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NO PLACE FOR EQUAL SPACE IN THE FIRST AMENDMENT

The first amendment guarantee of freedom of the press¹ has long been viewed as a right imbued with a public trust.² But while the right to "equal time"³ over the airwaves has gained judicial recognition,⁴ an analogous right to "equal space" in the printed media has not developed. It has never been held that the first amendment commands such a right,⁵ and only two states, Florida⁶ and Mississippi,⁷

1. The first amendment protects electronic and printed media alike, but the differences between the media often dictate that different considerations apply. See notes 64-66 *infra* and accompanying text.

2. See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (where it is noted that the guarantee of a free press is "not for the benefit of the press so much as for the benefit of all of us"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

3. § 315 of the Communications Act of 1934, 47 U.S.C. § 315 (1970) requires licensees to provide equal time for all qualified candidates for public office. The Federal Communications Commission enforces the fairness doctrine (see note 23 *infra*) and associated regulations to provide a similar right to equal time over the airwaves in other contexts. 47 C.F.R. § 73.123 (1972). The personal attack regulation requires a licensee, in the event an attack is made on an identified person or group, (1) to notify that person or group of the date, time, and identification of the broadcast, (2) to provide a script or tape or (if none is available) an accurate summary of the attack, and (3) to offer a reasonable opportunity to respond. These requirements must be satisfied within one week of the attack.

The regulation on political editorializing provides that, if a licensee endorses or opposes a candidate in an editorial, the licensee must give other qualified candidates or the opposed candidate the same type of notice and opportunity to respond described above within twenty-four hours of the editorial or, if the editorial is broadcast within seventy-two hours of an election, sufficiently in advance of broadcast to permit timely reply.

4. See notes 21-26 *infra* and accompanying text.

5. *But cf.* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) [hereinafter cited as Barron] which forcefully presents the case for a constitutional right of access to the printed media. The author of this article, Jerome A. Barron, was one of the attorneys for the appellant in *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78 (Fla. 1973), *consideration of juris. postponed to the hearing of the case on the merits*, 42 U.S.L.W. 3405 (1973) (No. 797), discussed *infra*. Barron's position has drawn considerable comment. See, e.g., Bagdikian, *Right of Access: A Modest Proposal*, 8 COLUM. JOURNALISM REV. 10 (1969); Daniel, *Right of Access to Mass Media—Government Obligation to Enforce First Amendment?*, 48 TEXAS L. REV. 783 (1970); Comment, *Constitutional Law: The Right of Access to the Press*, 50 NEB. L. REV. 120 (1970). For additional commentary by Barron on this subject, see Barron, *Access—The Only Choice for the Media?*, 48 TEXAS L. REV. 766 (1970); Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *In Defense of*

have enacted statutes granting private individuals access to the press.⁸ The constitutionality of such legislation had not been litigated⁹ until recently when the highest courts of Florida and Massachusetts considered the issue and reached opposite conclusions.¹⁰

I

A Florida statute provides that a newspaper which attacks a candidate for public office and fails to provide free of charge a like amount

"Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine, 37 U. COLO. L. REV. 31 (1964).

6. FLA. STAT. ANN. § 104.38 (1973) provides:

If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree

7. MISS. CODE ANN. § 23-3-35 (1972) provides:

If during any primary or other election campaign in Mississippi, any newspaper either domiciled in the state, or outside of the state circulating inside the State of Mississippi, shall print any editorial or news story reflecting upon the honesty or integrity or moral character of any candidate in such campaign or on the honesty and integrity or moral character of any candidate who was elected or defeated in such campaign, such newspaper shall, on the written or telegraphic request of such candidate or his agents, print in such newspaper not later than the second issue of such newspaper following the receipt of such request, a statement by the candidate or his duly accredited representative giving the candidate's reply. Such statement shall be printed in the exact language which the candidate or his representative presents and shall be printed as near as is practical on the same page, in the same position, and in the same size type and headlines as the original editorial or news story reflecting on the candidate had been printed.

This section shall be construed to include those news stories wherein the newspaper quotes from a candidate or individual statements attacking the honesty or integrity or moral character of a candidate or ex-candidate.

If such newspaper fails or refuses to publish such answer when requested, the owner of such newspaper shall be liable to a suit for damages by the candidate claiming to be injured by such publication. In event of a verdict in favor of the plaintiff, the measure of damages shall be the injury suffered or a penalty of five hundred dollars, whichever is the larger amount. In all cases, the truth of the charge may be offered as defense to the suit. But nothing herein contained shall be construed to abolish any existing legal rights of action in such cases.

8. WIS. STAT. ANN. § 895.05(2) (1966) provides that publication of a reply may serve as an alternative to the publication of a retraction for the purposes of correcting an allegedly libelous statement under circumstances where the truth of the statement was not reasonably ascertainable.

9. In *Manasco v. Walley*, 63 So. 2d 91 (Miss. 1953) it was found that the particular editorial complained of did not reflect "upon the honesty, integrity or moral character of the candidate" and, therefore, "did not come within the provisions of the statute." *Id.* at 96. The constitutional issue was apparently not raised.

10. *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78 (Fla. 1973), *consideration of juris. postponed to the hearing of the case on the merits*, 42 U.S.L.W. 3405 (1973) (No. 797); *Opinion of the Justices to the Senate*, 298 N.E.2d 829 (Mass. 1973).

of space for the candidate's reply shall be guilty of a misdemeanor.¹¹ The Miami Herald printed two editorials attacking a candidate for the state legislature but refused to publish his proffered replies.¹² The candidate brought suit for declaratory and injunctive relief as well as punitive damages under the access statute.¹³ The trial court struck down the statute as a restraint on freedom of speech and of the press and as impermissibly vague and indefinite.¹⁴ In *Tornillo v. Miami Herald Publishing Co.*,¹⁵ the Supreme Court of Florida reversed, holding that

[t]he statute assures, and does not abridge, the right of expression which the First Amendment guarantees. The statute supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be “blacked out” as to the other side of the controversy.¹⁶

Since the 1913 Florida statute was enacted as part of a broad legislative scheme designed to maintain conditions conducive to free and fair elections,¹⁷ the Florida majority found that it served a vital and legitimate state interest by providing an opportunity for the assailed candidate to be heard¹⁸ and by assuring that the public would hear both sides of a controversy.¹⁹ Far from being an incursion on first amendment rights, the statute encouraged “the wide open and robust dissemination of ideas and counterthought which the concept of free press both fosters and protects.”²⁰

11. 287 So. 2d at 79.

12. *Id.* Pat L. Tornillo is the leader of the Dade County Classroom Teachers' Association, an activist organization of public school teachers. In 1972 he became a candidate for the Democratic nomination for a seat in the Florida State House of Representatives. On September 20, 1972 the Miami Herald published an editorial calling Tornillo “a czar” who had taken part in “illegal act(s) against the public interest.” On September 29, 1972 the newspaper ran a second editorial assailing Tornillo's candidacy:

For years now he (Tornillo) has been kicking the public shin to call attention to his shakedown statesmanship. . . . Give him public office says Pat and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule.

To each of these editorials Tornillo demanded space to reply under the access statute. Brief for Appellant at xviii-xx.

13. 287 So. 2d at 79.

14. *Id.* at 80. The State Attorney General had refused to defend the statute because of his doubts as to its constitutionality. Brief for Appellee at 2.

15. 287 So. 2d 78 (Fla. 1973), *consideration of juris. postponed to the hearing of the case on the merits*, 42 U.S.L.W. 3405 (1973) (No. 797). The court divided 6-1.

16. *Id.* at 87 (emphasis in original).

17. *Id.* at 81.

18. *Id.*

19. *Id.*

20. *Id.* at 86.

The Florida court relied heavily on *Red Lion Broadcasting Co. v. FCC*,²¹ the case which upheld²² the fairness doctrine²³ and associated regulations of the Federal Communications Commission²⁴ providing for public access to the broadcast media. Since the limited number of available frequencies²⁵ necessarily restricted the number of persons permitted to operate radio or television stations, the *Red Lion* Court was prepared to sanction governmentally dictated alternative routes of access to the electronic media.²⁶ The *Tornillo* court saw a clear analogy in the trend toward concentration in the newspaper industry.²⁷ The court reasoned that this tendency toward monopolization might deprive the public of its right to be exposed to all sides of a controversy unless the government provided access to the press for conflicting viewpoints.²⁸ Since the statute questioned in *Tornillo* was substantially equivalent to the FCC's "personal attack" regulation approved in *Red Lion*,²⁹ the court concluded that the statute was "consistent with the First Amendment as applied to [the] State through the Fourteenth Amendment."³⁰

21. 395 U.S. 367 (1969).

22. *Id.* at 400-01.

23. The fairness doctrine is described in *Red Lion* as

an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act [47 U.S.C. § 315 (1970)] that equal time be allotted all qualified candidates for public office.

Id. at 369-70. The doctrine deals with the fair treatment by licensees of controversial issues of public importance. A Commission analysis of the fairness doctrine and a digest of FCC rulings on the subject appear at 29 Fed. Reg. 10415 (1964).

24. 47 C.F.R. § 73.123 (1972). See note 3 *supra*.

25. 395 U.S. at 376-77.

26. *Id.* at 400-01. See text accompanying notes 54-60 *infra*.

27. 287 So. 2d at 82-83.

The number of daily newspapers in the United States declined from 2202 in 1909-10 to 1760 in 1953-54. The number of cities with competing daily newspapers declined from 689 to 87. The number of cities with non-competing dailies increased from 518 to 1361. Eighteen states are now without any locally competing daily newspapers.

Barron, *supra* note 5, at 1644 n.10, citing J.R. WIGGINS, FREEDOM OR SECRECY 177 (rev. ed. 1964).

28. 287 So. 2d at 82-83.

29. Compare note 3 *supra* with note 6 *supra*.

30. 287 So. 2d at 84. The *Tornillo* court also took solace from dictum in a footnote contained in Justice Brennan's plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), apparently approving right of reply statutes as an alternative to libel suits in the area of defamation. Justice Brennan, in an opinion joined by Justice Blackmun and Chief Justice Burger, observed:

Some States have adopted retraction statutes or right-of-reply statutes. . . .

One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defama-

II

A proposed Massachusetts access statute,³¹ not differing in principle from the law upheld in *Tornillo*, did not fare nearly so well in *Opinion of the Justices to the Senate*.³² The Massachusetts State Senate asked that state's supreme judicial court for an advisory opinion³³ on the con-

tory falsehoods, has suggested several ways the law might encourage public discussion. . . . It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.

Id. at 47 n.15 (citations omitted). It is difficult to assess the significance of Justice Brennan's statement, particularly since it is clearly dictum. Since *Rosenbloom* dealt with the electronic media, any statements relating to the printed media, while certainly relevant, were not essential to the holding. Moreover, any vitality this *Rosenbloom* dictum may have had is greatly diminished by the position taken by Chief Justice Burger and Justice Blackmun in the *Pittsburgh Press* case. See text accompanying notes 41-45 *infra*. That case upheld a city ordinance which restricted the newspaper's right to segregate "help-wanted" ads into sex-designated columns. The Chief Justice dissented on the grounds that the ordinance encroached upon the newspaper's "protected journalistic discretion." 413 U.S. at 394. Justice Blackmun concurred in an opinion written by Justice Stewart which declared that a governmental agency cannot tell a newspaper what it can and cannot print. *Id.* at 400.

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

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

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

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

298 N.E.2d at 830-31.

32. 298 N.E.2d 829 (Mass. 1973).

33. The Massachusetts court had previously disapproved a statute on the same subject on grounds of vagueness. *Opinion of the Justices to the Senate*, 284 N.E.2d 919 (Mass. 1972). Although the new draft remedied those problems, it still could not pass muster under the first amendment.

stitutionality of proposed legislation providing (1) that a newspaper which published paid political advertisements for any candidate for office could not refuse paid political advertising from his opponents³⁴ and (2) that charges for political advertising space could not exceed charges for nonpolitical advertising space.³⁵ The court disapproved the first provision as an impermissible "interference with or prior restraint on the freedom of the press."³⁶ The Massachusetts court reviewed and relied upon first amendment cases limiting government to those regulations which serve a compelling governmental interest and which restrict first amendment freedoms no more than necessary.³⁷ The proposed statute failed on both grounds. First, there were no legislative findings of any substantial or overriding governmental interest to be served by the statute.³⁸ Second, the court held that "compulsion to publish all responsive political advertisements . . . goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers"³⁹

The basis for such advisory opinions is MASS. CONST. pt. 2, ch. 3, art. II (West Supp. 1973): "Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."

34. See note 31 *supra*.

35. See note 31 *supra*.

36. 298 N.E.2d at 831. Section 39B was approved as dealing "exclusively with a commercial aspect of the operation of a newspaper or other periodical." *Id.* at 835. See note 45 *infra*.

The court noted that the United States Supreme Court in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) had rejected the contention that the first amendment required a broadcaster to accept paid political advertising in response to advertisements he had already run. That case was not dispositive of the issue before the Massachusetts court, however, since it did not decide whether such a requirement could be created by legislative or administrative action. *Id.* at 131. But the Supreme Court intimated strongly that such action would be valid. "Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." *Id.*

37. 298 N.E.2d at 834. The court cited *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (upholding narrowly drawn prohibition against draft card burning). For similar holdings, see, e.g., *Freedman v. Maryland*, 380 U.S. 51, 59-60 (1965) (striking down state motion picture censorship statute lacking sufficient safeguards of first amendment rights); *NAACP v. Alabama*, 377 U.S. 288, 302-10 (1964) (restricting application of corporate registration and business qualification laws so as not to infringe freedom of association); *NAACP v. Button*, 371 U.S. 415, 431-38 (1963) (restricting application of law prohibiting solicitation of business by or for attorneys so as not to stifle first amendment freedoms).

38. 298 N.E.2d at 834.

39. *Id.* at 835. The Florida statute required the printing of a reply of the same size as the original attack. See note 6 *supra*. The Massachusetts bill would have required acceptance of *all* proffered paid political responses. See note 31 *supra*. While

The court feared that such compulsion might cause newspapers to refuse to accept political advertisements rather than be saddled with the burden of publishing responses and concluded that this chilling effect would not aid the fair dissemination of political advertising.⁴⁰

Finally, the court looked to *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*⁴¹ where a divided United States Supreme Court had ruled that it was not unconstitutional to regulate the column in which help-wanted ads appeared in order to eliminate sex discrimination in employment.⁴² The four dissenters,⁴³ however, felt that even the regulation of so limited a matter was an impermissible intrusion on journalistic discretion.⁴⁴ The Massachusetts court reasoned that if regulation of the content of commercial advertising is a close and disputed question, an attempt to mandate the content of political (as opposed to commercial) advertising must fail a fortiori.⁴⁵

III .

Although bases could be formulated for distinguishing these two

this is a clear distinction between the two cases, it is likewise clear that the Massachusetts opinion did not rest on this point, for the court continued, "Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement." *Id.* (emphasis added).

40. *Id.* at 834-35.

41. 413 U.S. 376 (1973).

42. *Id.* at 391.

43. Chief Justice Burger and Justices Douglas and Stewart filed dissenting opinions. Justices Douglas and Blackmun also concurred in Justice Stewart's dissent.

44. 413 U.S. at 394.

45. The court recognized that commercial advertising is generally subject to governmental regulation. *Id.*, citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (restriction on distribution of commercial handbills). The Massachusetts court noted that the press "has no special immunity from civil and criminal laws which relate to its business aspects." 298 N.E.2d at 832. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-92 (1964) (malicious libel); *Associated Press v. United States*, 326 U.S. 1, 6-8 (1945) (antitrust laws); *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943) (taxation); *Associated Press v. NLRB*, 301 U.S. 103, 125 (1937) (labor laws). However, unless there is a compelling governmental interest, government regulations may not be used to tell the press what it may or may not publish. 298 N.E.2d at 832. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

But the court was unwilling to depart from the cases which hold that newspapers are free to accept or reject advertising as they see fit. 298 N.E.2d at 834. See, e.g., *Associates & Aldrich Co., Inc. v. Times Mirror Co.*, 440 F.2d 133, 134-36 (9th Cir. 1971) (newspaper could censor, modify or refuse to publish movie advertisements); *Chicago Joint Bd. Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470, 477-78 (7th Cir. 1970) (newspaper could refuse to run paid editorial advertisements submitted by labor union).

cases,⁴⁶ the opinions proceed from radically different concepts of the first amendment. The Florida case illustrates the view that the first amendment formula is really a shorthand description of certain values sought to be promoted, *e.g.*, "the right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice."⁴⁷

Under this view (hereinafter called the "first amendment values" theory) the concepts of "free speech" and "free press" are simply different statements of the same proposition, *i.e.*, that free and full discussion of public affairs is the essence of self-government.⁴⁸ Thus, the Florida opinion moves easily from the freedom of speech (expression) of newspaper owners to the freedom of the press to the freedom of expression of individual citizens with little concern for any distinction between them.⁴⁹ There is little attempt to treat these various interests differently since they are all subsumed under the same first amendment values. Since the court determined that these values were promoted by the Florida access statute, it reasoned that the statute could not violate any of the specific commands of the first amendment.⁵⁰

The Massachusetts opinion is based on a second, fundamentally different concept of the first amendment. Recognizing that the first amendment represents certain values (such as the free flow of information and the right of the public to know), this view finds it dispositive that the first amendment could have, but did not, protect these values expressly. Instead, the mandate to Congress is couched in "thou shalt not" terms in order to protect the specific first amendment freedoms from governmental abridgment. Under this view (hereinafter called the "value judgment" theory), the first amendment stands for the value judgment that a free and unfettered press is the best way to promote first amendment values. This value judgment operates

46. See note 39 *supra*. In addition, the Massachusetts court found no evidence of a legislative determination of a substantial state interest served by the statute, while the Florida court had no difficulty in finding a clear interest in maintenance of the electoral process expressed in the Florida statutory scheme.

47. 287 So. 2d at 82.

48. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to 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."

Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

49. 287 So. 2d at 83.

50. *Id.* at 87.

somewhat in the nature of a rebuttable presumption against governmental restrictions of the press.⁵¹ Since the proposed statute may have the chilling effect of discouraging publication of any political advertising⁵² and since there was no showing of any compelling state interest to justify this restriction,⁵³ the first amendment presumption against such a statute stood unrefuted.

IV

It is against this background that the relevance of the *Red Lion* case⁵⁴ can best be judged. As noted above, the Florida court relied quite heavily on *Red Lion* in reaching its decision.⁵⁵ The Massachusetts court, on the other hand, mentioned it only once in passing while dismissing it as dealing only with right of access to radio and television.⁵⁶

The crux of the *Red Lion* decision upholding the FCC's fairness doctrine and access regulations thereunder is Justice White's statement for the majority that

the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource *which the Government has denied others the right to use.*⁵⁷

The chaos that had resulted when allocation of broadcast frequencies was left to the private sector necessitated governmental intervention to unclutter the airwaves.⁵⁸ Since the number of frequencies was limited *and* since the government in the process of granting licenses to some had to refuse them to others, it was only proper that a licensee be required

to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.⁵⁹

51. This is the basis for those cases which require the showing of a compelling governmental interest to justify infringement of first amendment rights. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963); Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. New Jersey, 308 U.S. 147 (1939).

52. 298 N.E.2d at 834-35.

53. *Id.*

54. 395 U.S. 367 (1969).

55. See text accompanying notes 21-30 *supra*.

56. 298 N.E.2d at 832.

57. 395 U.S. at 391 (emphasis added).

58. *Id.* at 375.

59. *Id.* at 389.

From this foundation *Red Lion* discussed the ways the fairness doctrine and access regulations promoted the right of the public (*i.e.*, viewers and listeners as well as licensees) to know and the interest of the public in broad dissemination of information on public controversies.⁶⁰

The reason that the Florida court found the analogy to *Red Lion* apt (although it sometimes struggled to do so⁶¹) while the Massachusetts court simply distinguished that case⁶² is a result of their different concepts of the first amendment. In *Tornillo*, the point of departure was the first amendment values served by the access statute. These values were espoused in *Red Lion* and, the situation at least being arguably similar, it was easy to contend that the same result should obtain. The *Tornillo* court argued that censorship by private interests is as inimical to first amendment values as is government censorship;⁶³ thus, from its perspective, an access statute is clearly proper under, if not compelled by, the first amendment.

In *Opinion of the Justices*, however, the point of departure was a free and unfettered press, an interest which controls unless compelling interests outweigh it. From this standpoint *Red Lion* is readily distinguishable. It is correct to say that "[n]o one has a First Amendment right to a license or to monopolize a radio frequency,"⁶⁴ but with respect to the printed media the opposite is true. Everyone has a first amendment right to publish a newspaper. While it may be that the trend toward concentration in the publishing industry⁶⁵ is arguably analogous to the scarcity of broadcast frequencies, the crucial difference is that in the latter case the government has the power to deny the right to broadcast whereas it has no power to deny the right to publish.⁶⁶

60. Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed.

Id. at 392.

61. At one point the court said *Red Lion* applied to the newspaper access statute because "[t]he dissemination of news other than purely local is transmitted over telegraph wires or over air waves." 287 So. 2d at 87.

62. 298 N.E.2d at 832.

63. *Id.* at 84. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

64. 395 U.S. at 389.

65. See note 27 *supra*.

66. Aside from the fact that the concentration in the publishing industry is not gov-

*Columbia Broadcasting System, Inc. v. Democratic National Committee*⁶⁷ sheds further light on the subject. In that decision the United States Supreme Court held that neither the first amendment nor the Federal Communications Act requires broadcast licensees to accept paid political advertisements.⁶⁸ Under the "first amendment values" theory this is an anomalous result, particularly since the *CBS* decision in no way derogated from the position taken by the Court in *Red Lion*.⁶⁹ But it is entirely consistent with the "value judgment" theory since there was no finding of circumstances requiring extraordinary measures to satisfy the values presumptively promoted by a free and unfettered press.

Although the Court did not reach the issue, it suggested that the Congress and/or the FCC could validly fashion a right of access to the electronic media given the peculiar nature of governmental involvement in that field.⁷⁰ Since *CBS* reaffirmed the distinction between broadcast and print media,⁷¹ it can hardly be interpreted as authorizing a state legislature to create a right of access to the printed media of the type involved in these two cases.⁷²

enmentally imposed, it is questionable whether that circumstance of concentration is sufficient to rebut the presumption in favor of the completely free and unfettered press. That the concentration of the printed media threatens our nation by affording an opportunity to a few editors to manipulate and control the thought patterns of the American public is at best a dubious proposition.

The implication that the people of this country . . . are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.

Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 787 (1972).

67. 412 U.S. 94 (1973).

68. In so doing, the Court reversed a court of appeals decision which found that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 646 (D.C. Cir. 1971).

69. *CBS* did not question the validity of the fairness doctrine, but found only that the "forced sale of advertising" would not advance the purposes of that doctrine but would result in a detrimental "diluting of licensee responsibility" for program content. 412 U.S. at 130-31. Moreover, Chief Justice Burger's opinion reaffirmed the clear distinction between the broadcast media and the printed press drawn by Justice White in *Red Lion*. *Id.* at 101.

70. *Id.* at 131.

71. *Id.* at 101.

72. There is an interesting, and rather enigmatic, passage in the concurrence in *Tornillo*. While concurring in the opinion and judgment of the majority, including presumably its heavy reliance on *Red Lion*, Justice Roberts stated: "The decision in *Columbia Broadcasting* is directed solely to the peculiar and limited nature of broad-

The *Tornillo* court, however, argued that this line of reasoning arrives at the absurd result that the vast power of the press is limited by no one but the press itself.⁷³ Quoting from *Pennekamp v. Florida*,⁷⁴ the court emphasized this passage: "No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself."⁷⁵ But the quoted passage included the following which the court chose not to emphasize: "But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility."⁷⁶ This latter statement is the heart of the "value judgment" theory, *i.e.*, that the press has a public responsibility which, absent extraordinary circumstances, is best served by letting the press itself define that responsibility. Chief Justice Burger restated this view in the *CBS* case:

The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers.⁷⁷

V

The *Tornillo* decision is somewhat ironic in that the language of the decision contains the very rhetoric traditionally adopted by the press in first amendment litigation. The "right of the public to know"⁷⁸ and the need for a "wide open and robust dissemination of ideas"⁷⁹ are catch phrases invariably found in media briefs⁸⁰ and pro-press court

casting frequencies, and that decision is not applicable to the instant facts presently before this Court in the case sub judice." 287 So. 2d at 87-88. Even more puzzling, the justices making up the majority concurred in this concurrence! It is unstated how, on the above rationale, *Red Lion* is any less distinguishable in the "case sub judice."

73. *Id.* at 82-83.

74. 328 U.S. 331 (1946).

75. 287 So. 2d at 82 (emphasis in original), quoting 328 U.S. at 355 (Frankfurter, J., concurring).

76. 287 So. 2d at 82, quoting 328 U.S. at 365.

77. 412 U.S. at 117.

78. 287 So. 2d at 82.

79. *Id.* at 86.

80. See, *e.g.*, Brief for The New York Times Co., et al. as Amici Curiae, *United States v. Caldwell*, 408 U.S. 665 (1972): "If . . . there is a firstness also among the interests fostered by the (First Amendment), then it is the interest in the flow of politically relevant information to the public." Brief for Amici Curiae at 13-14.

opinions.⁸¹ The appellant in *Tornillo* made much of this apparent inconsistency in the press' position. In *Branzburg v. Hayes*,⁸² he argued, the United States Supreme Court ruled that the first amendment does not exempt newsmen from responding to grand jury subpoenas,⁸³ nor does it create a testimonial privilege which allows newsmen to conceal confidential sources of information where that information is relevant to the investigations of the grand jury.⁸⁴ The newsmen had argued that unless such a privilege was recognized the fear of disclosure would cause their sources of information to dry up, "all to the detriment of the free flow of information protected by the First Amendment."⁸⁵ The Court rejected the newsmen's argument, holding that the first amendment did not compel such a privilege;⁸⁶ however, it recognized that the Congress or the state legislatures could create this privilege by legislative action.⁸⁷ *Tornillo* contended that this rationale was directly applicable to the access statute:

If the Legislatures of this country can be called upon to enact a privilege for the press to aid it in carrying out its responsibility to inform the public, cannot the same Legislature shape, nurture, and define the responsibility itself?⁸⁸

He urged that the very arguments raised by the press on its behalf in *Branzburg* apply with equal force to support the constitutionality of the Florida access statute.⁸⁹

How, in the name of morality, can a newspaper demand a *privilege* from the courts and Legislatures of this country, for the sake of advancing the public's knowledge, but resist as it is doing here, a legislatively defined responsibility to add to the knowledge of the same public during an election campaign?⁹⁰

81. See, e.g., Justice Stewart's dissent in *Branzburg v. Hayes*, 408 U.S. 665 (1972): The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press . . . because the guarantee is "not for the benefit of the press so much as for the benefit of all of us."

Id. at 725-26 (citations omitted).

82. 408 U.S. 665 (1972).

83. *Id.* at 690-91.

84. *Id.*

85. *Id.* at 680.

86. *Id.* at 690-91.

87. *Id.* at 706.

88. Brief for Appellant at v-vi.

89. *Id.* at v.

90. *Id.* at vii. The appellant continued: "Perhaps we should not question the press in the name of morality. The press has always demanded privileges; the press has always resisted its responsibilities." *Id.*

The superficial attractiveness of this analysis cannot survive close scrutiny. The "value judgment" theory recognizes that first amendment values are the *raison d'être* of the constitutional provision.⁹¹ But the Framers expressed these values in terms of the "freedom of the press," thereby expressing a judgment that a free press should have a preferred position⁹² in satisfying those values. Thus, as in *Branzburg*, when the press employs the rhetoric of first amendment values, it does so, not to justify the privilege in and of itself, but to demonstrate that such a privilege is comprehended within the scope of the concept "freedom of the press" upon which the value judgment operates.

The command of the first amendment is that Congress *shall not abridge* the freedom of the press. The enactment by Congress of legislation which furthers the value judgment expressed by the first amendment (such as the statutory creation of a testimonial privilege for newsmen⁹³) is clearly a proper exercise of its granted powers. Congress could not, however, enact legislation requiring that newsmen respond to subpoenas in all events, under all circumstances, availing themselves only of those defenses against appearance available to all private individuals.⁹⁴ This would be unconstitutional, not because it offended first amendment values, but because it restricted the free press which is the constitutional expression of those values. Similarly, the Florida access statute, while it may support first amendment values, should fail because it impinges directly and substantially on the constitutionally approved method for furthering those values, *i.e.*, a free press.

VI

Justice Stewart made an interesting, and perhaps prophetic, observation in his *Pittsburgh Press* dissent:

So far as I know, this is the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and makeup of

91. See part III *supra*.

92. 408 U.S. at 721 (Stewart, J., dissenting).

93. See text accompanying note 87 *supra*.

94. This is implicit in the *Branzburg* holding. While the public interest in effective grand jury proceedings may have been compelling enough to outweigh the newsmen's interests in the situations presented to the Court, a blanket requirement for newsmen appearances would be improper. See especially Powell, J., concurring:

[W]e do not hold . . . that state and federal authorities are free to "annex" the news media as "an investigative arm of government." . . . [N]o harassment of newsmen will be tolerated. . . . [T]he courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.

408 U.S. at 709-10.

the newspaper's pages. This is the first such case, but I fear it may not be the last. . . . So long as Members of this Court view the First Amendment as no more than a set of "values" to be balanced against other "values," that Amendment will remain in grave jeopardy.⁹⁵

It has been proposed that the first amendment be amended to reflect expressly the "first amendment values" theory.⁹⁶ But such an approach would countenance almost limitless government intervention in the name of "first amendment values" in clear violation of the "thou shalt not" philosophy of the first amendment as originally and wisely constituted. The consequences of such governmental intrusion on the freedom of the press drew comment in *CBS*:

Freedom of the press would then be gone. In its place we would have such governmental controls upon the press as a majority of this Court at any particular moment might consider First Amendment "values" to require. It is a frightening specter.⁹⁷

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95. 413 U.S. at 402.

96. Barron, *supra* note 5, at 1675-76, quotes a proposal by Meiklejohn to add this language to the first amendment:

"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 intellectual and cultural education of all of the citizens of the United States,"

97. 412 U.S. at 133 (Stewart, J., concurring).