Access Reconsidered

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Like old soldiers, old law review articles usually just fade away. This one didn't. In a remarkable speech at this symposium, Justice Breyer engaged with the issues raised in the *Access to the Press*[1] paper as if it had been written yesterday. But it wasn't written yesterday. It was written forty years ago. In light of all this, I thought it might be useful for me to reflect on the major themes of *Access to the Press* and see what it has to say to the media world of today.

There were three themes I was interested in developing in that paper that I am going to talk about today. First, I wanted to develop the theme that the marketplace of ideas as portrayed in the media, the courts, and the academy was a phantom. It was romance, not reality. The second theme was that private power as well as government power could inhibit or obstruct full and free discussion fully as much as government actors. Technology and patterns of media concentration had combined to place a few companies with the power to control access to the content to which the majority of the population was exposed. The third theme I wanted to advance was that a right of access was one way to remedy this imbalance in the opinion process. I am going to discuss each of these themes to determine whether they are still problems and to what extent the issues they present have changed. I am going to conclude by discussing whether an access remedy is still necessary in the age of the Internet.

I. The Marketplace of Ideas Rationale

Access to the Press began with the idea that our First Amendment theory had been captured by a romantic conception of free expres-

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1 Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

sion.[2] Therefore, legal intervention was needed "if novel and unpopular ideas [were] to be assured a forum."[3] There is certainly a wider variety of forums for "novel and unpopular ideas" than there used to be. For example, the Internet and the proliferation of blogs, e-mail, chat rooms, and Web sites that have blossomed in cyberspace have served to relieve to a very substantial extent some of the distortions in our national dialogue. But as I shall try to demonstrate, the Internet has not resolved all the many dimensions of the problem of access.

An early effort to deal with the problem of access and to create a real and functioning marketplace of ideas was broadcasting's fairness doctrine, the fortunes of which illustrate the surprising staying power of the romantic conception of the marketplace of ideas rationale of the First Amendment. The doctrine originated in the early days of broadcasting when the Federal Communications Commission ("FCC") prohibited broadcasters from editorializing for fear that their opinions would monopolize debate over a limited-access medium.[4] As broadcasting matured, FCC Commissioner Robert Jones lamented that broadcasters had not fought against the no-editorializing rule.[5] Clearly, it put broadcast journalists at a disadvantage vis-à-vis their print media peers. Finally, the FCC abandoned the blanket no-editorializing policy, instead declaring that broadcasters could editorialize as long as they agreed to provide an overall balanced presentation of controversial issues of public importance.[6] The fairness doctrine was thus born.

This doctrine attempted to give voice to viewpoints that might otherwise be excluded by basically setting rules for the presentation of controversial issues of public importance. It did not, however, require that every assertion be accompanied by its opposite. Instead, it required that over the length of a broadcaster's license period, there should be a balanced presentation of controversial ideas.[7]

An example of the mischief the marketplace of ideas rationale continues to cause can be found in the FCC's justification for abolish-

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2 *Id.* at 1641.

3 *Id.*

4 *See, e.g.*, Mayflower Broad. Corp., 8 F.C.C. 333, 341 (1940).

5 *See* Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1261 n.1 (1949) (separate views of Commissioner Robert F. Jones) ("[R]adio should remember the history and experience of newspapers in their fight for freedom of the press.").

6 *See id.* at 1252–54.

7 *See id.* at 1258 (requiring that "programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community").

ing the fairness doctrine. When it abolished the doctrine in 1987,[8] the FCC relied primarily on a marketplace of ideas rationale: "[A] cardinal tenet of the First Amendment," it declared, "is that government intervention in the marketplace of ideas of the sort involved in the enforcement of the fairness doctrine is not acceptable and should not be tolerated."[9] This "cardinal tenet" of the First Amendment was not entirely secure, however, because at the very time the FCC made this statement, it acknowledged that it was contradicted by the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*.[10] That case had upheld the fairness doctrine on the precise ground that it implemented the First Amendment.[11] *Red Lion*, as the FCC admitted, "sanctions restrictions on speakers in order to promote the interest of the viewers and listeners."[12] Nevertheless, the FCC justified its defiance of *Red Lion* on the ground that that decision's view of the marketplace of ideas was "squarely at odds with the general philosophy underlying the First Amendment."[13]

Recently, some members of Congress have expressed interest in resurrecting the fairness doctrine.[14] This is not surprising, given that

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8 *See* Syracuse Peace Council, 2 F.C.C.R. 5043, 5057 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989).

9 *Id.* at 5056.

10 Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

11 *See id.* at 375.

12 *Syracuse Peace Council*, 2 F.C.C.R. at 5057.

13 *Id.*

14 *See* John Eggerton, *Air Wars Break Out over Fairness Doctrine*, BROADCASTING & CABLE, July 9, 2007, at 3, *available at* http://www.broadcastingcable.com/article/CA6458125.html. ("Sen. Richard Durbin (D-Ill.) joined [Sen. John] Kerry's [(D-Mass.)] call for reinstatement [of the fairness doctrine] while Sen. Diane Feinstein (D-Calif.) said she was looking into it."). Similar support for bringing back the fairness doctrine was voiced by Democrats in the House of Representatives. Rep. Dennis Kucinich (D-Ohio), who is the chairman of the Domestic Policy Subcommittee of the House Oversight and Government Reform Committee, and Rep. John Dingell (D-Mich.), chairman of the House Energy and Commerce Committee, have indicated an intent to hold hearings on resurrecting the fairness doctrine. *See* John Eggerton, *Kucinich to Hold Fairness Doctrine Hearings*, BROADCASTING & CABLE, Jan. 19, 2007, *available at* http://www.broadcastingcable.com/article/CA6408453.html; Ira Teinowitz, *House Proposes Ban on Fairness Doctrine Funding*, TELEVISIONWEEK, June 8, 2007, *available at* http://www.tvweek.com/news/2007/06/house_proposes_ban_on_fairness.php.

Some Republican legislators on Capitol Hill have been, and remain, quick to try to counter efforts to revive the fairness doctrine. *See* Randy Hall, *Plan to Restore Fairness Doctrine Still on Track, Analyst Says*, CNS NEWS, July 5, 2007, http://www.cnsnews.com/Culture/Archive/200707/CUL20070705a.html ("Rep. Mike Pence (R-Ind.) has proposed an amendment to appropriations legislation to prevent the [FCC] from spending any money in 2008 to reinstate the Fairness Doctrine.").

The White House has told broadcasters that President Bush would veto legislation restoring the fairness doctrine. Jim Puzzanghera, *Democrats Speak Out for Fairness Doctrine*, L.A. TIMES,

the FCC ignored the understanding of the marketplace of ideas set forth by the Supreme Court, which stated in *Red Lion*: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[15] The Supreme Court in *Red Lion* sought to validate a governmental effort to achieve a functioning marketplace of ideas rather than a mythical one, and reinstatement of the fairness doctrine would further that goal.[16]

Overall, the FCC experience with the fairness doctrine is a sad illustration of the extent to which agencies become allies of the industry that they are charged to regulate. The FCC embraced the marketplace of ideas as a metaphor, but instead of promoting the concept, it has done all that it can to keep this metaphor from becoming a reality. For example, the FCC abolished not only the fairness doctrine,[17] but the personal attack rules as well.[18]

The personal attack rules functioned as a corollary to the fairness doctrine. These rules provided that if a broadcast licensee permitted an attack on the "honesty, character, or integrity" of an identified person or group, that person or group had to be provided an opportunity to respond without cost.[19] Moreover, the broadcaster had an affirmative obligation to notify the party attacked and provide the party with a transcript.[20] This right to respond, however, could only be invoked if

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July 23, 2007, at C1. In addition, FCC Chairman Kevin Martin has also announced his opposition to resurrecting the doctrine. *Id.* Under these circumstances, Congress is presently unlikely to enact the fairness doctrine into new federal legislation unless the 2008 election yields significant changes in both the White House and Congress.

15 *Red Lion*, 395 U.S. at 390.

16 I have been a defender of the fairness doctrine, but its revival, although desirable, would not itself provide a general right of access. Professor Magarian, in his comprehensive evaluation of the fairness doctrine for this symposium, has accurately observed that in my writings I have stressed "the clumsiness of [the fairness doctrine's] administrative enforcement." *See* Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. 845, 847 (2008). The history of the doctrine shows that although it had many successful moments, it was often thwarted by unnecessary procedural barriers and sometimes implemented by enforcement policies that were often sluggish and even hostile. Indeed, I believe the fairness doctrine issue in *Syracuse Peace Council* was enforced because it could serve, as in fact it did, as a vehicle to destroy the doctrine. *See supra* notes 8–13 and accompanying text. Nevertheless, as Professor Magarian points out, I have defended the doctrine as well as its accompanying regulations, such as the personal attack rules, because they were, as he says, "useful paving stones on the road to fulsome access rights." *See* Magarian, *supra*, at 847.

17 *See supra* note 8 and accompanying text.

18 *See infra* notes 22–23 and accompanying text.

19 47 C.F.R. § 73.1920(a)(3) (1991).

20 *Id.* § 73.1920(a)(1)–(2).

the personal attack occurred in the course of a discussion on a controversial issue of public importance.[21] These rules were not often invoked. When they were, the party seeking to avail itself of this right of reply usually lost.[22] This was because the FCC usually ruled that the broadcast at issue did not involve an issue of public importance.[23] Nevertheless, the very existence of the personal attack rules helped to provide some recourse to ad hominem personal attacks on radio, recourse which does not exist today.[24]

In 1999, the Radio-Television News Directors Association challenged the personal attack rules on First Amendment grounds. In the ensuing case, the D.C. Circuit ordered the FCC to justify the rule if the FCC intended to retain it.[25] The FCC did not respond to this mandate and, as a result, the court ordered the FCC to immediately repeal the order.[26] The FCC's lack of concern for the viability of the personal attack rules is further evidence of an absence of commitment to ensuring the existence of a true, free-flowing marketplace of ideas.

We still assume too easily that ideas can freely enter the marketplace of ideas. This is a mistake. As a basis for the First Amendment, the marketplace of ideas rationale stated a worthy objective. But as a description of the opinion process, it was not descriptive then, nor is it now. Indeed, the marketplace of ideas metaphor has been mischievous because its popularity suggests that what we have is a freely accessible opinion process.

II. The Problem of Private Power

The second theme discussed in the *Access to the Press* paper was the problem of private media power.[27] Government is not the only

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21 *See id.* § 73.1920(a).

22 *See, e.g.*, Jerome A. Barron, *The Right of Reply to the Media in the United States—Resistance and Resurgence*, 15 HASTINGS COMM. & ENT. L.J. 1, 7–8 (1992).

23 *See* Robert W. Leweke, *Rules Without a Home: FCC Enforcement of the Personal Attack and Political Editorial Rules*, 6 COMM. L. & POL'Y 557, 571–72 (2001).

24 For examples of complaints by individuals alleging violations of the personal attack rules, see Letter to Professor David Berkman, 6 F.C.C.R. 6640 (1991); Letter to John Price, Esq., 6 F.C.C.R. 7122 (1991). For a discussion of these cases, see Barron, *supra* note 22, at 6–8. Although these complaints were unsuccessful, it is my belief that the very existence of the personal attack rules contributed to civility and fairness in broadcasting. The *Red Lion* decision, it should be remembered, resulted from FCC enforcement of the personal attack rules. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 370–71 (1969).

25 Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872, 889 (D.C. Cir. 1999).

26 Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269, 270–72 (D.C. Cir. 2000); *see also* Jerome A. Barron, *Rights of Access and Reply to the Media in the United States Today*, 25 COMM. & L. 1, 9 (2003).

27 *See* Barron, *supra* note 1, at 1644–47.

obstacle to the uncensored emergence and dissemination of ideas. Private sources can easily "determine not only the content of information but its very availability."[28]

One of the themes of the *Access to the Press* paper in this regard was the problem of accelerating patterns of concentration of ownership in both the print and the electronic media. There is still an enduring insensitivity to the relationship between the massive concentration of ownership in the media and the effects such concentration has on diversity of ideas and on the domain of content itself. Illustrative of this has been congressional willingness to allow a single company to reach ever larger portions of the nationwide broadcast audience.[29]

Some of the more famous personalities in the history of the American media were quite candid about their intention to use the media voices they owned to influence the opinion process. One such personality, William Randolph Hearst, owned a national chain of newspapers. Hearst's biographer, David Nasaw, comments that Hearst maintained absolute editorial control over his newspapers: "Little, if anything, appeared in his magazines or papers—especially on the front page or the editorial page—without his approval. When one or the other of his editors dared venture off on his own, he was swiftly reprimanded."[30] Nasaw describes a blistering letter Hearst wrote in 1929 on this point to C.S. Stanton, the editor of the *Chicago Herald-Examiner*, which stated: "I have always been in direct charge of the editorial departments of my papers. . . . You will please conduct the paper in all its editorial departments according to the instructions which you receive from me."[31]

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28 *Id.* at 1643.

29 Prior to the Telecommunications Act of 1996, the FCC did not permit any single entity to reach more than twenty-five percent of the nationwide broadcast audience. *See* Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 100 F.C.C.2d 74, 97 (1985). The Telecommunications Act of 1996 raised the broadcast audience cap to thirty-five percent. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(b), 110 Stat. 56, 111 (amending 47 C.F.R. § 73.3555). In 2004, Congress raised the nationwide audience cap in broadcasting to thirty-nine percent. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629(1), 118 Stat. 3, 99 (amending § 202(c)(1)(B) of the Telecommunications Act of 1996).

30 David Nasaw, The Chief: The Life of William Randolph Hearst 385 (2000).

31 *Id.* Hearst's editorial control did not consist solely of occasional expressions of opinion on issues of the day that interested him on a sometime basis. Hearst wanted complete control and expressed his unequivocal wish to exercise it. As he instructed Edmond Coblentz, then managing editor of the *New York American*: "The editorials I write are not written as individual policies. They are written to outline policies for the paper to be pursued at every opportunity thereafter until rescinded." *Id.* Even during Hearst's later years, when he was beset by stock-

Hearst's contemporary, Joseph Pulitzer, was no less insistent that his media properties reflect his views. Pulitzer clearly stated his ambition for his *New York World*: "I want the *World*'s Democratic sympathies plain and unmistakable, while retaining full measure of honest independence. The *World* should be more powerful than the President."[32]

In the rising medium of broadcasting, a somewhat different picture was emerging. William S. Paley, the architect of CBS in its halcyon days, had been persuaded to see radio broadcasting as something more than an entertainment medium or a vehicle for his own opinions.[33] Fairness and balance were important goals sought by CBS during its ascent. Indeed, Paley often "claimed to have 'invented' a fairness policy for broadcasting that was eventually codified by the [FCC]."[34] However, Paley's biographer, Sally Bedell Smith, points out that his allegiance to the fairness rules that he created—rules which, as we have seen, would be quite alien to Hearst—was not inflexible: "[I]f principles collided with profits or ran afoul of one his friends, Paley made exceptions to the rules."[35] Nevertheless, Paley had a sense of trusteeship that distinguished him from some of his media-owner contemporaries. Media owners such as Paley were not common in his time nor are they today.

In *Access to the Press*, I observed that the owners of the giant media conglomerates, unlike the media owners of the past (such as Joseph Pulitzer or William Randolph Hearst), are indifferent to content.[36] At the time I was writing about the need for access to the media, Marshall McLuhan of "the medium is the message" fame was writing that the very nature of modern media is at war with a point-of-view orientation.[37] McLuhan thought that we had become mesmerized by new forms of communication to the point of indifference to

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holder suits and other troubles, he maintained complete control: "The text of every editorial was sent to him, edited by him, and set in type only when and as approved by him." *Id.* at 551.

32 W.A. SWANBERG, PULITZER 386 (1967).

33 *See* SALLY BEDELL SMITH, IN ALL HIS GLORY: THE LIFE OF WILLIAM S. PALEY 159 (1990).

34 *Id.* Paley was very clear on why he wanted CBS to be fair and balanced: "[Paley] initiated rules for fairness in the early 1930s because he was worried that broadcasters would use their power to promote their own views on the air, or that government might step in and take over broadcasting." *Id.* at 159–60. As Paley himself once commented: "These [fairness] guidelines were not imposed on us by government. They were imposed on us by our own volition." *Id.* at 160.

35 *Id.* at 166.

36 *See* Barron, *supra* note 1, at 1645–46.

37 *Id.* at 1645 (citing MARSHALL MCLUHAN, UNDERSTANDING MEDIA 203–04 (1964)).

their content and to the content of the older media.[38] Influenced by this insight, I wrote: "The contemporary structure of the mass media direct the media away from rather than toward opinion-making."[39]

The head of Viacom, Sumner Redstone, has famously said that "content is king."[40] But the content of which he speaks does not dwell in any specific kingdom. It has no geography. The content that is king is not moored to or relevant to any particular community. This is not simply an American phenomenon. The journalist Adam Gopnik has described becoming a cable subscriber in Paris: "When the cable television man came to hook us up . . . [he] ran through the thirty-odd channels . . . . 'Here is CNN, news in America. Here is MTV. Here is French MTV . . . . Here is Euronews, in English. Here is Eurosport.'"[41] Gopnik realized he was confronted with "the same familiar ribbon of information and entertainment that girdles the world now."[42] Gopnik described it as "electric rain[: a]ll you have to do is hold out a hand to catch it."[43] But what you catch is not necessarily what you want or what you need.

I think now I may have overstated the indifference to content by media owners. The blandness still endures but it coexists with a certain shrillness and intolerance of other points of view. Talk radio and cable television news channels are replete with commentators who feed—indeed, incite—the already converted.

Some media owners are interested in shaping opinion and others are indifferent to content. But neither monologue nor indifference is the proper response a democratic society should make to fulfill the task of informing its citizens. To understand that content and media ownership have a widely acknowledged relationship, one need look no further than the recent controversy that arose over the offer by Rupert Murdoch and his News Corporation to acquire the *Wall Street Journal*. This controversy sheds some light on how significant a role private restraints on expression play in our contemporary media discourse.

Media critics and some members of the Bancroft family, the controlling shareholders of the *Wall Street Journal*, have been critical of

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38 *Id. See generally* MARSHALL MCLUHAN, UNDERSTANDING MEDIA (1964).

39 Barron, *supra* note 1, at 1646.

40 Interview by Kai Ryssdal with Sumner Redstone, Chairman of CBS & Viacom, for Marketplace (May 15, 2006), *available at* http://marketplace.publicradio.org/segments/corneroffice/redstone_transcript.html.

41 ADAM GOPNIK, PARIS TO THE MOON 37–38 (2000).

42 *Id.* at 38.

43 *Id.*

Murdoch's proposal to buy the *Wall Street Journal* for fear that the objectivity and integrity for which the columns of that paper are known may be diminished in the service of Murdoch's financial interests or ideological positions.[44] One news account reported the family's position as being willing to sell only if Murdoch pledged to shield the *Wall Street Journal* "from editorial interference from him."[45] Ultimately, the Bancrofts accepted Murdoch's offer but the resulting wall between ownership and control does not appear to be built to last.[46] Nor is the current concern over the future independence of the *Wall Street Journal* a unique situation. Commenting on the proposal to acquire the *Wall Street Journal*, longtime journalist and educator Ben Bagdikian pointed out that in all news media "there is a strong history of owners and publishers dictating the editorial stance."[47]

The accelerating pace of mass media ownership concentration in the United States can be tracked by studying Bagdikian's successive analyses of the state of media monopoly in the United States over a period of more than twenty years. In 1983, Bagdikian found that fifty corporations dominated news media in the United States.[48] In his 1992 study, the number was down to twenty-three.[49] By 2000, the number of companies controlling the majority of media outlets in the United States had dwindled to six.[50] And in 2004, Bagdikian's re-

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44 *See* Richard Pérez-Peña, *2 Sides Meet Face to Face on Dow Jones*, N.Y. TIMES, June 5, 2007, at C1, *available at* http://www.nytimes.com/2007/06/05/business/media/05dow.html.

45 *Id.* In order to implement their no-interference condition, the Bancroft family is reported to have proposed the establishment of a board of independent overseers with "the power to hire and fire top editors." *Id.* Such a proposal was reported to be unacceptable to Mr. Murdoch. *Id.* A counterproposal suggesting a somewhat less independent board with some members appointed by Murdoch apparently met with greater favor. *See id.*

46 The Bancrofts accepted News Corporation's offer to purchase Dow Jones & Co., publishers of the *Wall Street Journal*, for $5 billion. *See* Martin Peers, Suzanne Vranica & Stephanie King, *Deal Will Test a Media Titan's Instincts*, WALL ST. J., Aug. 1, 2007, at B1, *available at* http://online.wsj.com/article/SB118591375335083761.html.

In a report to the readers of the *Wall Street Journal*, its publisher, Gordon Crovitz, sought to explain what the acquisition would mean to them. Crovitz pointed out that News Corporation and the Bancrofts agreed to continue the standards set forth in the Dow Jones Code of Conduct. L. Gordon Crovitz, *A Report to Our Readers*, WALL ST. J., Aug. 1, 2007, at A14, *available at* http://online.wsj.com/article/SB118592510130784008.html. Furthermore, under the agreement the "top editors of the Journal and Dow Jones Newswires [would] remain in their jobs." *Id.* Crovitz said that some of the concerns that surrounded the controversy about the acquisition were "illegitimate." *Id.* Specifically, Crovitz objected to "the notion that somehow ownership could be separated from control." *Id.* In contrast to Crovitz, I contend exactly that.

47 Pérez-Peña, *supra* note 44.

48 *See* BEN H. BAGDIKIAN, THE MEDIA MONOPOLY xvi (1st ed. 1983).

49 BEN H. BAGDIKIAN, THE MEDIA MONOPOLY 21 (4th ed. 1992) ("Today . . . the number of giants that get most of the business has shrunk from forty-six to twenty-three.").

50 BEN H. BAGDIKIAN, THE MEDIA MONOPOLY x (6th ed. 2000).

search indicated that only five corporations—Time Warner, Disney, Murdoch's News Corporation, Bertelsmann of Germany, and Viacom (formerly CBS)—controlled most of the media industry in the United States.[51]

Interestingly, some of the great media entrepreneurs of our time have learned that media combinations and media size present some troubling problems. The so-called synergies which are used to justify mergers of different media under one ownership raise problems besides placing too much power over the public's opinion into few hands. Cable visionary and founder of CNN Ted Turner was happy at first to have AOL acquire his Time Warner. After Turner lost $7 billion on the deal,[52] he learned to his sorrow that media consolidation had its downside. Media critic Ken Auletta described Turner's views:

> Within media conglomerates, [Turner] told me, journalistic divisions like CNN shrink [as a result of media mergers], and corporate executives may try to
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> > avoid doing stories that are critical of the big companies, like the oil companies and the automobile companies. It's not easy to do stories that are critical of [General Electric ("GE")]—you know, nuclear-power-plant stories. When was the last time you saw stories on TV critical of GE or DuPont? Better to stay away from the corporations—they're the sponsors. That's the danger.[53]

I pointed out in *Access to the Press* that there existed an "inequality in the power to communicate ideas just as there is inequality in economic bargaining power."[54] But there is a factor that aggravates this inequality: the tendency of the courts to treat the free speech rights of private actors as fungible with no regard to differentials in communicating power. As far as the mainstream media are concerned, the courts still see free speech rights as fungible. The Supreme Court stated this dominant view very succinctly in the 1976 campaign finance case *Buckley v. Valeo*.[55] In *Buckley*, the Court took aim at the argument that differentials in financial resources could influence the outcome of elections, therefore justifying limitations on

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51 Ben H. Bagdikian, The New Media Monopoly 3 (2004).

52 In an interview on June 11, 2003, Ted Turner told Mike Wallace on the CBS program *60 Minutes* that he lost $7 to $8 billion as a result of the AOL Time Warner merger. *See 'The Mouth from the South': CNN Founder Opposes Merger with ABC News*, CBS News, June 11, 2003, http://www.cbsnews.com/stories/2003/02/05/60II/main539463.shtml.

53 Ken Auletta, Media Man: Ted Turner's Improbable Empire 139–40 (2004).

54 Barron, *supra* note 1, at 1647.

55 Buckley v. Valeo, 424 U.S. 1 (1976).

expenditures, stating that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[56] In other words, the Court endorsed the idea that the First Amendment protects us equally in our free speech rights. But our free speech rights are not equal.

A word is in order here about the effort to equalize free speech rights in *Miami Herald Publishing Co. v. Tornillo*,[57] the only Supreme Court case to specifically deal with a right of access to the media. In that case, the Court rejected the position that a statute mandating an opportunity for response to those attacked by the media does not violate the First Amendment.[58] That case involved Pat Tornillo, the head of the teachers union in Dade County, Florida, who decided to run for the state legislature.[59] The *Miami Herald*, the newspaper with the largest circulation in the state, attacked him in two editorials.[60] Tornillo asked the *Herald* to let him respond to these attacks, but his requests were denied.[61]

But Tornillo was in better shape in Florida than he would have been elsewhere. Florida had a statute, enacted in 1913, which gave a political candidate attacked by a newspaper a right of reply.[62] Tornillo sued under this statute. His counsel, Toby Simon, and I represented him in both the Supreme Court of Florida and the Supreme Court of the United States. We won in Florida but lost in the Supreme Court. The United States Supreme Court opinion written by Chief Justice Burger set forth the arguments for access in careful and substantial detail.[63] The Court noted the "elimination of competing newspapers in most of our large cities" and the "concentration of control" which followed when the same entity owned the only newspaper as well as a television station and a radio station in the same community.[64]

Despite acknowledging these arguments, the Court concluded that the "content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of edito-

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56 *Id.* at 48–49.

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

58 *See id.* at 254–58.

59 *See id.* at 243.

60 *See id.* at 243 & n.1.

61 *See id.* at 243–44.

62 FLA. STAT. ANN. § 104.38 (West 1973), *invalidated by* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

63 *See Miami Herald Publ'g Co.*, 418 U.S. at 247–54.

64 *See id.* at 249–50.

rial control and judgment."[65] Under the First Amendment, such "enforced access"[66] was impermissible. Massive, concentrated media power was a reality and a problem. But apparently, under the First Amendment, nothing could be done about it. And so it remains to this day.

The idea that the obligation to respect freedom of expression applies only to government endows private media companies with constitutional immunity to restrain expression. A First Amendment theory which posits that government alone must respect freedom of expression is inadequate. The vast differences in communicating power within the private sector—between individuals and massive media corporations controlling the major outlets in every form of media—must be taken into account.

III. The Remedy—A Right of Access

As I said at the outset, in writing *Access to the Media* I wanted to propose a remedy for the problem of mass media exclusion of minority opinion. This brings me to my third theme from that article: I proposed that the First Amendment could itself be a source of a judicially created right of access.[67] This proposal made sense to me. It seemed to follow naturally from an idea developed by Justice Brennan in *New York Times v. Sullivan*:[68] courts should consider First Amendment issues "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[69] In order to effectuate this commitment, judges interpreting the First Amendment could create and enforce rights of access to the media. That I even made this proposal and looked to the courts to actually create and enforce it conveys the hope and promise of a more fair and just society that constitutional law then offered.

In *Access to the Press*, I suggested two bases for recognition of a right of access to the newspaper press. One, as mentioned above, was through judicial recognition and development of a First Amendment-based right of access to the press.[70] I proposed that "[a] right of access to the pages of a monopoly newspaper might be predicated" on the

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65 *Id.* at 258.

66 *Id.* at 251.

67 *See* Barron, *supra* note 1, at 1667–69.

68 N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

69 *Id.* at 270.

70 *See supra* note 67 and accompanying text.

"public function" theory of state action—that is, judicial recognition of a right to access need not be dependent necessarily or entirely on an interpretation of the First Amendment itself as the source for such a right.[71] I argued that "a newspaper, which is the common journal of printed communication in a community," should be viewed as a quasi-public entity—particularly if it is the *only* common journal in the community.[72] Consequently, "[i]f 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 [F]irst [A]mendment."[73] As I relate these ideas to you, it is obvious that they were conceived at a time far different than this age of constitutional minimalism.

But I also proposed another route to achieve access to the press; I thought that perhaps a "more appropriate[ ] approach would be to secure the right of access by legislation."[74] Courts certainly could enforce rights of access authorized by legislation. I noted that such "a revised, realistic view of the [F]irst [A]mendment would permit the encouragement of expression by providing not only for its protection after publication but also for its emergence by publication."[75] Some who rejected access as a judicial remedy at that time still thought some rights of access could be legislated and enforced. For example, Benno Schmidt, then a professor at Columbia Law School and later President of Yale University, had this to say:

> [I]f the pattern of First Amendment adjudication in other areas is followed, one can expect that narrowly drawn access requirements, designed to achieve specific legislative policies, will have a good chance of surviving judicial review. Narrowly drawn access statutes might be upheld as remedies for victims of defamation or antitrust violations, or as an incident of the broad legislative power to regulate advertising.[76]

As you can see, I was not alone in enunciating the idea that a right of access could be developed through the courts. I thought the courts rather than administrative agencies were the preferable forum. Judges, I believed, had a degree of independence that administrative agency commissioners did not. The FCC's fairness doctrine was very

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71 *See* Barron, *supra* note 1, at 1669.

72 *See id.*

73 *Id.*

74 *Id.* at 1670.

75 *Id.* at 1668.

76 Benno C. Schmidt, Jr., Freedom of the Press vs. Public Access 246 (1976).

much alive at the time I wrote *Access to the Press*. It was, however, an administrative agency doctrine. I did not focus on the fairness doctrine in *Access to the Press* because I thought a First Amendment-based right of access should not be linked with a doctrine that was born in an FCC report. I did not want the fortunes of a right of access to rise or fall with the fortunes of the fairness doctrine.

Some statutory rights to access and reply exist today. The "equal time" rule,[77] for example, still functions. This rule provides that if a broadcast licensee sells or offers time to a candidate for elective office, the broadcaster must sell or offer equivalent time to the candidate's opponents.[78] Although this is known as the "equal time" rule, it is really an "equal opportunities" rule. This is true because if a broadcaster declines to sell or offer time to *any* candidate, the equal time rule is not triggered. Another provision of the Federal Communications Act, however, deals with this scenario—the "reasonable access" rule.[79] This rule states that if a broadcaster willfully or repeatedly refuses to provide "reasonable access" to candidates for federal elective office, the broadcaster's license may be revoked.[80] Because I am suggesting that a right of access be developed in the form of legislation, I think it is significant that both of the legislative remedies that I have just discussed—the "equal time" rule and the "reasonable access" rule—have been upheld by the Supreme Court.[81]

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77 *See* 47 U.S.C. § 315(a) (2000).

78 *Id.*

79 *See* 47 U.S.C. § 312(a)(7) (2000).

80 *Id.* Although the Act specifically mentions license revocation as the sanction for its violation, this is not how it is enforced in practice. In fact, when a complaint is made, the FCC enforces the Act by asking the broadcaster how it intends to conform to the "reasonable access" obligation. In *CBS, Inc. v. FCC*, Chief Justice Burger, speaking for the Court, explained, with implicit approval, the way the FCC responded to the complaint of the Carter-Mondale Presidential Committee that it was denied "reasonable access" by the broadcast networks:

> As it did here, the [FCC], with the approval of broadcasters, engages in case-by-case adjudication of § 312(a)(7) complaints rather than awaiting license renewal proceedings. Although the penalty provided by § 312(a)(7) is license revocation, petitioners simply were directed to inform the [FCC] of how they intended to meet their statutory obligations. In essence, the [FCC] entered a declaratory order that petitioners' responses to the Carter-Mondale Presidential Committee constituted a denial of "reasonable access." Such a ruling favors broadcasters by allowing an opportunity for curative action before their conduct is found to be "willful or repeated" and subject to the imposition of sanctions.

CBS, Inc. v. FCC, 453 U.S. 367, 394 n.15 (1981) (internal citations omitted).

81 With respect to the equal time rule, see generally, for example, *Farmers Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959). The Supreme Court held that the "reasonable access" provision was consistent with the First Amendment in *CBS*, 453 U.S. at 397.

The Supreme Court actually upheld the type of narrowly drawn access statute that Schmidt talked about in the 1970s in *CBS, Inc. v. FCC*.[82] In *CBS*, Chief Justice Burger declared that although the Court had never upheld "a *general* right of access," the reasonable access rule created only "a *limited* right to 'reasonable' access."[83] Indeed, Burger took a pluralistic view of the First Amendment, stressing that the reasonable access rule protected "[t]he First Amendment interests of candidates and voters, as well as broadcasters."[84]

While it is true that the First Amendment protects the media, it does not only protect the media. The reasonable access rule sought to strike an appropriate balance with respect to the competing "First Amendment rights of federal candidates, the public, and broadcasters."[85] Burger declared that government could legislate to enhance "the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[86] This view should be contrasted with the statement from *Buckley* that government cannot enhance the speech of one group at the expense of another.[87] Right now, I think it is pretty clear that the view expressed in *Buckley* is in the ascendancy. But the view that the legislature can act to enhance speech may yet prevail.

IV. Is a Right of Access Still Needed?

But, you may ask, is there still need for a right of access? We now have satellite television, cable television, and satellite radio, each with a multiplicity of channels. We have the Internet, which now provides an open, vital, and influential forum. My answer is that I believe there still exists a need for a right of access. The mainstream media, major big city newspapers, and broadcast networks are still powerful shapers of opinion. Web sites, chat rooms, and other forums on the Internet may challenge the information these media can and do convey by providing information the mainstream media do not. But the mainstream media still set the agenda for the contemporary opinion process. Furthermore, as far as news audiences are concerned, it appears that just a few Web sites dominate the market. A recent study by the Shorenstein Center on the Press at Harvard University observes that, as far

82 CBS, Inc. v. FCC, 453 U.S. 367 (1981).

83 *Id.* at 396.

84 *Id.*

85 *Id.* at 397.

86 *Id.* at 396.

87 *See supra* text accompanying note 56.

as news is concerned, the Web sites of the dominant traditional media command most of the Internet traffic.[88] The report concludes: "Brand-name sites are growing at a pace unmatched by those of other news organizations."[89]

One of the writers I relied on in *Access to the Press* was the British politician and writer R.H.S. Crossman, who wrote that power had shifted from those who controlled the means of production to those who controlled the media of mass communication and those who controlled the means of mass destruction.[90] I suppose we are all more secure when those who own the media and those who have the power of mass destruction disagree.[91] In other words, big media can be a countervailing force to big government. But what if the media do not check government? What if instead they ally with government? This happened, for example, in this country at the beginning of the war in Vietnam and at the outset of the current war in Iraq. On both occasions, the dominant media allied with government and failed to perform a "checking" function.[92]

Indeed, one of the reasons my arguments for a right of access to the media first attracted attention was because in the early days of the Vietnam War, it was difficult to purchase an ad against the war.[93] In my experience as an access advocate, I have observed that such refusals tend to stimulate the movement to create a nondiscriminatory right of access to at least purchase an editorial advertisement from the dominant newspaper in a city. When big government and big media are allied, as happened during the early days of both the Vietnam War and the current Iraq War, there is a particular need for a right of access.

The Vietnam War, like the Iraq War today, was a national issue. But an area where a right of access is equally important is the local

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88 *See* JOAN SHORENSTEIN CTR. ON THE PRESS, POLITICS & PUB. SAFETY, CREATIVE DESTRUCTION: AN EXPLORATORY LOOK AT NEWS ON THE INTERNET 13–14 (2007) ("[In] the Internet news system[,] . . . it is clear that a small number of providers, such as cnn.com and nytimes.com, have the lion's share [of the market].").

89 *Id.* at 14.

90 Barron, *supra* note 1, at 1644 (citing R.H.S. CROSSMAN, THE POLITICS OF SOCIALISM 44 (1965)).

91 This is what my First Amendment colleague, Vince Blasi, referred to long ago as the checking value of the First Amendment. *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

92 *See, e.g.*, Howard Kurtz, *The Post on WMDs: An Inside Story*, WASH. POST, Aug. 12, 2004, at A01.

93 *See, e.g.*, CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 98 (1972).

level. Eric Klinenberg's recent book, *Fighting For Air*,[94] chronicles how the effects of a disaster occurring in a small town were exacerbated because there was no way of reaching the population via the town's media. On January 18, 2002, a Canadian Pacific Railway train derailed near Minot, North Dakota, spilling 240,000 gallons of anhydrous ammonia.[95] Exposure to large doses of anhydrous ammonia can shut down the respiratory system and even in limited doses can burn the eyes, the skin, and the lungs.[96] Many people in Minot turned on their television sets and radios to find out what had happened and what they should do.[97] Others, however, found that they could not get information broadcast on television because their electricity was out.[98]

Could radio have been used to inform those without electricity? It could—some of the citizens without power had transistor radios.[99] But it didn't. The town's radio stations were not reporting news about the great toxic spill. Instead, all six of Minot's commercial radio stations "continued playing a standard menu of canned music."[100] The stations had something in common: they were owned and operated by Clear Channel Communications,[101] one of the largest radio chains in the country. Clear Channel had acquired the Minot stations in 2000 and, after the takeover, "replaced locally produced news, music, and talk programs with prepackaged content engineered in remote studios and transmitted to North Dakota through digital voice-tracking systems."[102] Content in Minot was on autopilot and no radio station broke its spell to tell the community of the dangers it faced.[103] The town had radio stations but the content originated elsewhere. Their content was in fact irrelevant to the community they served.

Can the Internet solve this problem of local access? The Internet has been wonderfully useful in bringing ideas and information into the national conversation that, without the openness of the Internet, the major media might have successfully barred or ignored. Curiously, however, the Internet may be more of a problem than a solution with

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94 Eric Klinenberg, Fighting for Air: The Battle to Control America's Media (2007).

95 *Id.* at 1.

96 *Id.* at 2.

97 *Id.* at 4.

98 *See id.* at 6, 9.

99 *See id.* at 6.

100 *Id.*

101 *Id.*

102 *Id.* at 6–7.

103 *See id.* at 8–9.

respect to access on the local level. A recent study of the use of news in schools found that "[a]s teachers have turned to the Internet, they have switched from hundreds of local news outlets to a small number of national ones," including CNN.com, PBS.org, and NYTimes.com.[104] These teachers used local television or newspaper Web sites with much less frequency.[105] The report concedes that these developments might be desirable, given that the quality of the news reporting of the major news organizations is generally superior to that of local media.[106] But such a conclusion does not take into account a crucial fact: Local news organizations focus on local news. National media do not and cannot. The result is that local issues and local problems are deprived of a necessary voice.

In a conference last year at Hofstra Law School, I remarked on the enormous significance the advent of the Internet has had in enabling individuals to participate in the life of ideas: "[T]he Worldwide Web has given an opportunity for individual exercise of free speech that did not exist when I first wrote. Technology has done for access what law refused to do."[107] But I also noted that a number of issues prevent the Internet from providing the entire solution for the problem of access. First, there is a digital divide bred by either lack of computer literacy or economic status.[108] Second, there is a steady and advancing pressure to censor the Internet.[109] Third, there is the increasing dominance of the Internet by just a few search engines.[110] Finally, there is the growing importance and influence of Internet platforms owned and operated by the traditional media.[111] These developments may be harbingers that the ownership and behavior patterns of the dominant traditional media will be replicated on the Web. Moreover, the existing traditional media remain the dominant engines of opinion and, as I have suggested, are rapidly moving to a similar status on the Internet.

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104 Carnegie-Knight Task Force on the Future of Journalism Educ., The Internet and the Threat It Poses to Local Media: Lessons from News in the Schools 6 (2007).

105 *See id*. at 6–8.

106 *Id.* at 10.

107 Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 Hofstra L. Rev. 937, 950 (2007).

108 *See id.* at 951–52.

109 *Id.* at 952.

110 *See id.* at 953.

111 *See, e.g.*, *supra* text accompanying notes 104–05.

Conclusion

I said at the outset of this talk that in writing *Access to the Press* forty years ago, I sought to develop three ideas. First, the marketplace of ideas, both as a description of the contemporary opinion process and as a rationale for the First Amendment, was romance rather than reality. Second, concentrated private media power could be, and was, as much a threat to the free life of ideas as government repression. Third, a remedy was necessary to create a true and functioning marketplace of ideas and to try thereby to equalize communicating power.

The marketplace of ideas rationale is still approached by too many as if it truly exists. The belief that it does exist allows our society to tolerate the kind of monologue that too often passes for debate on radio, television, and cable news. We have seen the destruction of much of the existing structure of debate in the electronic media. Therefore, I think much of what I said about the marketplace of ideas in *Access to the Press* is still true.

As for the problem of concentrated media power, concentration of ownership within the major media in this country is much more intense now than it was forty years ago. Making matters worse, First Amendment rights of individual citizens and of great media organizations are still seen as entirely fungible, thereby greatly magnifying the power of the latter to the disadvantage of the former. The function of rights of access and reply is not to injure the marketplace of ideas, but to repair it. Paradoxically, the belief that a contemporary marketplace of ideas exists has become the rationale for preventing it from becoming a reality.