. Justice Douglas's position expresses the faith that, if government

¹ Broun, *Those Charming People*, in ONE HUNDRED YEARS OF THE NATION 197, 199 (H. Christman ed. 1965).

² 341 U.S. 494, 584 (1951) (emphasis added).

can be kept away from "ideas," the self-operating and self-correcting force of "full and free discussion" will go about its eternal task of keeping us from "embracing what is cheap and false" to the end that victory will go to the doctrine which is "true to our genius."³

This romantic view of the first amendment had its origin in Mr. Justice Holmes's free speech opinions; a typical statement of his "marketplace of ideas" theory is found in his dissent in *Abrams v. United States*:⁴

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

It is interesting, perhaps anomalous, that the same Justice who reminded his brethren in *Lochner v. New York*⁵ that the Constitution was not "intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*," nevertheless rather uncritically accepted the view that constitutional status should be given to a free market theory in the realm of ideas.

The possibility of governmental repression is present so long as government endures, and the first amendment has served as an effective device to protect the flow of ideas from governmental censorship: "Happily government censorship has put down few roots in this country. . . . We have in the United States no counterpart of the Lord Chamberlain who is censor over England's stage."⁶ But this is to place laurels before a phantom — our constitutional law has been singularly indifferent to the reality and implications of nongovernmental obstructions to the spread of political truth. This indifference becomes critical when a comparatively few private hands are in a position to determine not only the content of information but its very availability, when the soap box yields to radio and the political pamphlet to the monopoly newspaper.

³ *Id.* at 584-85.

⁴ 250 U.S. 616, 630 (1919).

⁵ 198 U.S. 45, 75 (1905) (dissenting opinion).

⁶ *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 699 (1959) (Douglas, J., concurring).

II. OBSTACLES TO ACCESS: THE CHANGING TECHNOLOGY OF THE COMMUNICATIONS PROCESS

The British M.P. and publicist, R.H.S. Crossman, has observed that the modern world is witnessing at present a Political Revolution as searing and as consequential as the Industrial Revolution, a revolution which "has concentrated coercive power and thought control in a few hands."⁷ Power, he contends, has shifted from those who control the "means of production" to "those who control the media of mass communication and the means to destruction (propaganda and the armed forces)."⁸ Mr. Crossman, to be sure, writes from the vantage point of the British Labor Party, but his observations have the ring of urgency and contemporaneity. Difficulties in securing access, unknown both to the draftsmen of the first amendment and to the early proponents of its "marketplace" interpretation, have been wrought by the changing technology of mass media.

Mr. Broun's experience as representative of the Newspaper Guild in the 1930's led him to write an article in which he expressed concern about the implications of the newspapers' refusal to print his reply at a time when "[e]very day brings the news that one or two or three more papers have collapsed or combined with their rivals."⁹ He has proved a good prophet, for where fourteen English language dailies were published in New York City in 1900, only two morning papers and two afternoon dailies survive. Many American cities have become one newspaper towns. This is a "disquieting" development for American journalist J. Russell Wiggins since "[t]his noncompetitive situation puts it within the power of the monopoly newspaper to suppress facts at its discretion"¹⁰

Mr. Wiggins suggests that the economics of newspaper pub-

⁷ R.H.S. CROSSMAN, *THE POLITICS OF SOCIALISM* 44 (1965).

⁸ *Id.*

⁹ Broun, *supra* note 1, at 197.

¹⁰ J.R. WIGGINS, *FREEDOM OR SECRECY* 178 (rev. ed. 1964). Wiggins offers these statistics on the diminishing competitive character of the American press:

The number of daily newspapers in the United States declined from 2202 in 1909-10 to 1760 in 1953-4. The number of cities with competing daily newspapers declined from 689 to only 87. The number of cities with non-competing dailies increased from 518 to 1361. Eighteen states are now without any locally competing daily newspapers. *Id.* at 177.

But Mr. Wiggins cautions that the danger of suppressing varied viewpoints as a result of the rise of the monopoly newspaper can be exaggerated since newspapers compete not only with each other but with other media.

lication — rising costs of everything from newsprint to labor — may be a more significant cause of the withholding of news than conspiratorial efforts of publishers. Less sympathetic to the mass media in evaluating the practical obstacles which confront the group seeking an adequate forum for its opinion is Marshall McLuhan's view that the very nature of modern media is at war with a point of view orientation.¹¹ McLuhan observes that each medium engenders quite different degrees of participation. The new modes of communication engage us by their form rather than by their content; what captivates us is the television screen itself. In his view the electronic media which have eclipsed the typographical age entail a high degree of nonintellectual and emotional participation and involvement.¹² We have become mesmerized by the new forms of communication to the point of indifference to their content and to the content of the older media. The electronic media which dominate modern communications are, in McLuhan's analysis, ill suited to the problem of making public issues meaningful.

Another commentator on communications, Dan Lacy, has explained this indifference to content somewhat differently. More critical than popular obsession with the forms of technological advance is the dull emphasis on majoritarian values which characterizes all our media, old and new:¹³

We have seen that the very technology of films and especially of broadcasting is such that their efficiency can be realized only when they are reaching very large audiences. This is a constant factor that is just as present in the BBC as in the advertising-supported networks of the United States. This technological fact predisposes all the mass media to conform to an already widely accepted taste. It also makes it very difficult for a novel point of view or a just emerging problem to gain access to network broadcasts or other mass components of the mass communications system. Let me make it clear once more that I am not talking

¹¹ H.M. MCCLUHAN, *UNDERSTANDING MEDIA* (1964).

¹² *Id.* at 173. The first amendment implications of this phenomenon are very great indeed. In the Supreme Court decisions we find a theory of knowledge which revolves around an outmoded conception of decision making: Information is distributed by advocates of various points of view and, after assimilation and reflection, the citizen makes his judgment. But, according to McLuhan, the media defeat this step-ladder approach to decision making: "As the speed of information increases, the tendency is for politics to move away from representation and delegation of constituents toward immediate involvement of the entire community in the central acts of decision. Slower speeds of information make delegation and representation mandatory." *Id.* at 204.

¹³ D. LACY, *FREEDOM AND COMMUNICATIONS* 69 (1961).

about the ability of each of two conflicting points of view to get on the air so long as each is a well-recognized point of view about a controversy that already commands attention. It is rather the subject or point of view in which people are not yet interested, but ought to be, that finds understandable difficulty in gaining access to the mass media.

The aversion of the media for the novel and heretical has escaped attention for an odd reason. The controllers of the media have no ideology. Since in the main they espouse no particular ideas, their antipathy to all ideas has passed unnoticed.¹⁴ What has happened is not that the controllers of opinion, Machiavellian fashion, are subtly feeding us information to the end that we shall acquiesce in their political view of the universe. On the contrary, the communications industry is operated on the whole with an intellectual neutrality consistent with V.O. Key's theory that the commercial nature of mass communications makes it "bad business" to espouse the heterodox or the controversial.¹⁵

But retreat from ideology is not bereft of ideological and practical consequences. In a commentary about television, but which applies equally well to all mass media, Gilbert Seldes has complained that, in a time demanding more active intelligence than has ever before been necessary if we are to survive, the most powerful of all our media are inducing inertia.¹⁶ The contemporary structure of the mass media direct the media away from rather than toward opinion-making. In other words, it is not that the mass communication industry is pushing certain ideas and rejecting others but rather that it is using the free speech and free press guarantees to avoid opinions instead of acting as a sounding board for their expression. What happens of course is that the opinion vacuum is filled with the least

¹⁴ That the media have had a cutting edge in the past, however, should not be forgotten. On the phenomenon of the political radio "voices" of the thirties it has been remarked:

There were many opportunities in the early years for commentators to convert listeners to a point of view. None succeeded until the beginning of the second decade of radio, when the Depression made home entertainment mandatory for most families . . . Men like Father Charles E. Coughlin and Huey Long could start a movement to bring to America a Fascist brand of social justice or to make it possible for Americans to share the wealth. Long was stopped in 1935 by a bullet in Baton Rouge, Louisiana; Father Coughlin was silenced in 1940 by his bishop. Both had long demonstrated how magnetic a radio voice could be.

B. ULANOV, THE TWO WORLDS OF AMERICAN ART 404 (1965).

¹⁵ See p. 1661 *infra*.

¹⁶ Seldes, *Public Entertainment and the Subversion of Ethical Standards*, 363 ANNALS 87 (1966).

controversial and bland ideas. Whatever is stale and accepted in the status quo is readily discussed and thereby reinforced and revitalized.

The failures of existing media are revealed by the development of new media to convey unorthodox, unpopular, and new ideas. Sit-ins and demonstrations testify to the inadequacy of old media as instruments to afford full and effective hearing for all points of view. Demonstrations, it has been well said, are "the free press of the movement to win justice for Negroes . . ." ¹⁷ But, like an inadequate underground press, it is a communications medium by default, a statement of the inability to secure access to the conventional means of reaching and changing public opinion. By the bizarre and unsettling nature of his technique the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message. But attention-getting devices so abound in the modern world that new ones soon become tiresome. The dissenter must look for ever more unsettling assaults on the mass mind if he is to have continuing impact. Thus, as critics of protest are eager and in a sense correct to say, the prayer-singing student demonstration is the prelude to Watts. But the difficulty with this criticism is that it wishes to throttle protest rather than to recognize that protest has taken these forms because it has had nowhere else to go.

III. MAKING THE FIRST AMENDMENT WORK

The Justices of the United States Supreme Court are not innocently unaware of these contemporary social realities, but they have nevertheless failed to give the "marketplace of ideas" theory of the first amendment the burial it merits. Perhaps the interment of this theory has been denied for the understandable reason that the Court is at a loss to know with what to supplant it. But to put off inquiry under today's circumstances will only aggravate the need for it under tomorrow's.

A. *Beyond Romanticism*

There is inequality in the power to communicate ideas just as there is inequality in economic bargaining power; to recognize the latter and deny the former is quixotic. The "marketplace of ideas" view has rested on the assumption that protecting the right

¹⁷ Ferry, *Masscomm as Educator*, 35 AM. SCHOLAR 293, 300 (1966).

of expression is equivalent to providing for it.¹⁸ But changes in the communications industry have destroyed the equilibrium in that marketplace. While it may have been still possible in 1925 to believe with Justice Holmes that every idea is "acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth,"¹⁹ it is impossible to believe that now. Yet the Holmesian theory is not abandoned, even though the advent of radio and television has made even more evident that philosophy's unreality. A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications.

Too little attention has been given to defining the purposes which the first amendment protection is designed to achieve and to identifying the addressees of that protection. An eloquent exception is the statement of Justice Brandeis in *Whitney v. California*²⁰ that underlying the first amendment guarantee is the assumption that free expression is indispensable to the "discovery and spread of political truth" and that the "greatest menace to freedom is an inert people." In *Thornhill v. Alabama*²¹ Justice Murphy described his view of the first amendment:

The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply *the public need for information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

That public information is vital to the creation of an informed citizenry is, I suppose, unexceptionable. Both Justices recognize the importance of confronting citizens, as individual decision makers, with the widest variety of competing ideas. But accuracy does demand one to remember that Justice Brandeis was speaking

¹⁸ See, e.g., *Weiman v. Updegraff*, 344 U.S. 183, 194 (1952) (Black, J., concurring):

With full knowledge of this danger the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous. This means that individuals are guaranteed an undiluted and unequivocal right to express themselves on questions of current public interest.

¹⁹ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (dissenting opinion).

²⁰ 274 U.S. 357, 375 (1927) (concurring opinion).

²¹ 310 U.S. 88, 102 (1940) (emphasis added).

in *Whitney*, as was Justice Murphy in *Thornhill*, of the constitutional recognition that is given to the necessity of inhibiting "the occasional tyrannies of governing majorities" from throttling opportunities for discussion. But is it such a large constitutional step to take the same approach to nongoverning minorities who control the machinery of communication? Is it too bold to suggest that it is necessary to ensure access to the mass media for unorthodox ideas in order to make effective the guarantee against repression?

Another conventionally stated goal of first amendment protection — the "public order function" — also cries out for recognition of a right of access to the mass media. The relationship between constitutional assurance of an opportunity to communicate ideas and the integrity of the public order was appreciated by both Justice Cardozo and Justice Brandeis. In *Palko v. Connecticut*²² Justice Cardozo clearly indicated that while many rights could be eliminated and yet "justice" not undone, "neither liberty nor justice would exist . . . [without] freedom of thought and speech" since free expression is "the matrix, the indispensable condition, of nearly every other form of freedom." If freedom of expression cannot be secured because entry into the communication media is not free but is confined as a matter of discretion by a few private hands, the sense of the justice of existing institutions, which freedom of expression is designed to assure, vanishes from some section of our population as surely as if access to the media were restricted by the government.

Justice Brandeis, in his seminal opinion in *Whitney* — one of the few efforts of a Supreme Court Justice to go beyond the banality of the "marketplace of ideas" — also stressed the intimacy of the relationship between the goals of a respect for public order and the assurance of free expression. For Brandeis one of the assumptions implicit in the guarantee of free expression is that "it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies" ²³ I would suggest that the

²² 302 U.S. 319, 325-27 (1937).

²³ 274 U.S. 357, 375 (1927). Chief Justice Hughes made a similar reference to the connection between free speech and public order in *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937):

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more

contemporary challenge to this "path of safety" has roots in the lack of opportunity for the disadvantaged and the dissatisfied of our society to discuss supposed grievances effectively.

The "sit-in" demonstrates that the safety valve value of free expression in preserving public order is lost when access to the communication media is foreclosed to dissident groups. It is a measure of the jaded and warped standards of the media that ideas which normally would never be granted a forum are given serious network coverage if they become sufficiently enmeshed in mass demonstration or riot and violence. Ideas are denied admission into media until they are first disseminated in a way that challenges and disrupts the social order. They then may be discussed and given notice. But is it not the assumption of a constitutional guarantee of freedom of expression that the process ought to work just the other way—that the idea be given currency first so that its proponents will not conclude that unrest and violence alone will suffice to capture public attention? Contemporary constitutional theory has been indifferent to this task of channeling the novel and the heretical into the mass communications media, perhaps because the problem is indeed a recent one.

B. The Need for a Contextual Approach

A corollary of the romantic view of the first amendment is the Court's unquestioned assumption that the amendment affords "equal" protection to the various media. According to this view new media of communication are assimilated into first amendment analysis without regard to the enormous differences in impact these media have in comparison with the traditional printed word. Radio and television are to be as free as newspapers and magazines, sound trucks as free as radio and television.

This extension of a simplistic egalitarianism to media whose

imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.

However, although all Justices would probably agree that there is a public order function underlying the free expression guarantee, others have pointed out that the guarantee contemplates a measure of disorder as well. Thus Justice Douglas declared for the Court in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949):

Accordingly a function of free speech under our system of government is to invite dispute. In may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

comparative impacts are gravely disproportionate is wholly unrealistic. It results from confusing freedom of media content with freedom of the media to restrict access. The assumption in romantic first amendment analysis that the same postulates apply to different classes of people, situations, and means of communication obscures the fact, noted explicitly by Justice Jackson in *Kovacs v. Cooper*,²⁴ that problems of access and impact vary significantly from medium to medium: "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."

However, this enlightened view, suggesting the creation of legal principles which fit the dimensions of the particular medium, was probably not accepted by the majority in *Kovacs* and appeared to be rejected by the dissenters. For the Court Justice Reed declared that the right of free speech is guaranteed each citizen that he may reach the minds of willing listeners, and to do so there must be opportunity to win their attention. This statement would have had tremendous impact had Justice Reed meant that the free speech guarantee applied with particular force to those media where the greatest public attention was focused. But what he probably meant was that because some media, albeit the most important ones, are closed, it is important that other means of communication remain more or less unregulated.

The dissenters, in an opinion by Justice Black, are explicit in rejecting any attempt to shape legal principles to the particular medium, reasoning that government cannot restrain a given mode of communication because that would disadvantage the others — "favoritism" would result because "[l]aws which hamper the free use of some instruments of communication thereby favor competing channels."²⁵ Justice Black's theory appears to be that if all instrumentalities of communication are "free" in the sense of immunization from governmental regulations, problems of access will work themselves out. But what happens in fact is that the dominant media become even more influential and the media which are freely available, such as sound trucks and pamphlets, become even less significant. Thus, we are presented with the anomaly that the protagonist of the "absolute" view of free

²⁴ 336 U.S. 77, 97 (1949) (concurring opinion).

²⁵ *Id.* at 102.

speech has helped to fashion a protective doctrine of greatest utility to the owners and operators of the mass communications industry. By refusing to treat media according to their peculiar natures Justice Black has done that very thing he so heartily condemns—he has favored some channels of communication.

Justice Black is not unaware of the inequality in the existing operation of the mass media, but he blurs distinctions among the media and acquiesces in their differing impacts:²⁶

Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. . . .

. . . For the press, the radio, and the moving picture owners have their favorites, and it assumes the impossible to suppose that these agencies will at all times be equally fair as between the candidates and officials they favor and those whom they vigorously oppose.

For all the intensity of his belief that “it is of particular importance” in a system of representative government that the “fullest opportunity be afforded candidates” to express their views to the voters,²⁷ Justice Black is nevertheless of the opinion that courts must remain constitutionally insensitive to the problem of getting ideas before a forum. That his approach affords greatest protection to mass media does not come about because of a belief that such protection is particularly desirable. Rather it results from a constitutional approach which looks only to protecting the communications which are presently being made without inquiry as to whether freedom of speech and press, in defense of which so much judicial rhetoric is expended, is a realistically available right. While we have taken measures to ensure the sanctity of that which is said, we have not inquired whether, as a practical matter, the difficulty of access to the media of communication has made the right of expression somewhat mythical.

Once again Justice Jackson was the author of one of the few judicial statements which recognizes that first amendment interpretation is uselessly conceptual unless it attempts to be responsive to the diverse natures of differing modes of communication. Dissenting in *Kunz v. New York*²⁸ he thought absolutist interpretations of the first amendment too simplistic and suggested that the susceptibility to public control of a given medium of

²⁶ *Id.* at 102–03.

²⁷ *Id.* at 103.

²⁸ 340 U.S. 290, 307–08 (1951) (emphasis added).

communication should be in direct proportion to its public impact: "Few are the riots caused by publication alone, few are the mobs that have not had their immediate origin in harangue. *The vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests.*" Although originally made in a context of the greater likelihood that a riot would be initiated by an harangue than by a newspaper publication, the principle applies equally well to the impact which the new technology has on the informational and public-order goals of the first amendment.

An analysis of the first amendment must be tailored to the context in which ideas are or seek to be aired. This contextual approach requires an examination of the purposes served by and the impact of each particular medium. If a group seeking to present a particular side of a public issue is unable to get space in the only newspaper in town, is this inability compensated by the availability of the public park or the sound truck? Competitive media only constitute alternative means of access in a crude manner. If ideas are criticized in one forum the most adequate response is in the same forum since it is most likely to reach the same audience. Further, the various media serve different functions and create different reactions and expectations — criticism of an individual or a governmental policy over television may reach more people but criticism in print is more durable.

The test of a community's opportunities for free expression rests not so much in an abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact. Such a test embodies Justice Jackson's observation that community control must be in proportion to the impact which a particular medium has on the community.

C. A New Perspective

The late Professor Meiklejohn, who has articulated a view of the first amendment which assumes its justification to be political self-government, has wisely pointed out that "what is essential is not that everyone shall speak, but that everything worth saying shall be said" — that the point of ultimate interest is not the words of the speakers but the minds of the hearers.²⁹ Can everything worth saying be effectively said? Constitutional opin-

²⁹ A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 25-28 (1960).

ions that are particularly solicitous of the interests of mass media — radio, television, and mass circulation newspaper — devote little thought to the difficulties of securing access to those media. If those media are unavailable, can the minds of "hearers" be reached effectively? Creating opportunities for expression is as important as ensuring the right to express ideas without fear of governmental reprisal.

The problem of private restrictions on freedom of expression might, in special circumstances, be attacked under the federal antitrust laws.³⁰ In *Associated Press v. United States*,³¹ involving an attempt to exclude from membership competitors of existing members of the Associated Press in order to deprive them of the use of the AP's wire service, Justice Black wrote for the Court that nongovernmental combinations are not immune from governmental sanction if they impede rather than expedite free expression:

[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Despite these unusual remarks this opinion reflects a romantic view of the first amendment, for Justice Black assumes the "free flow of ideas" and the "freedom to publish" absent a combination of publishers. Moreover, this was an unusual case; antitrust law operates too indirectly in assuring access to be an effective device.

But the case is important in its acknowledgment that the public interest, here embodied in the antitrust statutes, can override the first amendment claims of the mass media; it would seem that the public interest in expression of divergent viewpoints should be weighted as heavily when the mass media invoke the first amendment to shield restrictions on access. In the opinion for the trial court, Judge Learned Hand at least suggests first amendment protection for the interest which the individual mem-

³⁰ See *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

³¹ 326 U.S. 1, 20 (1945) (emphasis added).

bers of the body politic have in the communications process itself. Identification of first amendment beneficiaries is not complete if only the interests of the "publisher" are protected:³²

However, neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.

Our constitutional theory, particularly in the free speech area, has historically been inoperative unless government restraint can be shown. If the courts or the legislature were to guarantee some minimal right to access for ideas which could not otherwise be effectively aired before the public, there would be "state action"³³ sufficient to support a claim by the medium involved that this violated its first amendment rights. However, the right of free expression is not an absolute right, as is illustrated by *Associated Press*, and to guarantee access to divergent, otherwise unexpressed ideas would so promote the societal interests underlying the first amendment as perhaps to outweigh the medium's claim. Nor is the notion of assuring access or opportunity for discussion a novel theory. In *Near v. Minnesota ex rel. Olson*³⁴ Chief Justice Hughes turned to Blackstone to corroborate the view that freedom from prior restraint rather than freedom from subsequent punishment was central to the eighteenth century notion of liberty of the press. This concern with suppression before dissemination was doubtless to assure that ideas would reach the public:³⁵ "'Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.'

The avowed emphasis of free speech is still on a freeman's right to "lay what sentiments he pleases before the public." But Blackstone wrote in another age. Today ideas reach the millions largely to the extent they are permitted entry into the great

³² *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

³³ *Cf. Shelley v. Kraemer*, 334 U.S. 1 (1948).

³⁴ 283 U.S. 697 (1931).

³⁵ *Id.* at 713-14.

metropolitan dailies, news magazines, and broadcasting networks. The soap box is no longer an adequate forum for public discussion. Only the new media of communication can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a constitutional theory for the communication of ideas, *laissez faire* is manifestly irrelevant.

The constitutional admonition against abridgment of speech and press is at present not applied to the very interests which have real power to effect such abridgment. Indeed, nongoverning minorities in control of the means of communication should perhaps be inhibited from restraining free speech (by the denial of access to their media) even more than governing majorities are restrained by the first amendment — minorities do not have the mandate which a legislative majority enjoys in a polity operating under a theory of representative government. What is required is an interpretation of the first amendment which focuses on the idea that restraining the hand of government is quite useless in assuring free speech if a restraint on access is effectively secured by private groups. A constitutional prohibition against governmental restrictions on expression is effective only if the Constitution ensures an adequate opportunity for discussion. Since this opportunity exists only in the mass media, the interests of those who control the means of communication must be accommodated with the interests of those who seek a forum in which to express their point of view.

IV. NEW WINDS OF CONSTITUTIONAL DOCTRINE: THE IMPLICATIONS FOR A RIGHT TO BE HEARD

A. *New York Times Co. v. Sullivan: A Lost Opportunity*

The potential of existing law to support recognition of a right of access has gone largely unnoticed by the Supreme Court. Judicial blindness to the problem of securing access to the press is dramatically illustrated by *New York Times Co. v. Sullivan*,³⁶ one of the latest chapters in the romantic and rigid interpretation of the first amendment. There the Court reversed a five hundred thousand dollar judgment of civil libel which Montgomery Commissioner Sullivan had won against the *Times* in the Alabama state courts. The Court created the "*Times* privilege" whereby a defamed "public official" is constitutionally proscribed from

³⁶ 376 U.S. 254 (1964).

recovering damages from a newspaper unless he can show that the offending false publication was made with "actual malice."

The constitutional armor which *Times* now offers newspapers is predicated on the "principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."³⁷ But it is paradoxical that although the libel laws have been emasculated for the benefit of defendant newspapers where the plaintiff is a "public official,"³⁸ the Court shows no corresponding concern as to whether debate will in fact be assured. The irony of *Times* and its progeny lies in the unexamined assumption that reducing newspaper exposure to libel litigation will remove restraints on expression and lead to an "informed society." But in fact the decision creates a new imbalance in the communications process. Purporting to deepen the constitutional guarantee of full expression, the actual effect of the decision is to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate. Unless the *Times* doctrine is deepened to require opportunities for the public figure to reply to a defamatory attack, the *Times* decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate.³⁹

³⁷ *Id.* at 270.

³⁸ This protection bestowed on the press may extend far beyond that suggested by the "public official" language of *Times*. Expansion has already been made by the Supreme Court. *Garrison v. Louisiana*, 379 U.S. 64 (1964) (criticism of "private" behavior which reflects on judge's fitness for office is protected by *Times*); *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (local nonelected official may be a "public official"). Lower court cases have begun further extensions. The *Times* privilege may come to bar recovery by a private individual who is "incidentally" defamed by a criticism directed at a public official. See *Gilberg v. Goffi*, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (Sup. Ct. 1964), *aff'd*, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965); Note, *Defamation à Deux: Incidental Defamation and the Sullivan Doctrine*, 114 U. PA. L. REV. 241 (1965). The privilege may also be extended to protect defamatory statements about "public men." *Walker v. Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231 (W.D. Ky. 1965) ("public man"); *Pauling v. National Review Inc.*, 49 Misc. 2d 975, 269 N.Y.S.2d 11 (Sup. Ct. 1966) ("public figure").

³⁹ The decision may have a direct impact on discouraging debate if extended, as Judge Friendly suggests, to protect a defamatory statement about "the participant in public debate on an issue of grave public concern." *Pauling v. News Syndicate Co.*, 335 F.2d 659, 671 (2d Cir.) (dictum), *cert. denied*, 379 U.S. 968 (1964). Individuals will be less willing to engage in public debate if that participation will allow newspapers to defame with relative impunity. Despite this undesirable consequence, the Supreme Court might abandon its "public official" standard in favor of protecting the publication of statements about "public issues." See Note, *The Scope of First Amendment Protection for Good-*

Justice Black's concurring opinion in *Times*, joined in by Justice Douglas, is perhaps even more disappointing than the opinion of the Court in its failure to recognize the balancing problems created by the changing nature of the communications process. Once again Justice Black insisted that newspapers be entirely immune from libel actions where public officials are being attacked, and once again his absolutist rhetoric obscured fundamental problems. He seems to identify the "press" with the "people" and to think that immunity from suit for newspapers is equivalent to enhancing the right of free expression for all members of the community:⁴⁰

. . . I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. . . . An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.

The law of libel is not the only threat to first amendment values; problems of equal moment are raised by judicial inattention to the fact that the newspaper publisher is not the only addressee of first amendment protection. Supreme Court efforts to remove the press from judicial as well as legislative control do not necessarily stimulate and preserve that "multitude of tongues" on which "we have staked . . . our all."⁴¹ What the Court has done is to magnify the power of one of the participants in the communications process with apparently no thought of imposing on newspapers concomitant responsibilities to assure that the new protection will actually enlarge and protect opportunities for expression.

If financial immunization by the Supreme Court is necessary to ensure a courageous press, the public officials who fall prey to such judicially reinforced lions should at least have the right to respond or to demand retraction in the pages of the newspapers which have published charges against them. The opportunity for counterattack ought to be at the very heart of a constitutional theory which supposedly is concerned with providing an outlet for individuals "who wish to exercise their freedom of speech even

Faith Defamatory Error, 75 YALE L.J. 642, 648 (1966); cf. *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (right of privacy case).

⁴⁰ 376 U.S. at 297.

⁴¹ *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.), quoted with approval in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

though they are not members of the press."⁴² If no such right is afforded or even considered, it seems meaningless to talk about vigorous public debate.

By severely undercutting a public official's ability to recover damages when he has been defamed, the *Times* decision would seem to reduce the likelihood of retractions since the normal mitigation incentive to retract will be absent. For example, the *Times* failed to print a retraction as requested by Sullivan even though an Alabama statute provided that a retraction eliminates the jury's ability to award punitive damages. On the other hand, *Times* was a special case and the Court explicitly left open the question of a public official's ability to recover damages if there were a refusal to retract:⁴³

Whether or not a failure to retract may ever constitute such evidence [of "actual malice"], there are two reasons why it does not here. *First*, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. *Second*, it was not a final refusal, since it asked for an explanation on this point — a request that respondent chose to ignore.

Although the Court did not foreclose the possibility of allowing public officials to recover damages for a newspaper's refusal to retract, its failure to impose such a responsibility represents a lost opportunity to work out a more relevant theory of the first amendment. Similarly, the Court's failure to require newspapers to print a public official's reply ignored a device which could further first amendment objectives by making debate meaningful and responsive.⁴⁴ Abandonment of the romantic

⁴² 376 U.S. at 266.

⁴³ *Id.* at 286. Retraction statutes have some bearing on enforcing responsive dialogue. These statutes, common in this country, require the publisher to "take back" what has already been said if damages in a defamation suit are to be mitigated. If false statements have been made, and the complainant can convince the publisher to retract on the basis of correct information, such a procedure certainly serves a cleansing function for the information process. For a discussion of the status of retractions after the *Times* decision, see Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1740-43 (1967).

⁴⁴ The right of reply is commonly used in Europe and South America, constituting more than a remedy for defamation since it is available to anyone named or designated in a publication. There are essentially two approaches to the right of reply, one modelled on French law, which allows the reply to contain a statement of the individual's point of view, and one on German law, which limits the reply to corrections of factual misstatements. For a thorough study of these devices, see Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948). If either approach were to be adopted here,

view of the first amendment would highlight the importance of giving constitutional status to these responsibilities of the press.

However, even these devices are no substitute for the development of a general right of access to the press. A group that is not being attacked but merely ignored will find them of little use. Indifference rather than hostility is the bane of new ideas and for that malaise only some device of more general application will suffice. It is true that Justice Brennan, writing for the Court in *Times*, did suggest that a rigorous test for libel in the public criticism area is particularly necessary where the offending publication is an "editorial advertisement," since this is an "important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities — who wish to exercise their freedom of speech *even though they are not members of the press.*"⁴⁵ This statement leaves us at the threshold of the question of whether these individuals—the "nonpress"—should have a right of access secured by the first amendment: should the newspaper have an obligation to take the editorial advertisement? As Justice Brennan appropriately noted, newspapers are an important outlet for ideas. But currently they are outlets entry to which is granted at the pleasure of their managers. The press having been given the *Times* immunity to promote public debate, there seems little justification for not enforcing coordinate responsibility to allocate space equitably among ideas competing for public attention. And, some quite recent shifts in constitutional doctrine may at last make feasible the articulation of a constitutionally based right of access to the media.

B. *Ginzburg v. United States: The Implications of The "Commercial Exploitation" Doctrine*

The *Times* decision operates on the assumption that newspapers are fortresses of vigorous public criticism, that assuring the press freedom over its content is the only prerequisite to open and robust debate. But if the *raison d'être* of the mass media is not to maximize discussion but to maximize profits, inquiry should

the French method would appear appropriate since assurance of debate is the stated purpose of *Times*, suggesting the exchange of opinion. For a discussion of right of reply after *Times*, see 80 HARV. L. REV., *supra* note 43, at 1745–47. Cf. *Mills v. Alabama*, 384 U.S. 214 (1966), discussed pp. 1672–73 *infra*. See also Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964).

⁴⁵ 376 U.S. at 266 (emphasis added).

be directed to the possible effect of such a fact on constitutional theory. The late Professor V. O. Key stressed the consequences which flow from the fact that communications is big business:⁴⁶

[A]ttention to the economic aspects of the communications industries serves to emphasize the fact that they consist of commercial enterprises, not public service institutions. . . . They sell advertising in one form or another, and they bait it principally with entertainment. Only incidentally do they collect and disseminate political intelligence.

. . . .

. . . The networks are in an unenviable economic position. They are not completely free to sell their product — air time. If they make their facilities available to those who advocate causes slightly off color politically, they may antagonize their major customers.

The press suffers from the same pressures — “newspaper publishers are essentially people who sell white space on newsprint to advertisers”;⁴⁷ in large part they are only processors of raw materials purchased from others.⁴⁸

Professor Key’s conclusion — indifference to content follows from the structure of contemporary mass communications — compares well with Marshall McLuhan’s view that the nature of the communications process compels a “strategy of neutrality.” For McLuhan it is the technology or form of television itself, rather than the message, which attracts public attention. Hence the media owners are anxious that media content not get enmeshed with unpopular views which will undermine the attraction which the media enjoy by virtue of their form alone:⁴⁹

Thus the commercial interests who think to render media universally acceptable, invariably settle for “entertainment” as a strategy of neutrality. A more spectacular mode of the ostrich-head-in-sand could not be devised, for it ensures maximum pervasiveness for any medium whatever.

Whether the mass media suffer from an institutional distaste for controversy because of technological or of economic factors, this antipathy to novel ideas must be viewed against a background of industry insistence on constitutional immunity from legally imposed responsibilities. A quiet truth emerges from such a study: industry opposition to legally imposed responsibilities does

⁴⁶ V. O. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 378-79, 387 (1961).

⁴⁷ *Id.* at 379.

⁴⁸ *Id.* at 380.

⁴⁹ H.M. MC LUHAN, UNDERSTANDING MEDIA 305 (1964).

not represent a flight from censorship but rather a flight from points of view. Points of view suggest disagreement and angry customers are not good customers.

However, there is emerging in our constitutional philosophy of the first amendment a strain of realism which contrasts markedly with the prevailing romanticism. The much publicized case of *Ginzburg v. United States*⁵⁰ contains the seeds of a new pragmatic approach to the first amendment guarantee of free expression. In *Ginzburg* the dissemination of books was held to violate the federal obscenity statute not because the printed material was in itself obscene but because the publications were viewed by the Court "against a background of commercial exploitation of erotica solely for the sake of their prurient appeal."⁵¹ The books were purchased by the reader "for titillation, not for saving intellectual content."

The mass communications industry should be viewed in constitutional litigation with the same candor with which it has been analyzed by industry members and scholars in communication. If dissemination of books can be prohibited and punished when the dissemination is not for any "saving intellectual content" but for "commercial exploitation," it would seem that the mass communications industry, no less animated by motives of "commercial exploitation," could be legally obliged to host competing opinions and points of view.⁵² If the mass media are essentially business enterprises and their commercial nature makes it difficult to give a full and effective hearing to a wide spectrum of opinion, a theory of the first amendment is unrealistic if it prevents courts or legislatures from requiring the media to do that which, for commercial reasons, they would be otherwise unlikely to do. Such proposals only require that the opportunity for publication be broadened and do not involve restraint on publication or punishment after publication, as did *Ginzburg* where the distributor of books was jailed under an obscenity statute even though the books themselves were not constitutionally

⁵⁰ 383 U.S. 463 (1966).

⁵¹ *Id.* at 466.

⁵² The *Ginzburg* theory that an overriding commercial purpose may alter first amendment imperatives vis-à-vis legislative power to regulate a particular area is not new doctrine. For example, the *Ginzburg* Court cites *Valentine v. Chrestensen*, 316 U.S. 52 (1942), which upheld an ordinance forbidding the distribution of commercial matter in the streets when applied to an individual who had attempted to avoid the statute by printing noncommercial information on the opposite side of a commercial handbill.

obscene.⁵³ In a companion case to *Ginzburg*, Justice Douglas remarked that the vice of censorship lies in the substitution it makes of "majority rule where minority tastes or viewpoints were to be tolerated."⁵⁴ But what is suggested here is merely that legal steps be taken to provide for the airing and publication of "minority tastes or viewpoints," not that the mass media be prevented from publishing their views.

In *Ginzburg* Justice Brennan observed:⁵⁵

[T]he circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality — whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes.

The same approach should be taken in evaluating the protests of mass media against the prospect of a right to access. Is their argument — that the development of legally assured rights of access to mass communications would hinder media freedom of expression — "pretense or reality"? The usefulness of *Ginzburg* lies in its recognition of the doctrine that when commercial purposes dominate the matrix of expression seeking first amendment protection, first amendment directives must be restructured. When commercial considerations dominate, often leading the media to repress ideas, these media should not be allowed to resist controls designed to promote vigorous debate and expression by cynical reliance on the first amendment.

C. Office of Communication of the United Church of Christ v. FCC: A Support for the Future?

There are other signs of change in legal doctrine, among the more significant the recent decision in *Office of Communication of the United Church of Christ v. FCC*.⁵⁶ In *Church of Christ*, individuals and organizations claiming to represent the Negro community of Jackson, Mississippi — forty-five percent of the city's total population — requested the FCC to grant an evidentiary hearing to challenge the renewal application of a tele-

⁵³ "The Court today appears to concede that the materials *Ginzburg* mailed were themselves protected by the First Amendment." 383 U.S. at 500 (Stewart, J., dissenting).

⁵⁴ *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413, 427 (1966) (concurring opinion).

⁵⁵ 383 U.S. at 470.

⁵⁶ 359 F.2d 994 (D.C. Cir. 1966), *noted in* 80 HARV. L. REV. 670 (1967).

vision broadcast licensee in Jackson. The petitioners contended that the station discriminated against Negroes, both by failure to give meaningful expression to integrationist views contrary to the segregationist position taken by it and by the relatively tiny segment of religious programming assigned to Negro churches. The Commission held that the petitioners were merely members of the public and had no standing to claim a hearing since there was no showing of competitive economic injury or electrical interference. However, in an opinion which may be the harbinger of a new approach for the whole field of communications, the court of appeals reversed the Commission, radically expanding the grounds for standing by holding the interests of community groups in broadcast programming sufficient to obtain an evidentiary hearing on license renewal applications.

The court of appeals rested its decision on the FCC's "fairness" doctrine, an administrative creation⁵⁷ first adopted in 1949 and later codified in a 1959 amendment to section 315 of the Federal Communications Act.⁵⁸ The statute requires licensees "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance," which in operation means that where a licensee has taken a position he must permit spokesmen for the other side or sides to reply. Of course, the defect of the statute is that, as interpreted, the obligation to provide access for ideas of "public importance" arises only after the licensee has taken a position on an issue. By avoiding controversy the licensee can evade the fairness rule — there is no duty to report the other side of silence. Beyond this, if the licensee chooses to violate the requirements of the doctrine by only reporting one side of a controversy, little can be done about it until license renewal. Formerly not much was done even at the time of renewal since a refusal to renew is an extremely harsh penalty. However, groups and individuals representing the public now have been authorized to challenge license renewal in their own right.

Church of Christ, holding the listener's reaction to programming sufficient to furnish standing to contest license renewal, is one of the most significant cases in public law in recent years. It is unfortunate that the constitutional basis of the case, though readily discernible, was not made more explicit. The court's opinion relied on the FCC's *Report on Editorializing by Broadcast*

⁵⁷ The doctrine was promulgated by the FCC in its *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

⁵⁸ 47 U.S.C. § 315(a) (1964).

Licensees, the document which gave life to the Commission's "fairness" doctrine. The court emphasized principally the primary status of "the 'right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter . . .'"⁵⁹ This statement was accompanied in the *Report* by citation to two formative first amendment cases.⁶⁰

It is noteworthy that prior to the promulgation of the *Report* the alleged unconstitutionality of the fairness doctrine was vigorously asserted by industry witnesses in the hearings before the Commission.⁶¹ To the challenge that programming standards such as the "fairness" doctrine were violations of the first amendment, the Commission made remarks which are quite pertinent to the achievement of a healthy symbiosis between the first amendment and modern mass communications media:⁶²

The freedom of speech protected against governmental abridgment by the first amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement. We believe, on the contrary, that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the first amendment.

Church of Christ marks the beginning of a judicial awareness that our legal system must protect not only the broadcaster's right to speak but also, in some measure, public rights in the communications process. Perhaps this new awareness will stimulate inquiry into the stake a newspaper's readership has in the content of the press. Understanding that *Church of Christ* has a constitutional as well as statutory basis helps to expose the distinction typically made between newspapers and broadcast stations. An orthodox dictum in Judge Burger's otherwise pioneering opinion in *Church of Christ* illustrates the traditional approach:⁶³

⁵⁹ 13 F.C.C. at 1249, cited in 359 F.2d at 999 n.5.

⁶⁰ Associated Press v. United States, 326 U.S. 1 (1945), discussed pp. 1654-55 *supra*; Thornhill v. Alabama, 310 U.S. 88 (1940), discussed pp. 1648-49 *supra*.

⁶¹ Some feeling for the intensity of the debate may be gleaned from Commissioner Jones's separate opinion on the *Report*. 13 F.C.C. at 1259.

⁶² *Id.* at 1256.

⁶³ 359 F.2d at 1003.

A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot.

But can a valid distinction be drawn between newspapers and broadcasting stations, with only the latter subject to regulation? It is commonly said that because the number of possible radio and television licenses is limited, regulation is the natural regimen for broadcasting.⁶⁴ Yet the number of daily newspapers is certainly not infinite⁶⁵ and, in light of the fact that there are now three times as many radio stations as there are newspapers, the relevance of this distinction is dubious. Consolidation is the established pattern of the American press today, and the need to develop means of access to the press is not diminished because the limitation on the number of newspapers is caused by economic rather than technological factors. Nor is the argument that other newspapers can always spring into existence persuasive — the ability of individuals to publish pamphlets should not preclude regulation of mass circulation, monopoly newspapers any more than the availability of sound trucks precludes regulation of broadcasting stations.

If a contextual approach is taken and a purposive view of the first amendment adopted, at some point the newspaper must be viewed as impressed with a public service stamp and hence under an obligation to provide space on a nondiscriminatory basis to representative groups in the community.⁶⁶ It is to be hoped that an awareness of the listener's interest in broadcasting will lead to an equivalent concern for the reader's stake in the press, and that first amendment recognition will be given to a right of access for the protection of the reader, the listener, and the viewer.

V. IMPLEMENTING A RIGHT OF ACCESS TO THE PRESS

The foregoing analysis has suggested the necessity of rethinking first amendment theory so that it will not only be effective in preventing governmental abridgment but will also produce

⁶⁴ See *Report on Editorializing by Broadcasting Licensees*, 13 F.C.C. 1246, 1257 (1940).

⁶⁵ See p. 1644 & note 10 *supra*.

⁶⁶ This is reminiscent of Professor Chafee's query as to whether the monopoly newspaper ought to be treated like a public utility. Contrary to my position, however, he concluded that a legally enforceable right of access would not be feasible. 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 624-50 (1947).

meaningful expression despite the present or potential repressive effects of the mass media. If the first amendment can be so invoked, it is necessary to examine what machinery is available to enforce a right of access and what bounds limit that right.

A. Judicial Enforcement

One alternative is a judicial remedy affording individuals and groups desiring to voice views on public issues a right of non-discriminatory access to the community newspaper. This right could be rooted most naturally in the letter-to-the-editor column⁶⁷ and the advertising section. That pressure to establish such a right exists in our law is suggested by a number of cases in which plaintiffs have contended, albeit unsuccessfully, that in certain circumstances newspaper publishers have a common law duty to publish advertisements. In these cases the advertiser sought nondiscriminatory access, subject to even-handed limitations imposed by rates and space.

Although in none of these cases did the newspaper publisher assert lack of space, the right of access has simply been denied.⁶⁸ The drift of the cases is that a newspaper is not a public utility and thus has freedom of action regardless of the objectives of the claimant seeking access. One case has the distinction of being the only American case which has recognized a right of access. In *Uhlman v. Sherman*⁶⁹ an Ohio lower court held that the dependence and interest of the public in the community newspaper, particularly when it is the only one, imposes the reasonable demand that the purchase of advertising should be open to members of the public on the same basis.

⁶⁷ In *Wall v. World Publishing Co.*, 263 P.2d 1010 (Okla. 1953), a reader of the *Tulsa World* contended that the newspaper's invitation to its readers to submit letters on matters of public importance was a contract offer from the newspaper which was accepted by submission of the letter. The plaintiff argued that, by refusal to publish, the newspaper had breached its contract. Despite the ingenuity of the argument, the court held for defendant. Note, however, that a first amendment argument was not made to the court.

⁶⁸ *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *J.J. Gordon, Inc. v. Worcester Telegram Publishing Co.*, 343 Mass. 142, 177 N.E.2d 586 (1961); *Mack v. Costello*, 32 S.D. 511, 143 N.W. 950 (1913). These cases do not consider legislative power to compel access to the press. Other cases have denied a common law right but have suggested that the area is a permissible one for legislation. *Approved Personnel, Inc. v. Tribune Co.*, 177 So. 2d 704 (Fla. 1965); *Friedenberg v. Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930); *In re Louis Wohl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931); *Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (Sup. Ct. 1954).

⁶⁹ 22 Ohio N.P. (n.s.) 225, 31 Ohio Dec. 54 (C.P. 1919).

But none of these cases mentions first amendment considerations. What is encouraging for the future of an emergent right of access is that it has been resisted by relentless invocation of the freedom of contract notion that a newspaper publisher is as free as any merchant to deal with whom he chooses.⁷⁰ But the broad holding of these commercial advertising cases need not be authoritative for political advertisement. Indeed, it has long been held that commercial advertising is not the type of speech protected by the first amendment,⁷¹ and hence even an abandonment of the romantic view of the first amendment and adoption of a purposive approach would not entitle an individual to require publication of commercial material. However, at the heart of the first amendment is political speech. In this area of speech, a revised, realistic view of the first amendment would permit the encouragement of expression by providing not only for its protection after publication but also for its emergence by publication. The constitutional interest in "uninhibited," "robust" debate, expressed anew in *Times*, supplies new impetus for recognition of a right of access for political and public issue advertising generally.

Nevertheless, courts in two fairly recent cases have refused to require the publication of political advertisements. In *Mid-West Electric Cooperative, Inc. v. West Texas Chamber of Commerce*⁷² an electrical cooperative, a member of the chamber, had tendered an advertisement to be placed in the chamber's magazine. The chamber refused to publish the advertisement because it was "contrary to the policies of the organization," but it offered to publish it if "any presentation of political or economic philosophy" contrary to the chamber's policies were omitted. The court refused to require publication, rejecting the cooperative's contention that, although the chamber had the right to choose what to print, the right was to be enforced by a rule of reasonableness. The candor of the censorship requirement in *Mid-West* highlights an area where groups and individuals are at the mercy of censors, unchecked because of a romantic view of the first amendment. On the other hand, even if a realistic view of the first amendment had been adopted by the court, application of a contextual approach might not have dictated an enforcement of a right of

⁷⁰ See, e.g., *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933).

⁷¹ See *Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027-38 (1967).

⁷² 369 S.W.2d 842 (Tex. Ct. Civ. App. 1963).

access since the medium was not a newspaper, but a magazine, and the scope of its impact on the community was apparently not great.

The second case, *Lord v. Winchester Star, Inc.*,⁷³ presented an even more compelling situation for recognition of a first amendment right of access. A Boston attorney, residing in Winchester, Massachusetts, took a position on a local matter adverse to that taken by the newspaper in town. Although the newspaper gave space to its side of the controversy, it refused to publish Mr. Lord's letter to the editor — hence debate in the only available local forum was effectively cut off. Lord petitioned the Superior Court for a writ of mandamus requiring the editor to publish his letter. The writ was denied and the Supreme Judicial Court of Massachusetts affirmed. Lord appealed to the United States Supreme Court which dismissed for want of jurisdiction and, treating the appeal as a petition for certiorari, denied certiorari. Plaintiff was unable to provoke a single court to write an opinion, illustrating the lack of recognition given to the reader's interest in "freedom of the press." Although these cases would augur ill for judicial creation of a constitutionally recognized right of access, it must be noted that the interdependence of free access and a free press was neither argued to the courts nor considered by them.

The courts could provide for a right of access other than by reinterpreting the first amendment to provide for the emergence as well as the protection of expression. A right of access to the pages of a monopoly newspaper might be predicated on Justice Douglas's open-ended "public function" theory which carried a majority of the Court in *Evans v. Newton*.⁷⁴ Such a theory would demand a rather rabid conception of "state action," but if parks in private hands cannot escape the stigma of abiding "public character," it would seem that a newspaper, which is the common journal of printed communication in a community, could not escape the constitutional restrictions which quasi-public status invites. If monopoly newspapers are indeed quasi-public, their refusal of space to particular viewpoints is state action abridging expression in violation of even the romantic view of the first amendment.⁷⁵

⁷³ 346 Mass. 764, 190 N.E.2d 875 (1963), *appeal dismissed and cert. denied*, 376 U.S. 221 (1964).

⁷⁴ 382 U.S. 296 (1966).

⁷⁵ Cf. *Marsh v. Alabama*, 326 U.S. 501 (1946).

B. A Statutory Solution

Another, and perhaps more appropriate, approach would be to secure the right of access by legislation. A statute might impose the modest requirement, for example, that denial of access not be arbitrary but rather be based on rational grounds. Although some cases have involved a statutory duty to publish,⁷⁶ a constitutional basis for a right of access has never been considered. In *Chronicle & Gazette Publishing Co. v. Attorney General*⁷⁷ legislation limiting the rates for political advertising to the rates charged for commercial advertising was held constitutional by the Supreme Court of New Hampshire. In upholding the statute Justice Kenison stated:⁷⁸ "It is not necessary to consider the extent to which such regulation may go but so long as it does not involve suppression or censorship, the regulation of newspapers is as broad as that over . . . private business." This decision is consistent with a view of the first amendment which permits legislation to effectuate freedom of expression, although the court did not uphold the statute on a theory of constitutional power to equalize opportunities for expression. However, in a dissenting opinion Chief Justice Marble pointed out that the "real purpose" of the statute was to provide for an "economical means of [political] advertising" rather than to counteract the dangers of bribery. Although clearly not put forth for this purpose,⁷⁹ Chief Justice Marble's intriguing analysis of the legislative intent is consistent with an access-oriented view of the first amendment — limiting the amount that can be charged for political advertising provides equal opportunities of access for political candidates and views not buttressed by heavy financial support.

Justice Kenison, writing for the court in *Chronicle*, thought

⁷⁶ *Belleville Advocate Printing Co. v. St. Clair County*, 336 Ill. 359, 168 N.E. 312 (1929); *Lake County v. Lake County Publishing & Printing Co.*, 280 Ill. 243, 117 N.E. 452 (1917) (dictum) (statute setting rates chargeable for official notices imposed no duty to publish); *Wooster v. Mahaska County*, 122 Iowa 300, 98 N.W. 103 (1904) (dictum) (newspaper had no duty to publish and legislature could not impose one).

⁷⁷ 94 N.H. 148, 48 A.2d 478 (1946), *appeal dismissed*, 329 U.S. 690 (1947).

⁷⁸ *Id.* at 153, 48 A.2d at 482.

⁷⁹ I surmise that Chief Justice Marble offers this view of the statute because he believes the legislative interest in equalizing opportunities for political advertising is outweighed by the publisher's freedom of contract. Whether he would think the statute unconstitutional if it were defended on a theory that states have power to provide for "freedom of the press," so long as they do not expressly inhibit it, is arguable.

that the legislature's failure to compel some measure of access to the press made it an easy case:⁸⁰ "The present statute does not compel the plaintiff or any other newspaper to accept political advertising." This remark at least leaves open the validity of a statute requiring access for political advertising. However, such a statute was given explicit judicial consideration in *Commonwealth v. Boston Transcript Co.*,⁸¹ where the elegant and now vanished *Boston Evening Transcript* was charged with violation of a statute requiring newspapers to publish the findings of the state minimum wage commission. The court struck the statute down on a freedom of contract theory, the opinion bare of any mention of free expression problems. Although it was not until 1925 that Justice Sanford observed for the United States Supreme Court that freedom of press was hidden in the underbrush of the fourteenth amendment,⁸² failure to discuss freedom of the press in 1924 is probably not pardonable since the Supreme Judicial Court ignored a provision in the Massachusetts constitution prohibiting abridgment of freedom of the press.

But the Massachusetts court in *Boston Transcript* stopped short of suggesting that any statutory compulsion to publish was an invasion of freedom to contract. Rather, the case clearly implies that some regulation in this area is permissible. But it did find one of the constitutional defects of the statute to be the fact that no legitimate state interest was served by the restriction on the publisher. The court was convinced that even without the statute the minimum wage board would "have ample opportunity to print its notice in other newspapers than that published by the defendant at the statutory price."⁸³ This less pressing need for publication contrasts with the more compelling state interest in equalizing opportunities to reach the electorate presented in *Chronicle* and the interest in access presented by the contemporary character of the mass media, illustrating the importance of a contextual approach.

Another thread common to the *Chronicle* and *Boston Transcript* cases was the concern of both courts with the increased risk of

⁸⁰ 94 N.H. 148, 152-53, 48 A.2d 478, 481 (1946). Another important aspect of the case was the court's answer to the argument that regulation of political advertising rates in the press, without corresponding regulation of other advertising facilities such as job printing and billboard advertising, was unconstitutionally discriminatory: "It is sufficient answer to this argument that the 'state is not bound to cover the whole field of possible abuses.'" *Id.* at 152, 48 A.2d at 481.

⁸¹ 249 Mass. 477, 144 N.E. 400 (1924).

⁸² *Gitlow v. New York*, 268 U.S. 652 (1925).

⁸³ 249 Mass. 477, 484, 144 N.E. 400, 402 (1924).

libel litigation if a duty to publish were compelled by statute. In *Chronicle* the majority did not find the objection fatal, but Chief Justice Marble relied specifically on it in his dissent; in *Boston Transcript* at least one reason for invalidation of the statute was the fear that the publisher might be exposed to libel suits. However, the treatment of editorial advertisements by the *Times* Court substantially reduces the risk of the publisher's liability for defamation. Furthermore, the statute granting the right of access could provide that the publisher would not be held for libel for publishing a statement under the statutory mandate.⁸⁴

A recent United States Supreme Court case, *Mills v. Alabama*,⁸⁵ places new significance on opportunity for reply in the press and thus provides by implication new support for a statutory right of access to the press. In *Mills*, as in *Chronicle*, the state legislature had regulated newspapers under a state corrupt practices act. The Alabama statute⁸⁶ made it a criminal offense to electioneer or solicit votes "on the day on which the election affecting such candidates or propositions is being held." The *Birmingham Post Herald*, a daily newspaper, carried a very strong editorial urging the electorate to adopt a mayor-council form of government in place of the existing commission form. The editor of the newspaper, who had written the editorial, was arrested on a charge of violating the statute. The trial court sustained a demurrer to the complaint, but the Supreme Court of Alabama reversed on the ground that reasonable restriction of the press by the legislature was permissible.

In reversing this decision, Justice Black's opinion for the Supreme Court was based on the familiar concept that the press is a kind of constitutionally anointed *defensor fidei* for democracy:⁸⁷

The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by gov-

⁸⁴ In *Farmer's Educ. & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959), a station was held not liable for the defamatory utterance of a candidate exercising his right to speak under the Federal Communications Act of 1934, 47 U.S.C. § 315 (Supp. V, 1964).

⁸⁵ 384 U.S. 214 (1966).

⁸⁶ ALA. CODE tit. 17, § 285 (1958).

⁸⁷ 384 U.S. at 219.

ernmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

Mr. Justice Black observes that insofar as the Alabama statute is construed to prohibit the press from praising or criticizing the government, it frustrates the informing function of the press. But all this is familiar theory. What makes the *Mills* case something of a departure, and in its own way quietly original, is an interesting commentary by Justice Black. In rebutting Alabama's claim that the legislature's aim was a constitutionally permissible one—to purge the air of propaganda and induce momentary reflection in a brief period of tranquillity before election day—Justice Black suggested that this argument failed on its own terms since "last-minute" charges could be made on the day before election and no statutory provision had been made for effective answers:⁸⁸ "Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and counter-charges.'"

This statement suggests a substitution of the sensitive query "Does the statute prohibit or provide for expression?" for the more wooden and formal question "Does the statute restrain the press?" It is of course clear that *Mills* did not grant a constitutionally endorsed status to legislative or judicial provisions conferring a right of access to assure debate. Quite the contrary, Justice Black prefaced his discussion of the significance of lack of opportunity to reply to "last-minute" charges with the remark that the state's argument about the reflective intent of the statute is illogical "*even if it were relevant* to the constitutionality of the law." But it is the writer's contention that the existence of adequate opportunity for debate, for charge and countercharge, is an extremely relevant consideration in any determination of the constitutionality of legislation in this area. Justice Black's inquiry into the pragmatics of debate is an encouraging step in this direction.

Evidence of an awakening to a more realistic view of the first amendment can be found in another recent case, *Time, Inc. v. Hill*.⁸⁹ Directly presented with the issue of whether the first amendment is always to be interpreted as a grant of press im-

⁸⁸ *Id.* at 220.

⁸⁹ 385 U.S. 374 (1967).

munity and never as a mandate for press responsibility, a divided Court extended the *Times* doctrine by immunizing newspapers from liability under the New York right of privacy statute unless there is a finding that the publication was made in knowing or reckless disregard of the truth. But in a sensitive and thoughtful opinion, concurring in part and dissenting in part, Justice Harlan protested this "sweeping extension of the principles" of *Times*, largely because he thought an attack on private individuals was unlikely to create the "competition among ideas" which an attack on a public figure might create; the *Hill* situation was thought to be an area where the "'marketplace of ideas' does not function."⁹⁰ I would argue that the marketplace theory will not function even in the *Times* situation without legal imposition of affirmative responsibilities. Nonetheless, Justice Harlan's words may augur well for the future, as may the attitude expressed in Justice Fortas's dissent, joined in by the Chief Justice and Justice Clark:⁹¹

The courts may not and must not permit either public or private action that censors the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law — that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions.

The disenchantment of Justices Harlan and Fortas with the mindless expansion of *Times* discloses a new awareness of the range of interests protected by the first amendment.

Constitutional power exists for both federal and state legislation in this area. Turning first to the constitutional basis for federal legislation, it has long been held that freedom of expression is protected by the due process clause of the fourteenth amendment.⁹² The now celebrated section five of the fourteenth amendment, authorizing Congress to "enforce, by appropriate legislation" the provisions of the fourteenth amendment, appears to be as resilient and serviceable a tool for effectuating the freedom of expression guarantee of the fourteenth amendment as for implementing the equal protection guarantee. Professor Cox has noted that our recent experience in constitutional adjudica-

⁹⁰ *Id.* at 407-08.

⁹¹ *Id.* at 420.

⁹² *Gitlow v. New York*, 268 U.S. 652 (1925).

tion has revealed an untapped reservoir of federal legislative power to define and promote the constitutional rights of individuals in relation to state government.⁹³ When the consequence of private conduct is to deny to individuals the enjoyment of a right owed by the state, legislation which assures public capacity to perform that duty should be legitimate.⁹⁴ Alternatively, legislation implementing responsibility to provide access to the mass media may be justified on a theory that the nature of the communications process imposes quasi-public functions on these quasi-public instrumentalities.⁹⁵

It is interesting to note that the late Professor Meiklejohn did not anticipate the new uses that the long dormant section five of the fourteenth amendment could be put in order to implement in a positive manner the great negatives of section one of the fourteenth amendment. Consequently, he believed that the only solution to what I have styled the romantic approach to the first amendment was by way of constitutional amendment. Mr. W. H. Ferry of the Center for Democratic Institutions has made public Professor Meiklejohn's despair at the unintended result which had been wrought by the first amendment — freedom of the press had become an excuse for the controllers of mass communication to duck responsibility and to exercise by default the same censorship role which had been denied the government.⁹⁶ Mr. Ferry says that shortly before his death Professor Meiklejohn proposed, in an unpublished paper for the Center, that the first amendment be revised by adding the following:⁹⁷

In view of the intellectual and cultural responsibilities laid upon the citizens of a free society by the political institutions of self-government, the Congress, acting in cooperation with the several states and with nongovernmental organizations serving the same general purpose, shall have power to provide for the intel-

⁹³ Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

⁹⁴ *United States v. Price*, 383 U.S. 787 (1966); *United States v. Guest*, 383 U.S. 745 (1966); *Bullock v. United States*, 265 F.2d 683 (6th Cir.) (by implication), cert. denied, 360 U.S. 909 (1959); *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956) (by implication). See generally Cox, *supra* note 93, at 110-14.

⁹⁵ *Evans v. Newton*, 382 U.S. 296 (1966); *Marsh v. Alabama*, 326 U.S. 501 (1946). Both decisions find that private property may become quasi-public without a statute in extreme cases. The Court should surely defer to a congressional determination in an arguable case.

⁹⁶ Ferry, *supra* note 17.

⁹⁷ *Id.* at 301.

lectual and cultural education of all of the citizens of the United States.

What is especially interesting about Professor Meiklejohn's suggested addition is the depth of its criticism of contemporary first amendment theory. However, it is not necessary to amend the first amendment to attain the goal of greater access to the mass media. I do not think it adventurous to suggest that, if Congress were to pass a federal right of access statute, a sympathetic court would not lack the constitutional text necessary to validate the statute. If the first amendment is read to state affirmative goals, Congress is empowered to realize them. My basic premise in these suggestions is that a provision preventing government from silencing or dominating opinion should not be confused with an absence of governmental power to require that opinion be voiced.

If public order and an informed citizenry are, as the Supreme Court has repeatedly said, the goals of the first amendment, these goals would appear to comport well with state attempts to implement a right of access under the rubric of its traditional police power. If a right of access is not constitutionally proscribed, it would seem well within the powers reserved to the states by the tenth amendment of the Constitution to enact such legislation. Of course, if there were conflict between federal and state legislation, the federal legislation would control. Yet, the whole concept of a right of access is so embryonic that it can scarcely be argued that congressional silence preempts the field.

The right of access might be an appropriate area for experimental, innovative legislation. The right to access problems of a small state dominated by a single city with a monopoly press will vary, for example, from those of a populous state with many cities nourished by many competing media. These differences may be more accurately reflected by state autonomy in this area, resulting in a cultural federalism such as that envisaged by Justice Harlan in the obscenity cases.⁹⁸

C. Administrative Feasibility of Protecting A Right of Access

If a right of access is to be recognized, considerations of administrative feasibility require that limitations of the right be

⁹⁸ *Ginzburg v. United States*, 383 U.S. 463, 493 (1966) (dissenting opinion); *Roth v. United States*, 354 U.S. 476, 503-07 (1957) (dissenting opinion).

carefully defined. The recent case of *Office of Communication of the United Church of Christ v. FCC*⁹⁹ suggests, by analogy, the means by which such a right of nondiscriminatory access can be rendered judicially manageable. In *Church of Christ* the court, while expanding the concept of standing, did not hold that every listener's taste provides standing to challenge the applicant in broadcast license renewal proceedings. Similarly, the daily press cannot be placed at the mercy of the collective vanity of the public. *Church of Christ* suggests an approach to give bounds to a right of access which could be utilized cautiously, but nevertheless meaningfully.

The organizations and individuals requesting standing in *Church of Christ* represented the Negro community in Jackson, Mississippi, almost half of the city's population. Therefore, the court of appeal's grant of standing did not hold that all those who sought standing to challenge the application for license renewal were entitled to it. The court held, instead, that certain of the petitioners could serve as "responsible representatives" of the Negro community in order to assert claims of inadequate and distorted coverage.

A right of access, whether created by court or legislature, necessarily would have to develop a similar approach. One relevant factor, using *Church of Christ* as an analogue, would be the degree to which the petitioner seeking access represents a significant sector of the community. But this is perhaps not a desirable test — "divergent" views, by definition, may not command the support of a "significant sector" of the community, and these may be the very views which, by hypothesis, it is desirable to encourage. Perhaps the more relevant consideration is whether the material for which access is sought is indeed suppressed and underrepresented by the newspaper. Thus, if there are a number of petitioners seeking access for a particular matter or issue, it may be necessary to give access to only one. The unimpressed response of Judge Burger in *Church of Christ* to the FCC's lamentations about that enduring tidal phenomenon of the law, the "floodgates," strikes an appropriate note of calm:¹⁰⁰ "The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out."

Utilization of a contextual approach highlights the importance of the degree to which an idea is suppressed in determining

⁹⁹ 359 F.2d 994 (D.C. Cir. 1966); see pp. 1663-66 *supra*.

¹⁰⁰ 359 F.2d at 1006.

whether the right to access should be enforced in a particular case. If all media in a community are held by the same ownership, the access claim has greater attractiveness. This is true although the various media, even when they do reach the same audience, serve different functions and create different reactions and expectations. The existence of competition within the same medium, on the other hand, probably weakens the access claim, though competition within a medium is no assurance that significant opinions will have no difficulty in securing access to newspaper space or broadcast time. It is significant that the right of access cases that have been litigated almost invariably involve a monopoly newspaper in a community.¹⁰¹

VI. CONCLUSION

The changing nature of the communications process has made it imperative that the law show concern for the public interest in effective utilization of media for the expression of diverse points of view. Confrontation of ideas, a topic of eloquent affection in contemporary decisions, demands some recognition of a right to be heard as a constitutional principle. It is the writer's position that it is open to the courts to fashion a remedy for a right of access, at least in the most arbitrary cases, independently of legislation. If such an innovation is judicially resisted, I suggest that our constitutional law authorizes a carefully framed right of access statute which would forbid an arbitrary denial of space, hence securing an effective forum for the expression of divergent opinions.

With the development of private restraints on free expression, the idea of a free marketplace where ideas can compete on their merits has become just as unrealistic in the twentieth century as the economic theory of perfect competition. The world in which an essentially rationalist philosophy of the first amendment was born has vanished and what was rationalism is now romance.

¹⁰¹ Cf., e.g., *In re Louis Wohl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931).