

A HISTORICAL PERSPECTIVE ON THE PUBLIC'S RIGHT OF ACCESS TO THE MEDIA

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I. INTRODUCTION

Professor Jerome A. Barron argued in his 1967 article, *Access to the Press—A New First Amendment Right*,¹ that it was anomalous for the First Amendment to protect expression once it had come to the fore, but be indifferent to creating opportunities for expression. He explained that because of the dominance of the mass media—principally newspapers and broadcast stations—and the high cost of ownership, most people had no real opportunity to express their views. Therefore, he argued that the public's right of access to the media should be recognized as a constitutional principle.²

Today's symposium titled "Reclaiming the First Amendment: Constitutional Theories of Media Reform," marks the fortieth anniversary of Professor Barron's article. It is intended to explore how the First Amendment might be used to address the "growing concern that our current consolidated and commercialized mass media system represents a serious challenge to our democracy."³ The symposium brochure acknowledges, however, that "First Amendment arguments for government regulation to ensure diversity of viewpoints, have had a mixed reception in the courts."⁴

When Professor Barron published his article in 1967, many people were interested in expanding the idea of public access. The Supreme Court's 1969 decision in *Red Lion Broadcasting Co. v. FCC*,⁵ which

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

2. *Id.* at 1641, 1666-67.

3. Symposium Description, *Reclaiming the First Amendment: Constitutional Theories of Media Reform* (2007) (on file with the Hofstra Law Review).

4. *Id.*

5. 395 U.S. 367 (1969).

held that the public had a constitutional right to hear competing viewpoints and that the public's right of access was paramount to broadcasters' right to speak,⁶ helped to spur efforts to expand the public's right of access.⁷ But after opening the door to recognizing a public right of access in *Red Lion*, the Supreme Court quickly drew back from the logical extension of that decision. In 1973, the Court declined to extend the public's right to hear competing views on broadcast stations to a right to express views on broadcast stations through the purchase of time for editorial advertisements in *Columbia Broadcasting System, Inc. v. Democratic National Committee*⁸ (CBS). The next year, the Court found a Florida statute that required newspapers to afford political candidates a limited right of reply unconstitutional in *Miami Herald Publishing Co. v. Tornillo*.⁹

This Article analyzes the papers of three former Supreme Court Justices—Blackmun, Brennan, and Douglas—that are available at the Library of Congress to better understand why the Court declined the opportunity to establish a broad, constitutional right of access for the public.

II. BACKGROUND

A. Barron's Article

Professor Barron attributed the tendency of constitutional law to protect expression but not the opportunity for expression to a “romantic conception” of the First Amendment¹⁰ based on the concept of the “marketplace of ideas.”¹¹ He cites as an example of the romantic conception Justice Douglas's dissent in *Dennis v. United States*,¹² expressing the view that if government can be kept away from ideas, full

6. *Id.* at 375, 390.

7. See, e.g., Theodore M. Hagelin, *The First Amendment Stake in New Technology: The Broadcast-Cable Controversy*, 44 U. CIN. L. REV. 427, 463-64 (1975); Roy L. Mason & Robert E. Ganz, *Columbia Broadcasting: Public Access to the Media Denied*, 23 CATH. U. L. REV. 339, 343 (1973); Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After CBS?*, 122 U. PA. L. REV. 1283, 1288-89 (1974).

8. 412 U.S. 94, 130-32 (1973).

9. 418 U.S. 241, 244, 258 (1974).

10. Barron, *supra* note 1, at 1641.

11. *Id.* The marketplace of ideas had its origin in Justice Holmes's dissent in *Abrams v. United States*: “the best test of truth is the power of thought to get itself accepted in the competition of the market.” 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. 341 U.S. 494, 581-91 (1951) (Douglas, J., dissenting).

and free discussion would keep us from “embracing what is cheap and false.”¹³

Barron argued that “if ever there were a self-operating marketplace of ideas, it has long ceased to exist.”¹⁴ He was particularly concerned that subjects or perspectives in which people were not yet interested but ought to be, found difficulty in gaining access to the mass media. He pointed to the civil rights demonstrations and sit-ins as evidence that the existing media had failed to convey “unorthodox, unpopular, and new ideas.”¹⁵

To make the First Amendment work, Barron argued that the Court must recognize that “[t]here is inequality in the power to communicate ideas just as there is inequality in economic bargaining power.”¹⁶ The marketplace of ideas concept assumes that:

[P]rotecting the right of expression is equivalent to providing for it. But changes in the communications industry have destroyed the equilibrium in that marketplace. . . . A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications.¹⁷

Barron also questioned the assumption that the First Amendment should afford equal protection to all types of media despite enormous differences in impact. By “confusing freedom of media content with freedom of media to restrict access,” the Court “obscures the fact . . . that problems of access and impact vary significantly from medium to medium.”¹⁸ He pointed out the irony that Justice Black’s insistence on avoiding favoritism by treating all media the same actually had the effect of favoring mass media (newspapers, broadcasting, motion pictures) over media that was freely available such as sound trucks and pamphlets. Barron asked, “[i]f a group seeking to present a particular side of a public issue is unable to get space in the only newspaper in town, is this inability compensated by the availability of the public park or the sound truck?”¹⁹

13. Barron, *supra* note 1, at 1642-43 (quoting *Dennis*, 341 U.S. at 584).

14. *Id.* at 1641.

15. *Id.* at 1647.

16. *Id.*

17. *Id.* at 1647-48 (footnote omitted).

18. *Id.* at 1651.

19. *Id.* at 1653.

Barron recognized that First Amendment claims require a showing of state action.²⁰ But, he observed that “[t]oday ideas reach the millions largely to the extent that they are permitted entry into the great metropolitan dailies, news magazines, and broadcasting networks. . . . Only the new media of communication can lay sentiments before the public, and it is they rather than the government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance.”²¹ He argued that “[a] constitutional prohibition against governmental restrictions on expression is effective only if the Constitution ensures an adequate opportunity for discussion.”²² Since only the mass media provide an adequate opportunity, they must accommodate the interests of others who wish to speak.

Barron asserted that the right to be heard should be recognized as a constitutional principle.²³ He discussed several contemporaneous cases suggesting that such a right could be fashioned by the courts independently of legislation.²⁴ Barron described the D.C. Circuit decision in *Office of Communication of the United Church of Christ v. FCC*²⁵ (UCC), as “one of the most significant cases in public law in

20. *Id.* at 1655.

21. *Id.* at 1655-56.

22. *Id.* at 1656.

23. *Id.* at 1656, 1678.

24. Barron regarded the Supreme Court’s 1964 decision in *New York Times Co. v. Sullivan* as a “lost opportunity.” *Id.* at 1656, 1659. He found it paradoxical that the Court predicated protection for newspapers against libel from public officials on the “‘principle that debate on public issues should be uninhibited, robust, and wide-open,’” but showed no concern as to whether debate would in fact be assured. *Id.* at 1657 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). He concluded that “[u]nless the *Times* doctrine is deepened to require opportunities for the public figure to reply to a defamatory attack, the *Times* decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate.” *Id.* Next, he considered *Ginzburg v. United States*, which held that dissemination of books violated a federal obscenity statute because printed material represented “commercial exploitation of erotica solely for the sake of their prurient appeal.” 383 U.S. 463, 466 (1966). Barron saw in this case “the seeds of a new pragmatic approach to the first amendment guarantee of free expression.” Barron, *supra* note 1, at 1662. He argued that if the dissemination of books could be prohibited where the dissemination is for commercial exploitation, “it would seem that the mass communications industry, no less animated by motives of ‘commercial exploitation,’ could be legally obliged to host competing opinions and points of view.” *Id.* (quoting *Ginzburg*, 383 U.S. at 466). He noted that in writing for the Court, Justice Brennan found it appropriate to determine whether the social importance claimed for the material was “‘pretense or reality.’” *Id.* at 1663 (quoting *Ginzburg*, 383 U.S. at 470). Likewise, in Barron’s view, the mass media “should not be allowed to resist controls designed to promote vigorous debate and expression by cynical reliance on the first amendment.” *Id.*

25. 359 F.2d 994 (D.C. Cir. 1966). This decision was one of the last written by Warren Burger before he was appointed to the Supreme Court. This case grew out of the struggle for civil rights. The petitioners alleged that television station, WLBT, in Jackson, Mississippi, had failed to serve the significant African American population and had violated the Fairness Doctrine by failing

recent years. It is unfortunate that the constitutional basis of the case, though readily discernable, was not made more explicit.²⁶ Barron asserted that this case marked “the beginning of a judicial awareness that our legal system must protect not only the broadcaster’s right to speak but also, in some measure, the public rights in the communications process.”²⁷ At the same time, he recognized that then-Judge Burger’s opinion for the D.C. Circuit distinguished between a newspaper, which can be operated at the whim of its owners, and a broadcast station, which is “burdened by enforceable public obligations.”²⁸ Barron questioned the validity of this distinction in light of the fact that the number of broadcast stations exceeded the number of newspapers.²⁹

Barron suggested that courts might afford individuals and groups who wish to express views on public issues a right of nondiscriminatory access to newspapers.³⁰

[Such a right] might be predicated on Justice Douglas’s open-ended “public function” theory which carried a majority of the Court in *Evans v. Newton*. Such a theory would demand a rather rabid conception of “state action,” but if parks in private hands cannot escape the stigma of abiding “public character,” it would seem that a newspaper, which is the common journal of printed communication in a community, could not escape the constitutional restrictions which quasi-public status invites.³¹

Another option would be to secure the right of access through legislation. Barron argued that “if Congress were to pass a federal right of access statute, a sympathetic court would not lack the constitutional text necessary to validate the statute. If the first amendment is read to state affirmative goals, Congress is empowered to realize them.”³² Moreover, attempts by states to implement a right of access to promote an informed citizenry would not conflict with the First Amendment.

to present viewpoints inconsistent with the segregationist viewpoints of its owners. *Id.* at 998. The D.C. Circuit reversed the FCC’s determination that representatives of the viewing public lacked standing to raise these claims. *Id.* at 1009.

26. Barron, *supra* note 1, at 1664.

27. *Id.* at 1665.

28. *Id.* at 1665-66 (quoting *UCC*, 359 F.2d at 1003).

29. *Id.* at 1666.

30. *Id.* at 1667. Barron notes that in one case, a court in Ohio recognized a right of access, in which the court held that purchase of advertising should be open to members of the public on the same basis, especially when the newspaper is the only one. *Id.* However, several other courts had held otherwise. *Id.* at 1667 n.68. None of these cases were based on First Amendment analysis. *Id.* at 1667-68.

31. *Id.* at 1669 (footnote omitted).

32. *Id.* at 1676.

Finally, Barron argued that the *UCC* case suggested the administrative feasibility of a right of access.

B. Red Lion

Two years after Barron published his article, the Supreme Court unanimously upheld the right of reply for an individual personally attacked on the air against the claim that requiring a broadcast station to afford time for reply violated the First Amendment rights of the broadcaster.³³ A Pennsylvania radio station had aired a broadcast by the Reverend Billy James Hargis attacking Fred Cook, the author of a book criticizing Barry Goldwater. Cook demanded free time to reply and the station refused. The FCC ruled that under the Fairness Doctrine, the station was required to provide Cook with free time to reply.³⁴ The station appealed and the D.C. Circuit upheld the FCC.³⁵ This case was consolidated with another appeal from the Seventh Circuit.³⁶ In that case, the FCC had adopted rules clarifying a licensee's responsibilities under the Fairness Doctrine in the cases of personal attacks and political editorials. The Radio Television News Director Association challenged these rules, and the Seventh Circuit found they violated the First Amendment.³⁷

The opinion for the Court, written by Justice White, rejected the claims of broadcasters that the rules abridged their First Amendment rights. It began by observing that the "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."³⁸ Next, it noted that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."³⁹ Moreover,

33. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-401 (1969). Justice Douglas did not participate in the decision. *Id.* at 401.

34. The Fairness Doctrine generally required broadcast stations to cover controversial issues of public importance and to do so fairly by presenting both sides of controversial issues. *Id.* at 367.

35. *Id.* at 372-73; *Red Lion Broad. Co. v. FCC*, 381 F.2d 908, 930 (D.C. Cir. 1967).

36. *Red Lion Broad. Co.*, 395 U.S. at 370-71; *Radio Television News Dir. Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968).

37. *Radio Television News Dir. Ass'n*, 400 F.2d at 1020.

38. *Red Lion Broad. Co.*, 396 U.S. at 386. The decision analogizes broadcasters to sound trucks: "Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech . . . [t]he right of free speech of a broadcaster . . . does not embrace the right to snuff out the free speech of others." *Id.* at 387.

39. *Id.* at 388.

[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.⁴⁰

While the decision acknowledged that broadcasters have First Amendment rights, it gave greater weight to the public's First Amendment rights:

[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.⁴¹

The Court concluded that it was not:

[I]nconsistent 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. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.⁴²

While the *Red Lion* decision did not cite Barron's article, it lent support to a number of his ideas.⁴³ First, it found that requiring a right of

40. *Id.* at 389.

41. *Id.* at 390 (citations omitted) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)).

42. *Id.* at 392 (footnote omitted).

43. Barron's article was cited in the briefs of the government and the amicus Office of Communication of the United Church of Christ. Brief for Office of Communication of the United Church of Christ, et al. at 28 n.44, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (Nos. 2, 717);

reply was constitutional as applied to broadcasters. Second, it recognized that different media may need to be treated differently under the First Amendment. Third, it expressed concern that in the absence of the Fairness Doctrine, the wealthy few would have the ability to express their views and suppress those with which they disagreed. And finally, it recognized the public's paramount First Amendment right to have access to ideas.⁴⁴ The Court embraced the marketplace of ideas metaphor, but recognized that for the marketplace to work, it could not be monopolized by either government or private interests.⁴⁵

III. CBS

Shortly after *Red Lion*, the Court had an opportunity to consider whether the public's First Amendment right of access to ideas required that broadcasters sell time for the expression of political views. The case arose when an antiwar group, the Business Executives Move for Vietnam Peace (BEM), sought to purchase time to air spot announcements urging immediate withdrawal from Vietnam on WTOP, a news-oriented radio station in Washington, D.C., owned by Post-Newsweek. The station declined to sell time, citing its policy against the sale of spot advertisements on controversial issues. BEM filed a complaint with the FCC alleging that the station's refusal violated the Fairness Doctrine and the First Amendment and asking the FCC to order the station to air its advertisements.⁴⁶

The FCC denied BEM's complaint. It found that WTOP's policy of refusing to sell time was not a *per se* violation of the Fairness Doctrine and that WTOP had exercised reasonable, good faith judgment in its coverage of the Vietnam war.⁴⁷ The FCC rejected BEM's assertion that WTOP had frustrated the public's right to receive suitable access established in *Red Lion* because it found that the licensee itself had presented contrasting views on the Vietnam war. Although BEM had relied principally upon *Red Lion*, the FCC interpreted *Red Lion* as "stressing the essential nature of the fairness doctrine, rather than the right of particular spokesmen to obtain access to the air."⁴⁸

Brief for the United States and the FCC at 56, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (Nos. 2, 717), 1969 WL 120257.

44. See *Red Lion Broad. Co.*, 395 U.S. at 375, 386, 390, 392.

45. *Id.* at 390.

46. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 98-100 (1973); *Bus. Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242, 242-43 (1970).

47. *Bus. Executives' Move for Vietnam Peace*, 25 F.C.C.2d at 246-48.

48. *Id.* at 247-48.

BEM's appeal was considered together with the appeal of another FCC case decided the same day, *Democratic National Committee*.⁴⁹ After the CBS network refused to sell time to the Democratic National Committee (DNC), citing a policy of selling time to political parties only during election periods, the DNC requested a declaratory ruling that broadcasters may not as general policy refuse to sell time to responsible entities for comment on public issues. Relying on *Red Lion*, the DNC argued that that CBS's refusal to accept paid programming on controversial public issues violated the public's right to hear contrasting views on issues of public importance.⁵⁰

The FCC denied the DNC's request. It noted that under *Red Lion*, a licensee could not rule off coverage of important issues because of its private beliefs, but must rather act as a trustee for the public. Because the DNC had not alleged that CBS or any other licensee failed to comply with the Fairness Doctrine, the FCC interpreted the DNC request as seeking to overrule the public trustee policy.⁵¹

The Commission found that requiring licensees to sell time for comment on public issues would run counter to the Communications Act and legislative history which had rejected treating broadcasters as common carriers.⁵² While acknowledging the DNC's reliance on *Red Lion*, the FCC read *Red Lion* differently. It concluded as it did in *BEM*, that *Red Lion* stressed the right of the public to be informed, not the right of any individual or group to speak over broadcast facilities. Moreover, it was concerned that requiring broadcasters to sell time to anyone who wanted it could result in a chaotic situation and would allow the public agenda to be set by affluent groups.⁵³ Thus, the FCC concluded that "the present system of regarding licensees as trustees, with a duty to present contrasting viewpoints through representative spokesmen, is constitutionally sound and of greater public benefit than the concept of an individual right of access"⁵⁴

Commissioner Nicholas Johnson issued lengthy dissents in both cases. His dissent in *BEM* started from the premise, similar to the one articulated by Barron, that the First Amendment protects not just the right to speak but the right to reach an audience, that is, to

49. *Columbia Broad. Sys., Inc.*, 412 U.S. at 97; *In re Democratic Nat'l Comm.*, 25 F.C.C.2d 216 (1970).

50. *Democratic Nat'l Comm.*, 25 F.C.C.2d at 216-17.

51. *Id.* at 222-23, 230.

52. *Id.* at 223-24.

53. *Id.* at 224-27.

54. *Id.* at 228 (citation omitted).

communicate.⁵⁵ Johnson set forth multiple grounds for concluding that WTOB's refusal to accept the BEM advertisements constituted state action, and thus invoked the First Amendment.⁵⁶ He concluded that WTOB was a forum for the communication of ideas that had opened itself up to the public by making commercial time available for sale, and thus its refusal to sell time to BEM violated the First Amendment.⁵⁷

Johnson's dissent in *DNC* similarly made broad constitutional and policy arguments in support of the public's right of access. He suggested that if the media were not opened up, those who tried to "work[] within the system" would become frustrated and turn to violence.⁵⁸ He argued that the FCC had permitted a system of broadcasting to develop in which private broadcasters served as both moderators and speakers. Moreover, this system provided "an individual right of access . . . but only for hucksters of industrial garbage. Anyone wishing to discuss war, peace, mental health, or the suffering of the poor, must seek out a corporate 'trustee,' appointed by the government, to speak for him."⁵⁹

Johnson urged the FCC and the courts to develop "guidelines for 'reasonable' access to the broadcast frequencies, seeking to ensure that the electronic media of twentieth century communication are as open to the public as the soap boxes, public parks, and town hall meetings of the last century."⁶⁰ He suggested, for example, that the FCC could require licensees to accept paid political programming for up to five percent of their schedules on a first-come, first-served basis.⁶¹ In response to the majority's argument that this proposal would allow the wealthy to dictate the public agenda, he observed that the "short answer is that [they] already [do]."⁶² Partial access for purchase would at least open a closed system to partial dissent.⁶³

55. *Bus. Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242, 249 (1970). In fact, Commissioner Johnson cites Barron's *Harvard Law Review* article in two places. *Id.* at 262 (quoting Barron for proposition that the marketplace of ideas no longer functions well and that the mass media is suppressing opinion); *id.* at 264 (citing Barron and others as recognizing that access is required under the First Amendment to create a true marketplace of ideas).

56. *Id.* at 254-60, 264.

57. *Id.* at 266, 274.

58. *In re Democratic Nat'l Comm.*, 25 F.C.C.2d 216, 231 (1970).

59. *Id.* at 232-33.

60. *Bus. Executives' Move for Vietnam Peace*, 25 F.C.C.2d at 267.

61. *Democratic Nat'l Comm.*, 25 F.C.C.2d at 235.

62. *Id.* at 235-36.

63. *Id.* at 236.

A. *The D.C. Circuit Decision*

Both BEM and the DNC appealed to the D.C. Circuit. In a two-to-one decision written by Judge Wright, the court reversed the FCC and remanded for further proceedings.⁶⁴ Specifically, the court held that “a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted.”⁶⁵ The court limited the holding, noting that it was not requiring that the planned announcements be accepted. Rather, it left it to the FCC to develop and administer reasonable procedures for editorial advertisements.⁶⁶

Because the statutory and constitutional arguments were interrelated, the court found that it could not avoid the constitutional question. It noted that the broadcast media was affected by strong First Amendment interests, but that the nature of those interests was evolving.⁶⁷ The most important recent development was the Supreme Court’s decision in *Red Lion*, which the D.C. Circuit characterized as “a clarion call for a new public concern and activism regarding the broadcast media.”⁶⁸ While *Red Lion* did not directly reach the issue in these cases, it contained expansive language addressing the impermissibility of “private censorship.”⁶⁹

The D.C. Circuit concluded that the reach of the First Amendment did not depend on “public”—“private” technicalities but on the public character and importance of the enterprise for communicating ideas.⁷⁰ It found that several factors, taken together, brought broadcast licensees within the ambit of the First Amendment. First, broadcasting was heavily dependent upon the government and extensively regulated. Second, the FCC had given it “imprimatur” to the flat ban against controversial ads. Third, broadcasting was an important medium for the communication of ideas that had replaced the soap box orator and leafleteer.⁷¹

The court noted that the FCC decisions at issue dealt only with advertising time, and thus broadcasters had no strong speech interests

64. *Bus. Executives’ Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971).

65. *Id.* at 646.

66. *Id.* at 646, 665.

67. *Id.* at 649.

68. *Id.* at 650.

69. *Id.* at 651 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 392 (1969)).

70. *Id.*

71. *Id.* at 651-54.

compared to program time.⁷² Moreover, it found that the public had a First Amendment interest in the mode as well as the content of public debate. Citing *Red Lion*, it observed that the purpose of the First Amendment was to preserve an uninhibited marketplace of ideas.⁷³ Even if broadcasters presented a full spectrum of viewpoints on non-advertising time, their retention of total editorial control was inimical to the First Amendment because the public needed exposure to a robust exchange of ideas. Thus, the court concluded that the Fairness Doctrine's goal of full and fair coverage during programming did not eliminate the public interest in the further, complementary airing of controversial views during advertisements.⁷⁴ It rejected the FCC's claims that requiring access would lead to chaos or allow the wealthy to dominate public debate, noting that each of these concerns could be addressed through reasonable regulation.⁷⁵

Barron and other advocates for public access surely must have been heartened by the D.C. Circuit holding that the First Amendment required the FCC to afford the public some right of access to broadcast stations. Yet, their optimism was soon cut short by the Supreme Court's decision to take the case.

B. *The Supreme Court Decision*

The FCC, CBS, ABC, and Post-Newsweek sought Supreme Court review of the D.C. Circuit's decision. The Supreme Court's decision, issued on May 29, 1973, had six written opinions. While seven Justices voted to reverse the D.C. Circuit, they lacked consensus on the rationale for reversal. Since the D.C. Circuit had found that a broadcast station's "flat ban" on paid public issue announcements violated the First Amendment, the Court could reverse either by finding that the First Amendment was not implicated because there was no state action or that the First Amendment allowed a flat ban on paid public issue announcements.

The main opinion, written by Chief Justice Warren Burger, found both. This opinion has four parts. Part I, joined by four other Justices, began with a discussion of *Red Lion*, noting that the broadcast media posed unique and special problems and involved an unusual First

72. *Id.* at 654.

73. *Id.* at 655.

74. *Id.* at 656, 658.

75. *Id.* at 663-65. Judge McGowan dissented on the grounds that a right of access would be difficult to administer and was not compelled by the First Amendment. *Id.* at 666-67 (McGowan, J., dissenting).

Amendment order. Balancing the First Amendment interests was described as a “task of a great delicacy,” which warranted great deference to Congress and the FCC.⁷⁶ Part II, joined by the same Justices, recounted the origins of the modern system of broadcast regulation, citing earlier Supreme Court decisions such as *Red Lion*.⁷⁷

Part III addressed the state action question. It concluded that the action complained of was the result of private, independent journalistic decisions. Since the government was not a partner to these actions, there was no state action.⁷⁸ This part was joined only by Justices Stewart and Rehnquist.

Part IV, joined by Justices Rehnquist, White, Powell, and Blackmun, purported to address “whether the ‘public interest’ standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether assuming governmental action, broadcasters are required to do so by reason of the First Amendment.”⁷⁹ After noting that “the ‘public interest’ standard necessarily invites reference to First Amendment principles,”⁸⁰ the remainder of this section addressed the Communications Act, the Fairness Doctrine, and the positions of the FCC and D.C. Circuit, without any detailed constitutional analysis. It found that application of the Fairness Doctrine to editorial advertisements could jeopardize the efficient operation of the doctrine and subordinate the public interest to private interests.⁸¹ It rejected the lower court view that speakers are the best judge of what the public ought to hear, noting that “[f]or better or worse, editing is what editors are for.”⁸² It found that the lower court discounted the difficulties of implementing a right of access, which would require substantial governmental oversight.⁸³ It also rejected the claim of discrimination between commercial and editorial advertisements, finding that none of the cited cases involved a forum with a statutory duty to provide full and fair coverage of issues such as that imposed on broadcasters by the Fairness Doctrine.⁸⁴ However, the Court did not completely close the

76. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 101-02 (1973).

77. *Id.* at 103-05. It also discusses the legislative history of the Communications Act, in particular, the Dill amendment, which rejected the regulation of broadcast stations as common carriers. *Id.* at 105-14.

78. *Id.* at 119-21 (plurality opinion).

79. *Id.* at 121 (majority opinion).

80. *Id.* at 122.

81. *Id.* at 122-32.

82. *Id.* at 124.

83. *Id.* at 125-27.

84. *Id.* at 129-30.

door to the idea of a public right of access. It noted that Congress or the FCC could devise a limited right of access in the future, and the FCC had in fact opened a proceeding to study the options.⁸⁵

Two of the concurring opinions center on the question of state action. Justice White's concurring opinion explained that he did not join Part III of the Chief Justice's opinion because he thought state action was implicated.⁸⁶ Assuming state action, and given the constitutionality of the Fairness Doctrine, allowing broadcasters to choose how to comply with the Fairness Doctrine did not violate the First Amendment.⁸⁷ Justice Blackmun's concurring opinion, joined by Justice Powell, stated that because Part IV concluded that assuming governmental action, the First Amendment did not compel broadcasters to accept editorial ads, "the governmental action issue does not affect the outcome of the case." Thus, he would "refrain from deciding it."⁸⁸

Two other concurring opinions articulated different reasons for reversing the decision below. In a lengthy concurrence, Justice Douglas argued that commercial licensees should not be treated any differently than newspapers and requiring access to newspapers would obviously constitute unconstitutional government intrusion.⁸⁹ Douglas also noted that he did not participate in *Red Lion* and "with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime."⁹⁰

Justice Stewart's concurring opinion indicated that his views were close to those of Justice Douglas. He "agreed with the Court in *Red Lion*, although with considerable doubt, because [he] thought that that much Government regulation of program content was within the outer limits of First Amendment tolerability."⁹¹ He observed that were the Commission to require broadcasters to accept editorial advertising under the public interest standard, the case would be analogous to *Red Lion*. But, here the Court of Appeals, not the FCC, held that the First Amendment compelled broadcasters to accept editorial advertisements. This, Justice Stewart found, reflected "an extraordinarily odd view of the First Amendment."⁹²

85. *Id.* at 131.

86. *Id.* at 146 (White, J., concurring).

87. *Id.* at 147.

88. *Id.* at 147-48 (Blackmun, J., concurring).

89. *Id.* at 148-52 (Douglas, J., concurring).

90. *Id.* at 154.

91. *Id.* at 132, 138 (Stewart, J., concurring).

92. *Id.* at 138-39.

Justice Stewart also elaborated on his reasons for joining in Part III of the opinion concerning state action. He explained: “The First Amendment protects the press *from* government interference. . . . To hold that broadcaster action is governmental action would . . . strip broadcasters of their own First Amendment rights” and would produce a result “wholly at odds with the broadcasting system established by Congress.”⁹³ He declined to join Part IV of the Court’s opinion, which he understood to address the statutory argument. Noting that the two other concurring Justices saw Part IV as a discussion of the First Amendment, he commented that the conflation of these two issues was “quite wrong . . . for the simple reason that the First Amendment and the public interest standard of the statute are not coextensive.”⁹⁴ He also expressed concern that affirming the lower court decision would “lead to the conclusion that the First Amendment requires that newspapers, too, be compelled to open their pages to all comers.”⁹⁵

Justice Brennan’s dissent, which Justice Marshall joined, finds government action. He concluded that:

[G]iven the confluence of these various indicia of “government action”—including the public nature of the airwaves, the governmentally created preferred status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy—I can only conclude that the Government “has so far insinuated itself into a position” of participation in this policy that the absolute refusal of broadcast licensees to sell air time to groups or individuals wishing to speak out on controversial issues of public importance must be subjected to the restraints of the First Amendment.⁹⁶

He found that “the Fairness Doctrine, standing alone, [was] insufficient—in theory as well as in practice—to provide the kind of ‘uninhibited, robust, and wide-open’ exchange of views to which the public is constitutionally entitled.”⁹⁷ Broadcasters faced strong economic incentives to limit the variety and controversial nature of their coverage. Moreover, the public had an interest in “receiving ideas and information directly from the advocates of those ideas without the interposition of journalistic middlemen,” and to hear new and unorthodox ideas.⁹⁸

93. *Id.* at 139-40.

94. *Id.* at 141-42.

95. *Id.* at 144-45.

96. *Id.* at 180-81 (Blackmun, J., dissenting) (footnotes omitted).

97. *Id.* at 187.

98. *Id.* at 189.

Justice Brennan made arguments similar to those made in Barron's article:

[The right of self-expression] can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed.⁹⁹

Brennan also noted that:

[A]lthough “full and free discussion” of ideas may have been a reality in the heyday of political pamphleteering, modern technological developments in the field of communications have made the soapbox orator and the leafleteer virtually obsolete. And, in light of the current dominance of the electronic media as the most effective means of reaching the public, any policy that *absolutely* denies citizens access to the airwaves necessarily renders even the concept of “full and free discussion” practically meaningless.¹⁰⁰

Brennan recognized that broadcasters have First Amendment rights, but these rights must be balanced against the rights of others. And in striking that balance, he emphasized:

[T]hese cases deal *only* with the allocation of *advertising* time—air time that broadcasters regularly relinquish to others without the retention of significant editorial control. Thus, we are concerned here, not with the speech of broadcasters themselves, but, rather, with their “right” to decide which *other* individuals will be given an opportunity to speak in a forum that has already been opened to the public.¹⁰¹

Justice Brennan pointed out that there was “no majority for the *holding* that the challenged ban does not violate the ‘substance’ of the First Amendment” because the views of Chief Justice Burger and Justice

99. *Id.* at 192-93. The dissent cites Barron's *Harvard Law Review* article for the point that broadcasters tend to permit only established views to enter the “marketplace of ideas.” *Id.* at 188 n.24. It also quotes Barron's article for the point that the inability of some groups to communicate has led to sit-ins and demonstrations to get the attention of the press. *Id.* at 190 n.27.

100. *Id.* at 196.

101. *Id.* at 199-200 (footnote omitted).

Rehnquist were rendered dictum by their conclusion that there was no state action.¹⁰²

C. *Insights from the Justices' Papers*

1. The Views of Justice Blackmun and His Clerk

The Bench Memo written by Ralph I. Miller, Justice Blackmun's clerk, summarized the arguments in the briefs and discussed the issues.¹⁰³ He asked: "How would spot advertising on minority views affect the country?"¹⁰⁴ He noted that the parties seem to assume that "liberal elements" would benefit from requiring access for editorial advertisements. But he was "concerned . . . that corporate America may be the real winner."¹⁰⁵ He was also concerned about increasing government involvement: "The pervasiveness of television increases the danger that the electorate may become a nation of sheep. Government involvement in the content of programming is now firmly established by *Red Lion*, but this case invites the Court to constitutionally compel a further intrusion of the government into the information business."¹⁰⁶

Under the heading "Precedents," Miller discussed only one case: *Red Lion*. He noted:

Language in the opinion stresses the notion that licensees are given frequency monopolies out of a practical necessity and that the public retains an interest in the content of the material aired over those frequencies. *Red Lion* is quite important for some of the issue, but *Red Lion* does not resolve the case.¹⁰⁷

As to whether there was state action, Miller characterized the "policy basis for state action" as:

[A] balancing of the amount of governmental involvement (including the amount of power placed in private hands by the government) against the strength of the private rights of the entity at issue

102. *Id.* at 171 (Brennan, J., dissenting). Although the decision for the Court in Part IV leaves the door open to the FCC or Congress to devise limited right of access in the future, neither has taken up this invitation.

103. Bench Memorandum from RIM [Ralph I. Miller] to Justice Harry Blackmun (Oct. 4, 1972), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

104. *Id.* at 24.

105. *Id.* at 24-25.

106. *Id.* at 25.

107. *Id.* at 25-26.

(including 9th A[mendment] privacy, 1st A[mendment] associational privacy, and 5th A[mendment] “substantive due process” privacy, whatever those may connote).¹⁰⁸

He then noted that “*Red Lion* seems almost controlling on the state action issue to me. *Red Lion* makes it clear that the frequency assigned to a broadcaster is not his private demesne.”¹⁰⁹ He explained:

The broadcaster seems to have a very limited right of privacy (of any flavor). Conversely, the amount of power delegated to the licensee is enormous. DNC urges the ability of television to turn the tides in a Presidential election. Vice President Agnew has expressed similar sentiments. Whether the lease of public airwaves or ‘extensive regulation’ approach is used, I think it is rather easy to find that the general policies of broadcasters (as sharply distinguished from the time-slot by time-slot decisions) are state action. Only a general policy banning all controversial advertisements is at issue here.¹¹⁰

On the merits, Miller found that the Petitioners’ “strongest argument . . . is that the fairness doctrine . . . provides the best protection of the public right to know.”¹¹¹ He noted that the “broadcasters would prefer to stay with the benevolent fairness approach (which they opposed violently in *Red Lion*) rather than to lose more of their control over spokesmen selection.”¹¹² In his view, the strongest argument against the Fairness Doctrine was that the format and mode of response were controlled by the network.¹¹³ His “personal feeling [was] that the fairness doctrine ha[d] worked remarkably well” and that it could be enlarged.¹¹⁴ Nonetheless, he was concerned that the system mandated by the lower court would raise administrative problems that would inevitably draw the FCC into a “multitude of disputes” and require substantial court involvement.¹¹⁵ He concluded:

108. *Id.* at 27. Miller suggests a way that the issue of state action might be avoided, but admits that the argument is “rather weak,” none of the briefs make it, and it could be criticized as “intellectually dishonest.” *Id.*

109. *Id.* at 28. In support, Miller quotes from *Red Lion*: “No one has a First Amendment right to a license or to monopolize a radio frequency.” *Id.* (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969)).

110. *Id.* at 28.

111. *Id.* at 29.

112. *Id.*

113. *Id.*

114. *Id.* at 30.

115. *Id.*

I think the Court of Appeals went too far too fast. The need for input from without the broadcasting industry is great, but the 'advertorial' is a questionable technique for meeting that need. More FCC action is required. I would recommend that the [Court of Appeals] judgment be vacated and that the case be remanded to the FCC for a feasibility study of ways to provide independent program input. When the issue comes to the Court again, it should be more refined. The opinion will be difficult to write, but I think an opinion could be written which would indicate the importance of individual access (because of needs of the public to see original presentations; not because every citizen has a right to be on TV) but which would stress the need for a workable system drawn from a great range of alternatives, including, but not limited to, paid editorials.¹¹⁶

Justice Blackmun set out his view of the case in handwritten notes that seem to have been written in anticipation of the oral argument. He wrote:

The next step beyond Red Lion
Red Lion does not give us the answer here
Note that in Red Lion, the broadcasters *opposed* the fairness doctrine

So generally disturbing elements to me in the court of appeals decision

1. Elevates to constitutional level the right of access
2. This would involve the courts in all kinds of Constitutional questions—a great flood
3. The rich-poor differentiation would ensue
4. Ignores that the fairness doctrine has worked well
5. Ignores enforcement aspects

Clearly we deal here with a *limited* facility

1. The FCC has expressed the statute's reasonableness, discretionarily administered
A public trustee concept
2. The Congress has rejected specifically the common carrier aspect

I get the impression that the fairness doctrine has found approval as well, and that it is consistent with [First Amendment] values.

I am inclined to reverse because court of appeals went too far too fast

1. The fairness doctrine is itself workable
2. Has a *statutory* rather than a *constitutional* base

116. *Id.* at 32-33.

3. Can be admin with general appropriateness
4. Despite a tendency here and there toward mediocre non-controversial, not all media (cf. newspapers) would be content so to do
5. Constitutional imposition would ruin it
6. Opening the door fails to account for the limitations
7. Opens the way to differentiation by wealth . . .
8. True, it does tend to emphasize the commercial over the political
9. Opens way to more insidious and pervasive governmental control and censorship
10. Any disadvantages can be alleviated by the FCC regulations
11. Let FCC work out feasibility study as to increased input

We must face the constitutional (i.e. state action) issue—cannot be avoided. If, however, we go off on the statute, legislative history supports petitioners

On the constitutional, there *is* state action hidden in the woodwork—Red Lion

If we grant the presence of state action, so what—respondents do not necessarily win

I prefer to stay on the statute—But can we?¹¹⁷

2. The Views of the Justices at the Conference

Oral argument was held on October 16, 1971. At the conference held four days later, the Justices voted six to three to reverse the lower court decision. The Chief Justice voted to reverse. He thought that Judge McGowan's dissent was correct. He saw the case as presenting a "political not a 1st Amendment matter."¹¹⁸ He found the FCC's position rational and that the alternative would lead to "bedlam."¹¹⁹ He was also concerned that a right of access would "give wealthy the power to speak, not others—FCC should not allow every nut with money to do this—he would wait for Congress to act."¹²⁰

117. Justice Blackmun's Notes from Oct. 20, 1972 Conference on Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress) [hereinafter Justice Blackmun's Oct. 20, 1972 Conference Notes].

118. *Id.*

119. *Id.*

120. Justice Douglas's Notes from Oct. 20, 1972 Conference on Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., in PAPERS OF WILLIAM O. DOUGLAS, Box 1597, Nos. 71-863 to 71-866 (Library of Congress) [hereinafter Justice Douglas's Oct. 20, 1972 Conference Notes].

Justice Douglas voted to affirm the lower court. He did “not see offhand how government can adopt this blanket program,” and indicated that he would like to see what the FCC does.¹²¹ His own notes of the conference state: “These are public licensees dealing with federal airspace—Court of Appeals sent it back for rules—the case is really premature until we have the rules.”¹²²

Justice Brennan also voted to uphold the lower court decision. He emphasized that the lower court had only held that a flat ban offended the First Amendment.¹²³ Justice Brennan thought that there was both government action and a First Amendment problem, and in that context, the lower court did not go too far.¹²⁴

Justice Stewart voted to reverse because he felt “strongly” that there was no government action.¹²⁵ He observed:

When FCC limits a broadcaster, that is government action. But cannot say the broadcaster’s action is government action. First Amendment too far for me. Then a broadcaster could not edit etc. Country has chosen *not* to have government broadcasting. *Red Lion* is a difficult case for me. I prefer less rather than more government restriction on broadcasting. FCC has refrained from pushing broadcaster around. Had they said you must accept advertising, then a genuine first amendment issue.¹²⁶

Justice White voted to reverse as well. He found the statutory argument “absurd,” but thought the case posed a First Amendment issue.¹²⁷ While he believed that the Fairness Doctrine was mandated by the Constitution and required a broadcaster to act as a proxy for many

121. Justice Blackmun’s Oct. 20, 1972 Conference Notes, *supra* note 117.

122. Justice Douglas’s Oct. 20, 1972 Conference Notes, *supra* note 120.

123. *Id.*

124. Justice Blackmun’s Oct. 20, 1972 Conference Notes, *supra* note 117. Douglas’s notes attribute to Brennan “there is a 1st A[mendment] interest here—it’s government action.” Justice Douglas’s Oct. 20, 1972 Conference Notes, *supra* note 120.

125. Justice Blackmun’s Oct. 20, 1972 Conference Notes, *supra* note 117.

126. *Id.* Justice Douglas’s notes similarly report Stewart’s views: “FCC action restraining a licensee is government action—there is none here—broadcasters are not a government agency—if so, the 1st A[mendment] would bar them from barring anyone. *Red Lion* was difficult case for him—otherwise could impose a degree of regulation—it did not hold broadcasters were agencies of the U.S.—FCC has refrained from limiting them—That is what the 1st A[mendment] is all about—there is no government regulation here . . . law requiring newspaper to take all or certain materials is clearly unconstitutional—There is no restraint here over the broadcasters—The media are protected by 1st Amendment, save for minor exceptions.” Justice Douglas’s Oct. 20, 1972 Conference Notes, *supra* note 120.

127. Justice Blackmun’s Oct. 20, 1972 Conference Notes, *supra* note 117.

voices, he “draws the line and refuses to extend gov[ernment] control over broadcasting.”¹²⁸

Justice Marshall voted to affirm the D.C. Circuit. He thought that because, unlike newspapers, broadcasters paid nothing for use of the air and could use it only under a license, there was a “government aspect.”¹²⁹ He believed that the First Amendment “protects controversial talk.”¹³⁰ For him, “*Burton* settled that use of the air is sufficient” to invoke government action and the media’s refusal to carry “controversial” items violated the First Amendment.¹³¹

Justice Blackmun voted to reverse. He reportedly said that “this is a policy case—if [this] case is affirmed there will be a great flood of constitutional decisions.” He also believed that the Fairness Doctrine had worked well and there was no violation of the First Amendment.¹³²

Justice Powell likewise voted to reverse. According to Justice Blackmun’s notes, Justice Powell found that “[g]overnment action is a close question in totality,” and noted that the airwaves belong to the public.¹³³ Douglas’s notes on Powell are similar: “not easy to find no state action—FCC has not told media not to accept these ads—airways belong to public—private licensee is affected with a public interest.”¹³⁴

Justice Rehnquist also voted to reverse. However, his reasoning is not entirely clear from the notes. Justice Blackmun’s notes indicated that Rehnquist “agrees with [White] as to government action,” and “with [Stewart] as to its absence. Licensees represent private parties during terms of their license.”¹³⁵

3. Disagreements Over the State Action Question

The varying views of the Justices made reaching consensus on an opinion difficult. The Justices’ files reveal that Chief Justice Burger made great efforts to convince the other Justices to join in his conclusion that there was no state action.

128. Justice Douglas’s Oct. 20, 1972 Conference Notes, *supra* note 120.

129. Justice Blackmun’s Oct. 20, 1972 Conference Notes, *supra* note 117.

130. *Id.*

131. Justice Douglas’s Oct. 20, 1972 Conference Notes, *supra* note 120.

132. *Id.*

133. Justice Blackmun’s Oct. 20, 1972 Conference Notes, *supra* note 117.

134. Justice Douglas’s Oct. 20, 1972 Conference Notes, *supra* note 120.

135. Justice Blackmun’s Oct. 20, 1972 Conference Notes, *supra* note 117. Douglas’s notes similarly indicated that Rehnquist “agrees with [White]—there is governmental action here—U.S. controls by licensing and excluding others—license represent private not public interests.” Justice Douglas’s Oct. 20, 1972 Conference Notes, *supra* note 120.

a. The Chief Justice's First Draft

The Chief Justice's first draft of the opinion was circulated on February 1, 1973.¹³⁶ This draft generally presented the same arguments in the same order as the published decision.

Justice Blackmun's clerk agreed with the Chief Justice's draft except for Part III's conclusion that there was no governmental action.¹³⁷ While suggesting that the finding of no state action was intended to "pull" Justice Stewart's vote, he noted that:

Legally, this Court has made a number of things "state action" under the 14th A[mendment]. This case deals with the 1st A[mendment], but the opinion does not suggest that "governmental" action is more difficult to show than "state" action or that the 1st A[mendment] should be distinguished from the 14th A[mendment]. The policy difference, of course, is that the 14th A[mendment] cases have been racial cases decided primarily before the 1964 Civil Rights Act.

If the Court is going to use the principles of those 14th A[mendment] cases (and this circulation does that . . .) I do not feel they support the result reached. The particularly difficult case is *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). From a purely legal standpoint, I feel this part of Part III is weak.¹³⁸

As a "matter of policy," he observed that the issue of state action "may be far more important than the merits."¹³⁹ He explained:

I feel the role of the Court under emerging doctrines (especially privacy) is likely to carry the Court into more and more areas now considered private. . . . I feel the Court is shifting more and more toward protection of the individual from a crowded, technological world. If that is one role of the Court (and I submit that the electronic eavesdropping, environmental, and privacy cases suggest that it is), then this decision might get in the way in the future.¹⁴⁰

136. While this draft is not in Justice Blackmun's files, it was included in the papers of Justice Brennan. PAPERS OF WILLIAM J. BRENNAN, Box 292, Nos. 71-863 to 71-866 (Library of Congress).

137. Memorandum from RIM [Ralph I. Miller] to Justice Harry A. Blackmun (Feb. 3, 1972), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress). Miller commented that the Chief Justice's draft "brings a wealth of good writing and sound thinking." *Id.* at 4. He noted that the organization did not clearly separate the statutory and constitutional holdings, but dismissed that concern as a "matter of style." *Id.*

138. *Id.* at 5.

139. *Id.*

140. *Id.* at 5-6.

Miller concluded that it was not necessary to reach the state action question because there were two “independent and adequate reasons” for concluding that the First Amendment did not apply. First, as explained in Part III of the draft, there was no governmental action. Second, as explained in Part IV, access was not mandated by either the First Amendment or the Communications Act. He recommended that Justice Blackmun ask the Chief Justice to edit Part III, and if he was unwilling, to draft a short opinion concurring in all but Part III and explaining that he saw no reason to discuss governmental action.¹⁴¹

Justice White seems to have had a similar reaction to the first draft. In a letter to the Chief Justice dated February 9, 1973, he wrote, “[b]ecause you reach and decide the First Amendment issue as a statutory matter in Part IV, I do not see the reason for Part III Indeed, I thought the Court normally avoided constitutional issues that were unnecessary to decision.”¹⁴² He added that in any event, he did not agree with the conclusion that there was no government action here.

The broadcasters make substantial claims that their conduct is either authorized or required by the Fairness Doctrine, and your Part IV seems to recognize that the Fairness Doctrine and other Communications Act policies are greatly implicated in the challenged broadcaster policy. I had thought that an otherwise private act ordered or authorized by statute or other official policy constitutes government conduct for constitutional purposes.¹⁴³

Justice Stewart, on the other hand, indicated in his letter to the Chief Justice dated February 6, 1973, that he agreed with the result and much of the proposed opinion, but noted, “portions of it, particularly Part IV, cause me considerable concern.”¹⁴⁴

141. *Id.*

142. Memorandum from Justice Byron R. White to Chief Justice Warren E. Burger (Feb. 9, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

143. *Id.*

144. Memorandum from Justice Potter Stewart to Chief Justice Warren E. Burger (Feb. 6, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

b. The Chief Justice's Response to Comments on His Draft

The Chief Justice responded to the comments on his draft opinion with a Memorandum to the Conference dated February 14, 1973.¹⁴⁵ He observed that there seemed "to have been some confusion" about whether Part IV was addressing statutory or constitutional issues.¹⁴⁶ He offered to separately address the statutory and First Amendment issues, but noted that "we cannot escape deciding whether the First Amendment itself requires a right of access, unless we stop with a holding of no governmental action. I cannot be persuaded that governmental *acquiescence* equals governmental *action* or that there is governmental action here."¹⁴⁷

Burger suggested the he could be persuaded by the lack of votes to omit Part III. But then noted, "we would be obliged to say, of course, that even assuming, *arguendo*, but without intimating an affirmative view, that there is 'governmental action' present, nevertheless the [Court of Appeals] is wrong on holding a First Amendment right of access. To me that is a cart-before-the-horse approach."¹⁴⁸

Burger added that he had "spent months in tearing [the government action] issue apart, and [saw] in the Court of Appeals' holding a greater threat to 'free press' than some others may acknowledge."¹⁴⁹ He suggested that finding government acquiescence to be government action would have had potentially broad implications with respect to the Fourteenth Amendment and the printed media. On both of these points, he referred to Professor Jaffe's "thoughtful article" in the *Harvard Law Review*.¹⁵⁰

In this Article, Jaffe argued that the "doctrines of fairness and access do have some beneficial value in expanding the scope of public debate on issues of importance. But the grounding and scope of these doctrines is uncertain and if pressed too tendentiously their contribution might be outweighed by their cost in other important values."¹⁵¹ In the pages cited by the Chief Justice, Jaffe argued that the D.C. Circuit's opinion in *BEM* "stretch[ed] the concept of state action," and should

145. Memorandum of Chief Justice Warren E. Burger to the Conference (Feb. 14, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress) [hereinafter Chief Justice Burger's Feb. 14, 1974 Conference Memo].

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* (citing Louis L. Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 782-87 (1972)).

151. Jaffe, *supra* note 150, at 768.

have been based on statutory rather than constitutional grounds.¹⁵² Basing the decision on statutory grounds could have avoided “the inevitable question whether printed publications are state action.”¹⁵³ While he noted the “danger in one-newspaper towns that the press will suppress *local* news for corrupt reasons,” and thought it would be “feasible to require newspapers to print advertorials and replies to attacks on individuals,” any broader effort to force newspapers to cover newsworthy events or to do so fairly would “undermine such independence as the press now shows without achieving any real diversity.”¹⁵⁴ Jaffe pointed out that it was difficult to distinguish newspapers from broadcasting because there are more broadcast stations than newspapers and over ninety-five percent of American cities lacked competitive newspapers.¹⁵⁵

The Chief Justice’s memorandum similarly suggested that it might be difficult to distinguish broadcasting from print because the printed media received governmental benefits in the form of subsidized mailing rates and antitrust immunity. He did “not want to enlarge governmental action concepts so as to embrace what government *permits* as distinguished from what it *commands*.”¹⁵⁶ He concluded:

This case is crucial to the media, and I have approached it with a view to giving broadcasters a posture as nearly as possible like that of a private newspaper, consistent with the regulatory scheme. I do not want broadcasters regulated *more* than they are now, which would surely be the result of a Court of Appeals’ holding.¹⁵⁷

152. *Id.* at 784.

153. *Id.*

154. *Id.* at 784-85 (quoting T. EMERSON, *THE SYSTEM OF FREE EXPRESSION* 670-71 (1970)).

155. *Id.* Jaffe discussed a “broader rationale” for finding state action put forth by commentators including Barron and Nicholas Johnson. He noted: “[These commentators] subscribe to the proposition that today—as distinguished from some never-identified halcyon age—great decision-making powers are lodged in the hands of a few who operate without defined legal responsibilities or any formal duties of public accountability. Such great private power, it is reasoned, must be brought under constitutional control.” *Id.* at 785-86. “Jaffe strongly disagreed with this argument. The implication that the people of this country—except for the proponents of this theory—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.” *Id.* at 787.

156. Chief Justice Burger’s Feb. 14, 1974 Conference Memo, *supra* note 145.

157. *Id.*

The next day, Justice Burger sent a handwritten note to Justice Blackmun in an attempt to get Blackmun to support him on the state action issue.

In all candor your Law Clerk's (RIM) memo is a surface job trying to analyze what I've spent *four* months on.

I suggest that the enclosed Jaffe article will afford some *very valuable background*.

The "leopards" in law schools and courts are trying to lead people down primrose path on the 14th Amend[ment]. Their wild eyed, expansive view of "14" would open virtually all gov't decisions to judicial review. This lad hasn't cut his "umbilical cord" to the professors yet! I know—that is what my boys tried to sell me on!¹⁵⁸

On February 21, 1973, the Chief Justice again implored Justice Blackmun to support his view of the government action question. In a "personal" letter to "Harry," he wrote: "I know you have not 'come to rest' on the governmental action section of this case and the following seems possibly useful for me to add—if I get four 'joiners' on that section"¹⁵⁹ What followed was a long quote from the Jaffe article critiquing Judge Wright's argument that broadcasting is state action because it is regulated. It made the point that broadcasting is not a public utility and added:

Furthermore, we are all regulated in thousands of ways in our use of our houses and our streets. We are all inextricably and intimately dependent upon and interdependent with government. Yet because we believe it to be important to distinguish the private and public spheres, our acts, our failures to act, our prejudices, and our misconducts do not become acts of government. If we discriminate, indeed, if we are permitted to discriminate, against blacks, government has not therefore discriminated. . . . By merely tolerating my action the state does not adopt it as its own¹⁶⁰

Burger concluded that if this approach gave Blackmun "any 'comfort'" he would "try out on the Brethren." A handwritten postscript

158. Personal Note from Chief Justice Warren E. Burger to Justice Harry A. Blackmun (Feb. 15, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress) [hereinafter Chief Justice Burger, Personal Note].

159. Personal Memorandum from Chief Justice Warren E. Burger to Justice Harry A. Blackmun (Feb. 21, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress) [hereinafter Chief Justice Burger, Personal Memorandum].

160. *Id.*

added: “This is for reading in your ‘vast leisure’—but please don’t wait *that long!*”¹⁶¹

On March 8, 1973, Justice Stewart wrote to the Chief Justice in reply to his February 14 memo. Stewart noted his agreement that they “must deal with both constitutional and statutory issues, because the petitioners cannot prevail unless the respondents are wrong on both issues. I am convinced the respondents *are* wrong on both issues.”¹⁶² He argued that the decision of a broadcast station was not a government decision and because there was no governmental action, the Constitution was not implicated. He thought that lack of state action so clear that he was unwilling to assume it *arguendo*.¹⁶³

By the end of March, Justices Marshall, Blackmun, and Powell had still not responded to the Chief Justice’s February 14 memo. The Chief Justice sent another memo to those three, suggesting yet another reason for finding no state action. He argued that finding broadcaster action to be government action would create new problems under the Establishment Clause. He asked: “1. Can ‘government action’ be permitted to sponsor church service programs on radio and TV? 2. Can we say broadcaster action is ‘governmental’ for the Speech Clause but not for the Establishment Clause?”¹⁶⁴

c. The Chief Justice’s Second Draft

On April 9, 1973, the Chief Justice circulated a revised draft.¹⁶⁵ This draft made a number of changes, particularly in Part IV. The first draft of Part IV started out observing that the lack of governmental action normally obviated the need to consider constitutional claims. Here, however:

Congress expressly wrote First Amendment values into the Communications Act, and . . . DNC urges that a licensee’s refusal to

161. *Id.*

162. Memorandum from Justice Potter Stewart to Chief Justice Warren E. Burger (Mar. 8, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

163. *Id.* Stewart adds that if the FCC were to impose an access scheme as suggested by respondents, broadcasters would have a serious First Amendment claim. He concludes with the observation that perhaps his thinking is “unduly influenced by Hugo Black,” but he is “instinctively leery of talk about ‘First Amendment values’ or of the ‘values’ of any other provisions of the Constitution.” *Id.*

164. Memorandum from Chief Justice Warren E. Burger to Justices Thurgood Marshall, Harry A. Blackmun, and Lewis Powell (Mar. 29, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

165. PAPERS OF WILLIAM J. BRENNAN, Box 292, Nos. 71-863 to 71-866 (Library of Congress).

accept editorial ads violates the “public interest” standard of the Act. We therefore go on to consider whether the statute, including the First Amendment principles embodied in the Act, requires a licensee to grant the right of access claimed by respondents.¹⁶⁶

In contrast, the second draft of Part IV does not address the First Amendment, and only considers “respondents’ claim that the ‘public interest’ standard of the Communications Act requires broadcasters to accept editorial advertisements.”¹⁶⁷ The second draft also adds a footnote in Part III that cites Jaffe’s article critiquing the D.C. Circuit’s finding of state action.¹⁶⁸

In a memo to Justice Blackmun summarizing the Chief Justice’s April 9 draft, Miller stated that nothing in the Jaffe article changed his opinion on the state action issue.¹⁶⁹ He explained that while Jaffe rejected finding state action merely because broadcasting was regulated or powerful, he failed to address whether the use of state property and state monopoly constituted state action. Further, Miller noted that Jaffe believed that the D.C. Circuit had reached the correct result, and had urged affirmance on narrow grounds. Miller commented that “Obviously, the Chief is not interested in that part of the article.”¹⁷⁰

Miller concluded:

I think the 1st A[mendment] substantive issue (“does the 1st A[mendment] mandate a right of access”) is implicit in the “public interest” statutory issue. The statutory issue must be considered, and I see no reason not to consider the 1st A[mendment] claim. If the 1st A[mendment] claim is rejected on the merits, it is then unnecessary to reach the difficult state-action issue.¹⁷¹

He recommended that Justice Blackmun join Part IV alone or issue a short concurrence (or join with White or Powell).¹⁷² A handwritten “agree” in the margin denotes Justice Blackmun’s agreement with this approach.¹⁷³

166. 1st Draft Opinion, in PAPERS OF WILLIAM O. DOUGLAS, Box 1597, Nos. 71-863 to 71-866 (Library of Congress).

167. 2d Draft Opinion, *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, at 26 (Feb. 10, 1973), in PAPERS OF WILLIAM J. BRENNAN, Box 292, No. 71-863 to 71-866 (Library of Congress).

168. *Id.* at 19 n.15.

169. Circulation Memorandum from RIM [Ralph I. Miller] to Chief Justice Warren E. Burger (Apr. 10, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress) [hereinafter RIM, Circulation Memorandum].

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

On April 16, 1973, Justice Blackmun wrote to the Chief Justice that “[a]fter careful study” of the April 9 draft and the Jaffe article,

[His] present inclination is to join the judgment of the Court and your opinion except for Part III and such other portions as may bear on the question of governmental action. It seems to me that the First Amendment issue is implicit in the public interest statutory issue which, in any event, must be resolved. When we reject the implicitly included First Amendment claim on the merits, as you do in Part IV, then it seems to me to be unnecessary to reach the difficult governmental action issue.¹⁷⁴

He added that he was not opposed to Part III remaining in the opinion, but preferred to defer deciding the state action issue to another time.¹⁷⁵ On the same date, Justice White told the Chief Justice that he was still having difficulties with Part III.¹⁷⁶ And a few days later, Justice Powell notified both the Chief Justice and Justice Blackmun that even after further study of the Jaffe article and other authorities, he continued to have doubts on the government action issue and did not think it necessary to decide.¹⁷⁷

d. The Third Draft and Published Opinion

The Chief Justice circulated a third draft of his opinion on May 23, 1973. A memo from the Chief Justice later that same day notes that he “had intended to send a cover letter calling attention to a substantive change in Part IV. The change restores the first draft approach of dealing with both the statutory claims [and] the First Amendment claim in Part IV. In the second draft Part IV was not an explicit First Amendment

174. Memorandum from Justice Harry A. Blackmun to Chief Justice Warren E. Burger (Apr. 16, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

175. *Id.*

176. Memorandum from Justice Byron R. White to Chief Justice Warren E. Burger (Apr. 16, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

177. Memorandum from Justice Lewis Powell to Chief Justice Warren E. Burger and Justice Harry Blackmun (Apr. 19, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

treatment as it is now.”¹⁷⁸ He added that this section will likely get five votes.¹⁷⁹

The third draft does not differ significantly from the published version. Only some of the arguments that Burger made in trying to get the other Justices to join this part of the opinion were included in the published opinion.

The published opinion described the question of state action as novel and noted that the lower court held that broadcasters were state actors because they were “granted use of part of the public domain and are regulated as ‘proxies’ or ‘fiduciaries’ of the people.”¹⁸⁰ It then observed that while these “characterizations are not without validity . . . they do not resolve the sensitive constitutional issues inherent in deciding whether a particular licensee action is subject to First Amendment restraints.”¹⁸¹ It asserted that “the line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority.”¹⁸² This was followed by a history of the development of broadcasting regulation. It described the regulatory scheme as one in which “the Commission acts in essence as an ‘overseer,’ but the initial and primary responsibility for fairness, balance, and objectivity rests with the licensee.”¹⁸³ The opinion pointed out that “the Commission has not fostered the licensee policy challenged here; it has simply declined to command particular action because it fell within the area of journalistic discretion.”¹⁸⁴ Thus, it concluded that the government was not a partner to the broadcaster’s action.¹⁸⁵

The opinion also noted that if it were to find state action,

few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny. In this sensitive area so sweeping a concept of governmental action would go far in practical effect to undermine nearly a half century of

178. Memorandum from the Chief Justice to the Conference (May 23, 1973), in PAPERS OF WILLIAM J. BRENNAN, Box 292, No. 71-863 to 71-866 (Library of Congress).

179. On May 22, 1973, the Chief Justice also wrote to Justice Brennan to advise him of the change in Part IV since it could affect his dissent. PAPERS OF WILLIAM J. BRENNAN, Box 292, Nos. 71-863 to 71-866 (Library of Congress).

180. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 115 (1973) (quoting *Bus. Executives’ Move for Vietnam Peace v. FCC*, 450 F.2d 642, 652 (D.C. Cir. 1971)).

181. *Id.*

182. *Id.*

183. *Id.* at 117.

184. *Id.* at 118.

185. *Id.* at 119. The opinion contrasts this conclusion to such cases as *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

unmistakable congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to public interest standards.¹⁸⁶

This part of the opinion reflects the Chief Justice's concern expressed in his February 14 memo that upholding the lower court's decision would pose a threat to free press. However, the opinion does not reflect his concerns outside of broadcasting. For example, it does not reflect the view expressed in his handwritten note to Justice Blackmun that adopting the lower court's view of state action "would open virtually all gov't decisions to judicial review."¹⁸⁷ It does not make the point suggested by the quote from Jaffe in the February 21 letter to Justice Blackmun that a finding of state action would prohibit private acts of discrimination by individuals.¹⁸⁸ Nor does it mention potential problems under the Establishment Clause cited in the March 29 memo to Justices Marshall, Blackmun, and Powell.¹⁸⁹ It is impossible to tell, of course, whether the Chief Justice was just trying out different arguments to see if he could get the votes needed for a majority, or whether these concerns actually motivated his decision, even though they are not discussed in the opinion.

4. Concurring Opinions of Justices Blackmun and White

The differing views on the question of state action prompted Justice Blackmun, joined by Justice Powell, and Justice White to issue separate concurring opinions. The files shed some light on why the three Justices did not join in a single concurring opinion.

On April 10, 1973, Miller reported that Justice White had circulated a note stating that he would avoid the state action issue and resolve the case on statutory and substantive First Amendment grounds, the same approach that Miller had recommended. He offered to find out if Justice White planned to write a concurrence, and if not, he suggested that Justice Blackmun might do so.¹⁹⁰

On April 16, 1973, Miller wrote Justice Blackmun that he had called Justice White's clerk, Bob Barnett, to get clarification on whether Justice White would draft a concurring opinion. Barnett was unsure

186. *Id.* at 120.

187. Chief Justice Burger, Personal Note, *supra* note 158.

188. *See* Chief Justice Burger, Personal Memorandum, *supra* note 159.

189. *See* Memorandum from Chief Justice Warren E. Burger to Justices Thurgood Marshall, Harry A. Blackmun, and Lewis Powell (Mar. 29, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

190. RIM, Circulation Memorandum, *supra* note 169.

whether Justice White would write a concurring opinion, but he thought that Justice White thought the Chief Justice was “simply wrong on state action.”¹⁹¹ Miller suggested that the better course was to assert that the question need not be reached and Barnett agreed. Barnett seemed to think that Justice White might be open to that approach.¹⁹²

This same memo praised Justice Blackmun’s note to the Chief Justice, in which Blackmun argued it was unnecessary to reach the government action issue.¹⁹³ But he added that if Justice Blackmun sent the note only to the Chief Justice, it would not encourage Justice White. Thus, he recommended that Justice Blackmun circulate a note to the conference indicating his concerns about Part III and suggested that he find out whether Justice White planned to write a concurring opinion.¹⁹⁴ Two days later, on April 18, 1973, Justice Blackmun circulated the first draft of his concurrence. The next day, Justice White circulated his first draft.¹⁹⁵

Miller’s analysis of the two drafts concluded that Justice Blackmun’s position differed from Justice White’s in two ways. First, the “most obvious difference is that [Justice Blackman] remain[ed] on neutral ground on the governmental action issue. Justice White initially expressed strong feelings that governmental action was present (February 9 note) but he has now changed that to say he is ‘not ready to conclude’ there is no governmental action.”¹⁹⁶ Interestingly, despite Miller’s assertion that Blackmun had consistently taken a neutral position on the question of state action, Miller’s bench memo strongly

191. Memorandum from RIM [Ralph I. Miller] to Justice Harry A. Blackmun (Apr. 16, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

192. *Id.*

193. *Id.*

194. *Id.*

195. The circulation of two similar concurring opinions seems to have precipitated some concern that Justice Blackmun could be accused of violating Court etiquette. In a memo dated May 17, 1973, Miller set out a detailed chronology of events regarding the two concurrences that he constructed from the files and his memory. See Memorandum from RIM [Ralph I. Miller] to Justice Harry A. Blackmun (May 17, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress) [hereinafter RIM, May 17, 1973 Memo]. He concluded that Justice Blackmun “cannot be accused of stealing ideas from Justice White. Justice White was having trouble getting his ducks in a row.” *Id.* He pointed out that Justice Blackmun’s position had “consistently been that ‘the governmental action issue does not affect the outcome’ so you ‘refrain from deciding it.’” *Id.* In contrast, Justice White’s position, as evidenced in the correspondence, had vacillated. RIM added, “I am not clear on the private conversation you had with him. The objective indicia indicate that you wrote when Justice White had abandoned his former position and had not taken a new stand. I do not feel there was any breach of courtesy.” *Id.*

196. *Id.*

argued for finding state action and Blackmun's own memo seemed to agree.¹⁹⁷

A second difference, according to Miller, was that Justice Blackmun had reasoned that "any affirmative duties imposed by the 1st A[mendment] would be read into the [Communications] Act. Since the Court finds that the [Communications] Act imposes no affirmative duty of the type imposed by [the D.C. Circuit], a fortiori the 1st A[mendment] imposes no such duty."¹⁹⁸ In contrast, Miller noted:

Justice White hints that the 1st A[mendment] does impose obligations and, but for the Fairness Doctrine, the Court might need to step in. He feels the Fairness Doctrine cures those defects. His position goes much further than yours because he seems to conclude that the 1st A[mendment] imposes the Fairness Doctrine. That is a step beyond *Red Lion*, and I suspect you would need a substantial amount of consideration before taking that step.¹⁹⁹

Thus, Miller recommended that Justice Blackmun "stand fast."²⁰⁰

Justice Blackmun's concurrence went through four drafts. The draft was cut from two paragraphs to one between the third and fourth drafts. It appears that this change was made in response to the third (and final draft) circulated by the Chief Justice on May 23, 1973. The clerks for Justices Blackmun and Powell agreed that since the "Court has now decided the constitutional issue," the concurrence no longer needed to link the constitutional issue to the statutory issue.²⁰¹ Miller suggested two options for modifying the concurrence and Blackmun incorporated the first option into the fourth draft, which is identical to the published version. It read:

In Part IV the Court determines "whether, assuming governmental action, broadcasters are required" to accept editorial advertisements "by reason of the First Amendment." The Court concludes that the Court of Appeals erred when it froze the "continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees" into "a constitutional holding." The Court's conclusion that the First Amendment does not compel the result reached by the Court of Appeals demonstrates that the

197. See *supra* notes 103-04, 117, and accompanying text.

198. RIM, May 17, 1973 Memo, *supra* note 195.

199. *Id.*

200. *Id.*

201. Memorandum from RIM [Ralph I. Miller] to Justice Harry A. Blackmun (May 24, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

governmental action issue does not affect the outcome of this case. I therefore refrain from deciding it.²⁰²

In contrast, Justice White's concurring opinion was three paragraphs long and contained no substantive changes from his first draft dated April 19, 1973. He found that "it is at least arguable, and strongly so, that the Communications Act and the policies of the Commission, including the Fairness Doctrine, are here sufficiently implicated to require review of the Commission's orders under the First Amendment."²⁰³ But he did not think that deciding the state action question was necessary to reverse the lower court because:

[A]ssuming, *arguendo*, . . . that Congress or the Commission is sufficiently involved in the denial of access to the broadcasting media to require review under the First Amendment, I would reverse the judgment of the Court of Appeals. Given the constitutionality of the Fairness Doctrine, and accepting Part IV of the Court's opinion, I have little difficulty in concluding that statutory and regulatory recognition of broadcaster freedom and discretion to make up their own programs and to choose their method of compliance with the Fairness Doctrine is consistent with the First Amendment.²⁰⁴

Thus, while Blackmun and White agreed that assuming government action, the First Amendment did not compel broadcasters to accept editorial advertisements, White strongly suggested that there was government action while Blackmun and Powell indicated no views on the question. The Justices' papers suggest however, that at least at one time, Blackmun and Powell thought there probably was state action.²⁰⁵ It is unclear why Blackmun wrote his concurring opinion taking no position. He may have been persuaded by the Chief Justice's entreaties that finding state action would set a bad precedent.²⁰⁶ He may have simply thought it did not matter because finding state action would not have altered the outcome of this case. Yet, had Blackmun and Powell

202. 4th Draft Concurrence of Justice Harry A. Blackmun, *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, at 2 (recirculated May 14, 1973), in *PAPERS OF HARRY A. BLACKMUN*, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress) (internal citations omitted).

203. Compare 1st Draft Concurrence of Justice Byron R. White, *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.* (circulated Apr. 19, 1973), in *PAPERS OF HARRY A. BLACKMUN*, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress) with *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 146 (1973) (White, J., concurring).

204. *Columbia Broad. Sys., Inc.*, 412 U.S. at 147. See *supra* notes 127, 143-44, and accompanying text.

205. See *supra* notes 127, 142-43, and accompanying text.

206. See *supra* Part III.C.3.

found state action instead of merely assuming it for purposes of argument, there would have been a majority for this finding, and a holding that broadcasters' editorial decisions constituted state action could have had substantial consequences.²⁰⁷

5. Concurring Opinions by Justices Stewart and Douglas

The separate concurring opinions by Justices Douglas and Stewart agreed with the Chief Justice that there was no state action, but went further to argue that upholding the D.C. Circuit's decision would violate the First Amendment rights of broadcasters.

a. Justice Douglas's Early Drafts

Justice Douglas originally voted to uphold the D.C. Circuit's decision and planned to dissent.²⁰⁸ Over the course of eighteen drafts, however, his opinion changed from a dissent to a concurring opinion. It also became increasingly strident in its disapproval of *Red Lion* and of treating broadcasters any differently than newspapers under the First Amendment.

207. See, e.g., *Johnson v. FCC*, 829 F.2d 157, 159 n.10 (D.C. Cir. 1987) (declining to determine whether the petitioners' exclusion by the broadcasters constituted governmental action for First Amendment purposes); *Belluso v. Turner Commc'ns Corp.*, 633 F.2d 393, 398-99, 401 (5th Cir. 1980) (noting disagreement over the governmental action issue in *CBS* and declining to hold the action of the broadcaster in denying the plaintiff airtime was governmental action open to challenge under the First Amendment); *Kuczo v. W. Conn. Broad. Co.*, 566 F.2d 384, 387-88 (2d Cir. 1977) (same); *Levitch v. Columbia Broad. Sys., Inc.*, 495 F. Supp. 649, 657-58 (S.D.N.Y. 1980) (same).

208. In a memorandum to Justice Brennan in October 1972, shortly after the conference, Justice Douglas said he was willing to let Justice Brennan undertake drafting the dissent in *CBS*. Memorandum from Justice William O. Douglas to Justice William Brennan (Oct. 25, 1972), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress). Yet, on February 4, 1973, Douglas's memorandum to the conference indicates that he planned to write his own dissent. Memorandum from Justice William O. Douglas to the Conference (Feb. 4, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress). And on February 10, 1973, Justice Douglas sent a note to the Chief Justice saying he had hoped to have his dissent ready by February 12, 1973, but would not be able to do so. Memorandum from Justice William O. Douglas to Chief Justice Warren E. Burger (Feb. 10, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

Justice Douglas's first draft is dated January 12, 1973.²⁰⁹ This draft, as well as drafts two through eight, were not circulated to the other Justices. The first draft indicated that Justice Douglas, like dissenting FCC Commissioner Johnson, was troubled by the greater protection afforded commercial speech than political speech. Douglas observed that in *Valentine v. Chrestensen*,²¹⁰ the Court held that business advertisements did not enjoy the protection of the First Amendment, while *New York Times Co. v. Sullivan*,²¹¹ held that editorial advertising was protected by the First Amendment.²¹²

It comes therefore as a surprise that business and commercial matters, which are not protected by the First Amendment, can use the mass media for a fee but those who want to discuss public issues or do editorial advertising may not do so, even though they tender the same fee that would purchase time for a manufacturer or retailer.²¹³

This draft identified the central issue as whether the FCC may discriminate in favor of paid commercial broadcasts against paid broadcasts of political and other issues. It recognized that the problem was complicated because only a limited amount of spectrum was available, the spectrum was part of public domain, broadcast channels were the most important instrument for the exercise of First Amendment rights, and the First Amendment prohibited censorship of broadcasts.²¹⁴ Citing *Red Lion*, the draft concluded that "the people . . . must of necessity establish some ground rules for its use."²¹⁵ However, "[e]xperience has shown that power cannot be trusted to serve the public weal even though it be in government hands."²¹⁶ Thus, "[w]hile some regulation of the spectrum owned by the people is necessary, . . . the

209. Justice Douglas's papers at the Library of Congress contained printed copies of all eighteen drafts. 1st Draft (Jan. 8, 1973); 2d Draft (Jan. 12, 1973); 3d Draft (Jan. 17, 1973); 4th Draft (Feb. 9, 1973); 5th Draft (Feb. 10, 1973); 6th Draft (Feb. 27, 1973); 7th Draft (Feb. 28, 1973); 8th Draft (Mar. 21, 1973); 9th Draft (Mar. 27, 1973); 10th Draft (Mar. 30, 1973); 11th Draft (Apr. 23, 1973); 12th Draft (Apr. 24, 1973); 13th Draft (Apr. 30, 1973); 14th Draft (May 15, 1973); 15th Draft (May 17, 1973); 16th Draft (May 18, 1973); 17th Draft (May 22, 1973); and 18th Draft (May 23, 1973), in PAPERS OF WILLIAM O. DOUGLAS, Boxes 1597 & 1598, Nos. 71-863 to 71-866 (Library of Congress). In addition, the files also contained printed copies that were marked up by hand to indicate changes to be made in the next draft. Such drafts are designated with both the old and new number (e.g., 9th/10th draft).

210. 316 U.S. 52 (1942).

211. 376 U.S. 254 (1964).

212. Justice Douglas's 1st Draft, *supra* note 209, at 2.

213. *Id.*

214. *Id.* at 3.

215. *Id.* at 4.

216. *Id.* at 5.

First Amendment cautions that that regulation be the very minimum.”²¹⁷ The draft then discussed the equal time provisions of section 315 and the Fairness Doctrine, “which this Court approved in the *Red Lion* case.”²¹⁸

Returning to the issue in this case, the draft observed: “The issue is between paid-for political controversial speech and paid-for noncontroversial (or not so controversial) commercial speech. If the latter is not protected by the First Amendment, I see no possible grounds for allowing it a preferred position.”²¹⁹ Moreover, even if commercial speech is protected by the First Amendment, Justice Douglas noted:

Where two competing First Amendment rights are treated differently by government, there must be “compelling interests” that justify the discrimination We may not say that all controversial speech can be excluded from the mass media for that would be censorship of an especially ominous kind. It would cast the die with the *status quo* and only increase the amount of mass media garbage that we already collect.²²⁰

Thus, Douglas agreed with the lower court that “the First Amendment does not permit discrimination against paid editorial comment in favor of paid commercial speech.”²²¹ At the same time, he believed that the First Amendment did not give the right to speak only to those who could pay. He emphasized the narrowness of the issue, that is, whether the FCC may constitutionally approve a flat ban on paid editorials, and thought that the lower court properly remanded the case to the FCC to develop guidelines.²²²

The first draft concluded with this paragraph:

I did not participate in *Red Lion* and I would not extend its dynasty. The guidelines I would ask the Commission to prepare would relate to the access of television and radio to all groups and interests and set it to work out the orderly process for making the channels available to all parts of the spectrum.²²³

In the second draft, Douglas omitted the sentence about not extending the *Red Lion* dynasty. He added two paragraphs to the end of the decision emphasizing that the broadcast media are entitled to the

217. *Id.* at 5.

218. *Id.* at 6.

219. *Id.* at 7.

220. *Id.* at 8.

221. *Id.*

222. *Id.* at 8-9.

223. *Id.* at 10.

same freedoms as the print media and that the federal government's role is limited to providing for orderly procedures.²²⁴

In the third draft, he again registered his discomfort with *Red Lion*, this time in a footnote:

While I did not participate in the *Red Lion* decision, I have been dubious about its result for the reason that the monetary and other burdens imposed by the right of reply, like the traditional damage remedy for libel, lead to the self-censorship respecting matters of importance to the public that the First Amendment denies the government the power to impose. The burdens certainly are as onerous as the indirect restrictions on First Amendment right which we have struck down²²⁵

b. Justice Douglas's Fourth Through Ninth Drafts

Douglas's fourth draft, dated February 9, 1973, differed significantly from the first three drafts. The entire first section, which discussed how the FCC discriminated against paid political speech in favor of paid commercial speech, was deleted. Instead, the fourth draft began: "If, as the Court holds, a broadcast license is not engaged in governmental action for purposes of the First Amendment, I fail to see how constitutionally we can treat TV and the radio differently than we treat newspapers."²²⁶ It continued:

It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide "guidelines" for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made.²²⁷

This change in approach was undoubtedly made in response to the Chief Justice's first draft, which circulated on February 1, 1973, and found in Part III that there was no state action.

224. Justice Douglas's 2d Draft, *supra* note 209, at 10-11.

225. Justice Douglas's 3d Draft, *supra* note 209, at 11, n.8.

226. Justice Douglas's 4th Draft, *supra* note 209, at 1.

227. *Id.* at 1-2. In response to the argument made by advocates of public access that broadcast stations have become too powerful and exert such an influence that they must be controlled by government, Douglas noted that "even Thomas Jefferson, who knew how base and obnoxious the press could be, never dreamed of interfering. For he thought that government control of newspapers would be the greater of two evils." *Id.* at 2.

The fourth draft also contained a stronger rejection of *Red Lion*. In place of the footnote stating that he was “dubious about its result,” he wrote in the text that *Red Lion*, “in a carefully written opinion that was built upon predecessor cases put the TV and the radio under a different regime. I did not participate in that decision and, with all respect, would not support it.”²²⁸ He expressed concern that if a broadcast licensee was a government agency for First Amendment purposes, “[a]dministration after administration could toy with it to serve its sordid or its benevolent ends.”²²⁹

Justice Douglas acknowledged claims that the broadcast media were too slanted in their coverage of politics, but observed that the same concerns were raised against newspapers and magazines during the McCarthy era. Yet, even then, there was “no reason to put the saddle of the federal bureaucracy on the backs of publishers. Under our Bill of Rights people are entitled to have extreme ideas, silly ideas, partisan ideas.”²³⁰ He added, “[t]he same is true, I believe, of the TV and radio.”²³¹

Douglas went on to observe that the First Amendment was written in absolute terms and could only be changed by constitutional amendment. While the licensing of broadcast stations was necessary for engineering reasons to avoid interference, censorship was not. He criticized the Court’s decision:

[The decision] sanctions a federal saddle on broadcast licensees . . . [T]he regime of federal supervision approved today is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election.²³²

Justice Douglas made numerous additions in the next several drafts. The fifth draft included examples of how inroads had been made on the freedom of newspapers.²³³ The seventh draft acknowledged that FCC Commissioner Johnson had written a “powerful dissent,” but found that “the prospect of putting government in a position of control over

228. *Id.* at 3.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 5-6.

233. Justice Douglas’s 5th Draft, *supra* note 209, at 6-8.

publishers [was] an appalling one, even to the extent that *Red Lion* went.”²³⁴

The eighth draft added a new beginning section that discussed Congress’s authorization of the Corporation for Public Broadcasting (“CPB”) and the Public Broadcasting System (PBS). Douglas observed that although CPB is said not to be a government agency, it is difficult to see why not. He added that if the government owned a newspaper, it would not be free to pick and choose news items as it desired because government may not censor or enact any law abridging freedom of press.²³⁵ By this logic, a public broadcasting station could not turn down programs tendered by respondents in the present case.²³⁶

The ninth draft quoted *National Broadcasting Co. v. United States* for the point that “radio inherently is not available to all,” but went on to observe that “the press in a realistic sense is likewise not available to all.”²³⁷ This draft also cited Emerson’s *The System of Freedom of Expression* as making a “powerful argument” for “revamping or reconditioning” the First Amendment, but concluded:

What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old fashioned First Amendment that we have is the Court’s only guideline; and one hard and fast principle which it announces is that government shall keep its hands off the press.²³⁸

c. Justice Douglas’s Later Drafts

The ninth draft, dated March 27, 1973, was the first to be circulated to the other Justices. It was labeled as a dissent.²³⁹

The next day, the Chief Justice sent a personal note to Justice Douglas:

234. Justice Douglas’s 7th Draft, *supra* note 209, at 7-8.

235. Justice Douglas’s 8th Draft, *supra* note 209, at 1-2.

236. *Id.*

237. Justice Douglas’s 9th Draft, *supra* note 209, at 8 (quoting *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 226 (1943)).

238. *Id.* at 9.

239. On the same date, Justice Douglas’s clerk suggested that the opinion should be labeled as a concurrence because “[t]he Court reverses the [Court of Appeals], which had held that the FCC must promulgate regulations regarding the right of access. Thus, the Court rejects the notion that *Red Lion* approves a comprehensive scheme of regulation. As long as broadcasters hold to overall ‘fairness,’ the Court says, they are free to do what they want.” Memorandum from PMK to Justice William O. Douglas (Mar. 27, 1973), in *PAPERS OF WILLIAM O. DOUGLAS*, Box 1597, Nos. 71-863 to 71-866 (Library of Congress).

As I read your draft dissent I suggest you misread my opinion. Far from “saddling” broadcasters with anything (your page 11), I propose to *remove* the saddle the [Court of Appeals] put on them concerning “editorial ads.”

The net of your treatment really seems to me to constitute a concurrence in at least Part IV and in the result I reach.

What have I missed?²⁴⁰

The following day, Justice Douglas wrote back to the Chief Justice: “[Y]ou are quite right. My opinion is not a dissent. I concur in the judgment of reversal and will circulate a new draft.”²⁴¹ Also dated March 29 is a note to Justice Douglas from his clerk: “I believe that you do concur in the result because you would reverse the decision of the [Court of Appeals]. However, I would be reluctant to join any part of the [Chief Justice’s] opinion [because] he endorses so heavily *Red Lion* and does not preclude censorship in the future.”²⁴² Thus, Douglas added a new first sentence to the tenth draft: “While I join the Court in reversing the judgment below, I do so for quite different reasons.”²⁴³

240. Memorandum from Chief Justice Warren E. Burger to Justice William O. Douglas, Re: Nos. 71-863 to 71-866 (Mar. 28, 1973), in PAPERS OF WILLIAM O. DOUGLAS, Box 1597, Nos. 71-863 to 71-866 (Library of Congress).

241. Memorandum from Justice William O. Douglas to Chief Justice Warren E. Burger (Mar. 29, 1973), in PAPERS OF WILLIAM O. DOUGLAS, Box 1597, Nos. 71-863 to 71-866 (Library of Congress).

242. Memorandum from PMK to Justice William O. Douglas (Mar. 29, 1973), in PAPERS OF WILLIAM O. DOUGLAS, Box 1597, Nos. 71-863 to 71-866 (Library of Congress). He adds: “As to his charge that you misread his opinion, it probably is that he misreads yours.” *Id.* He suggests that there is some ambiguity in the third full paragraph on page eleven that could be clarified with a sentence he suggested. It is not clear exactly what the clerk suggested in the way of change, but the first sentence of that paragraph was altered by adding a side notation that would have the sentence read:

The Court in today’s decision *by endorsing the Fairness Doctrine* sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment.

Justice Douglas’s 9th/10th Draft, *supra* note 209, at 11 (proposed change denoted in italics). *Cf.* *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 163 (1973) (Douglas, J., concurring).

243. Justice Douglas’s 10th Draft, *supra* note 209, at 1. This is also the first sentence of the published version. *Columbia Broad. Sys., Inc.*, 412 U.S. at 148. In the published version of Justice Douglas’s opinion, this passage remains but the last sentence has been changed to “[t]he Court does not, however, decide whether a broadcast licensee is a federal agency within the context of these cases.” *Id.* at 150.

The tenth draft also responded to Justice Brennan's dissent, which had been circulated on March 28, 1973. Douglas wrote:

If a TV or radio licensee were a federal agency, the thesis of my Brother Brennan would inexorably follow. For a licensee of the federal government would be in precisely the situation of the Public Broadcasting Corp. A licensee, like an agency of the government, would within limits of its time be bound to disseminate all views. For being an arm of the government it would be unable by reason of the First Amendment to "abridge" some sectors of thought in favor of others. But since the licensee is not by the ruling of the Court an agency of the government, the posture of these cases is radically changed.²⁴⁴

The tenth draft also added language regarding *Red Lion*: "The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."²⁴⁵

In subsequent drafts, Justice Douglas added quotations²⁴⁶ and examples,²⁴⁷ but did not make substantial changes to the structure or arguments set forth in the tenth draft. He added a footnote to the fifteenth draft observing that "[s]carcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television."²⁴⁸ In the eighteenth draft, he added a new opening paragraph strongly stating his conclusion "that the TV and radio stand in the same protected position under the First Amendment as the newspapers and magazines."²⁴⁹

244. Justice Douglas's 10th Draft, *supra* note 209, at 3.

245. *Id.* at 4-5.

246. For example, the 11th/12th Draft, April 23, 1973, adds a quote from Jaffe's article in the *Harvard Law Review* in the third footnote. Justice Douglas's 11th/12th Draft Concurrence, *supra* note 209, at Rider 4. The 14th/15th Draft, adds a long quote from Harry Kalven, Jr. about the use of self-help. Justice Douglas's 14th/15th Draft, *supra* note 209, at 7-8.

247. For example, the 11th/12th Draft cites a bill introduced by Congressman Farbstein in 1970 to impose Fairness Doctrine-type requirements on monopoly newspapers as an example of how government will try to extend broadcast regulation to newspapers. Justice Douglas's 11th/12th Draft, *supra* note 209, at Rider 3.

248. Justice Douglas's 14th/15th Draft, *supra* note 209, at Rider 10 (adding footnote 8) (citations omitted). This footnote has been frequently cited since by those advocating that *Red Lion* be overturned. *See, e.g.*, Petitioner for Writ of Certiorari at 15-16, *Tribune Co. v. FCC*, 545 U.S. 1123 (2005) (No. 04-1036).

249. Justice Douglas's 18th Draft, *supra* note 209, at 1.

Thus, as it progressed through multiple drafts, Justice Douglas's opinion changed from a dissent to a concurrence. Initially, he took the position that discrimination in favor of commercial speech, which was not protected by the First Amendment, over political speech, which was protected by the First Amendment, was unsupportable. Douglas abandoned this position, however, after the Chief Justice circulated a draft opinion concluding that there was no state action. But when it became clear that the Chief Justice lacked a majority for this finding, Justice Douglas did not revert to his original position. Instead, he expanded upon his view that there was no basis for treating broadcasters differently than newspapers, and thus any regulation of broadcasting was contrary to our constitutional scheme.

Douglas's concurring opinion has been frequently cited over the past thirty-five years by parties opposed to public access or seeking to overturn *Red Lion*. Indeed, in *Miami Herald*, the amicus brief of the Radio Television News Directors Association included a page-long quote of Justice Douglas's concurrence in support of its argument that the Court should reject the effort to extend the fairness rationale to newspapers because leading jurists as well as FCC officials were questioning the constitutionality of the Fairness Doctrine.²⁵⁰ The National Association of Broadcasters' amicus brief quoted Douglas's assertion that the "Fairness Doctrine has no place in our First Amendment regime" in urging the Court to avoid relying on *Red Lion*.²⁵¹

d. Justice Stewart's Draft Opinions

By the time Justice Stewart circulated the first draft of his concurring opinion on May 10, 1972, Justice Douglas had circulated his fifteenth draft. Justice Stewart's first draft opened by expressing his general agreement with Justice Douglas: "While I join Parts I, II, and III

250. Brief for Radio Television News Directors Ass'n as Amicus Curiae Supporting Respondent at 5-7, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797).

251. Brief for National Ass'n of Broadcasters as Amicus Curiae Supporting Respondent at 11, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797). The FCC itself cited Justice Douglas's concurring opinion in its decision repealing the Fairness Doctrine. *Syracuse Peace Council*, 2 F.C.C. Rcd. 5043, 5069 n.207 (1987). More recently, a party asking the Court to overrule the Third Circuit's decision in *Prometheus Radio Project v. FCC*, upholding the constitutionality of ownership limits, quoted Douglas's observation that "[s]carcity may soon be a constraint of the past, thus obviating *Red Lion*," in urging the Court to "jettison the scarcity doctrine." *Petition for Writ of Certiorari, Media General, Inc. v. FCC*, 545 U.S. 1123 (2005) (No. 04-1020).

of the Court's opinion, my views closely approach those expressed by Mr. Justice Douglas in concurrence."²⁵²

Justice Stewart circulated a second draft on May 14, 1972, and a third draft on May 16, 1972. In addition, on May 25, 1972, he circulated revisions in "light of Harry Blackmun's revised concurring opinion."²⁵³ There were no major changes between the first draft and the published version. While Justice Stewart indicated that his views were close to those of Justice Douglas, he was not so stridently opposed to *Red Lion*.²⁵⁴

Much of Justice Stewart's concurrence was devoted to explaining why he disagreed with other dissenting or concurring Justices. In so doing, he seems to have generated complaints that he mischaracterized their positions. Justice Blackmun's clerk, for example, alerted Justice Blackmun that Justice Stewart had erroneously described Justice Blackmun's concurrence as taking the position that the "public interest" standard of the Communications Act and the First Amendment were "coextensive."²⁵⁵ The clerk called this "an unacceptable attempt to get around your solid position," and recommended that the Justice "parry this ill-conceived thrust" by adding a sentence to his concurrence.²⁵⁶

Justice Brennan's copy of Justice Stewart's first draft had several handwritten notations to the effect that Brennan never said the things attributed to him by Justice Stewart. For example, Stewart wrote that

[H]ere the Court of Appeals held, and the dissenters today agree, that the First Amendment *requires* the Government to impose controls upon private broadcasters—in order to preserve First Amendment

252. The wording in the published opinion is slightly different, in that "in concurrence" has been changed to "concurring in the judgment." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 132 (1973) (Stewart, J., concurring).

253. Memorandum from Justice Potter Stewart to the Conference (May 25, 1973), in PAPERS OF WILLIAM J. BRENNAN, Box 292, No. 71-863 to 71-866 (Library of Congress). All of these documents may be found in PAPERS OF WILLIAM J. BRENNAN, Box 292, No. 71-863 to 71-866 (Library of Congress).

254. See *supra* note 91 and accompanying text.

255. Memorandum from RIM [Ralph I. Miller] to Justice Harry A. Blackmun, Re: Justice Stewart; 1st Draft; May 10 (May 10, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 157, No. 71-863 (Library of Congress).

256. *Id.* The cover note to Miller's memo suggests that he found "Justice Stewart's conduct mildly offensive," and that Justice Blackmun might wish to "take this out of turn." *Id.* The suggested addition read: "Although the Communications Act and the First Amendment are certainly not 'coextensive,' the type of affirmative duty imposed by the Court of Appeals would necessarily be implicit in the Communications Act if it were mandated by the First Amendment." *Id.* The Third Draft of Blackmun's concurrence included language somewhat similar to that recommended by Miller. However, this language does not appear in the published version of Justice Blackmun's concurrence.

“values.” The appellate court accomplished this strange convolution by the simple devise of holding that private broadcasters *are* Government.²⁵⁷

Someone, presumably Justice Brennan’s clerk, wrote in the margin: “No!” and explained that: “PS says if there is gov’t action, broadcaster *is* gov’t & therefore loses all of his own 1st Amend. rts. But, we don’t say broadcasters *are* gov’t, rather we say gov’t is involved!”²⁵⁸ Although this passage is unchanged in the published version, Justice Stewart did change another passage to accurately reflect Justice Brennan’s position.²⁵⁹

IV. *MIAMI HERALD PUBLISHING CO. v. TORNILLO*²⁶⁰

Just about six weeks after the Court issued its decision in *CBS* finding that groups such as the DNC had no right under the First Amendment to have broadcast stations air editorial announcements, the Supreme Court of Florida issued a decision finding that a state statute giving political candidates the right to publish a reply in newspapers in which they had been attacked did not violate the First Amendment.²⁶¹

A. *The Florida Supreme Court*

Pat Tornillo, Jr., the head of the teacher’s union, was a controversial candidate for the Florida House of Representatives. Twice in September 1972, the *Miami Herald* printed editorials critical of Tornillo’s candidacy. Based on Florida Statute 104.38, a rarely-invoked

257. 1st Draft of Justice Potter Stewart, *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, at 2 (circulated May 10, 1973), in *PAPERS OF WILLIAM J. BRENNAN*, Box 292, No. 71-863 to 71-866 (Library of Congress).

258. *Id.* at 1-2. Justice Brennan added a long footnote to his dissent explaining why, in his view, Stewart’s assertion that a finding of government action meant that private broadcasters were government “reflected a complete misunderstanding of the nature of the governmental involvement in this case.” *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 182 n.12 (Brennan, J., dissenting).

259. Justice Stewart’s first draft equated the dissenters’ position with the respondent’s point that the Constitution required only that “responsible” parties be given the right to purchase advertising. A handwritten note in the margin in the copy found in Justice Brennan’s files objected “No! WBJ never says this.” The published version was changed to read that respondents argue “somewhat differently” that the Constitution only required that responsible parties be allowed to purchase time. *Columbia Broad. Sys., Inc.*, 412 U.S. at 139 (Stewart, J., concurring).

260. 418 U.S. 241 (1974).

261. *Id.* at 245.

“right of reply statute” that had been on the books since 1913, Tornillo demanded that the paper print his reply.²⁶²

The *Miami Herald* refused and sought a declaration that the Florida statute was unconstitutional. The Circuit Court agreed. Tornillo appealed directly to the Florida Supreme Court where he was represented by Jerome Barron. The Florida Supreme Court issued a *per curiam* decision reversing the Circuit Court. In so doing, it relied on *Red Lion* in holding that the Florida statute was constitutional.²⁶³ The Florida Court concluded:

[W]e do not find that the operation of the statute would interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States. Indeed it strengthens the concept in that it presents both views leaving the reader the freedom to reach his own conclusion. This decision will encourage rather than impede the wide open and robust dissemination of ideas and counterthought which the concept of free press both fosters and protects and which is essential to intelligent self government.

Newspapers are not wholly dependent on electronic media as were the broadcasters in [*Red Lion Broadcasting Co. v. FCC*]. However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or over air waves. This not only includes dissemination of news but also in chain newspaper operations so prevalent today, the *Miami Herald* being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in [*Red Lion Broadcasting Co. v. FCC*] have been taken into consideration in reaching our opinion.²⁶⁴

The concurring opinion of Justice Roberts, in which five other justices joined, noted that the Florida Supreme Court was fully aware of the U.S. Supreme Court’s decision in *CBS*, but that *CBS* had in no way “derogated the earlier opinion of that court” in *Red Lion*.²⁶⁵ Rather, *CBS* was “directed solely to the peculiar and limited nature of broadcasting frequencies, and that decision is not applicable” to the instant case.²⁶⁶

262. *Id.* at 243-44.

263. *Tornillo v. Miami Herald Publ’g Co.*, 287 So. 2d 78, 83, 86-87 (Fla. 1973).

264. *Id.* at 86-87 (citations omitted).

265. *Id.* at 87.

266. *Id.* at 87-88.

The Miami Herald sought certiorari, which the Supreme Court granted on January 14, 1974.²⁶⁷

B. *The United States Supreme Court*

1. The Briefs

The briefs on both sides discussed *Red Lion* and *CBS*. The Miami Herald argued that the Florida statute was unconstitutional on its face because it “substitutes governmental fiat for editorial freedom.”²⁶⁸ This claim was immediately followed by a quote from *CBS*: “For better or worse, editing is what editors are for; and editing is selection and choice of material.”²⁶⁹

The Miami Herald characterized the Florida Supreme Court decision as relying heavily on the *Red Lion* decision.²⁷⁰ But it charged the state court “ignored the repeated statements . . . in *Red Lion* itself, and subsequently in [*CBS*], that the fairness doctrine is a narrow exception to general First Amendment principles, applicable solely to the broadcast media, and explicitly inapplicable to the press.”²⁷¹ It argued that *CBS* “held that broadcasters cannot constitutionally be compelled to abdicate editorial discretion and accept material for broadcast against their will. *A fortiori*, newspapers, with a greater range of discretion, cannot be subjected to a compulsory publication rule.”²⁷²

Tornillo’s brief, written by Professor Barron, responded that the Florida statute did not restrain freedom of expression, but encouraged freedom of expression. Citing the “fairness doctrine in broadcasting” as one of “two famous examples,” it argued that there was “no doubt that legislation designed to protect freedom of expression is constitutional.”²⁷³ However, the bulk of the brief focused not on *Red Lion*, but on how the statute was consistent with the premises underlying

267. *Miami Herald Publ’g Co. v. Tornillo*, 414 U.S. 1142 (1974).

268. Brief of Appellant at 10, *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797).

269. *Id.* (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 124 (1973)).

270. *Id.* at 20.

271. *Id.* at 21. The Miami Herald argued that while the “fairness doctrine” could be constitutionally applied to broadcast stations, it could not be applied to newspapers because the doctrine “rests solely on the unique technological limitations inherent in broadcast media.” *Id.* at 8.

272. *Id.* at 23.

273. Brief of Appellee at 9, *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797). The other example was *Associated Press v. United States*, 326 U.S. 1 (1945).

New York Times Co. v. Sullivan and *Rosenbloom v. Metromedia, Inc.*²⁷⁴ *Red Lion* was primarily discussed in the section arguing that the Florida statute was neither impermissibly vague nor unnecessarily broad.²⁷⁵ The brief argued that the Supreme Court rejected the claim that the FCC's fairness doctrine and personal attack rules were unconstitutionally vague.²⁷⁶ It distinguished *CBS* on the ground that it was a "state action case,"²⁷⁷ and argued that "[i]t would be completely erroneous to read the *CBS* case as saying that government may never legislate to encourage free debate."²⁷⁸

Several amicus briefs devoted substantial space to addressing *Red Lion* and the Fairness Doctrine.²⁷⁹ The amicus brief filed by the Radio Television News Director's Association (RTNDA) argued that "[r]eversal in this case, without reaffirmance of the constitutionality of the Fairness Doctrine, is important to the freedom of the electronic press."²⁸⁰ It explained:

RTNDA agrees that in *Red Lion* the Court then *believed* that broadcasting is significantly different [from newspapers] for these purposes; it does *not* agree with any implication that this is a correct evaluation and one that can continue to be relied upon to distinguish *Red Lion* from cases like the one at bar.

274. See *id.* at 22-40 (arguing that the Florida right of reply statute is "entirely consistent with the major premise of *New York Times v. Sullivan*" and that "[t]he First Amendment should be interpreted to encourage 'debate on public issues'").

275. *Id.* at 61-64.

276. *Id.* at 61-62. *Red Lion* is also used in responding to the claim made in an amicus brief submitted by the Washington Post Co. that the Florida statute effected a "taking" of the newspaper's property. *Id.* at 68-69; Brief for Washington Post Co., as Amicus Curiae Supporting Appellant at 13, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797).

277. Brief of Appellee, *supra* note 273, at 19.

278. *Id.*

279. See, e.g., Brief for Radio Television News Directors Ass'n, as Amicus Curiae at 3-20, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797) (arguing that the rationale for the Fairness Doctrine should not extend to newspapers, nor reaffirmed for broadcasting); Motion for Leave to File Brief Amicus Curiae and Brief for National Ass'n of Broadcasters Supporting Appellant at 7-14, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797) (arguing that the Florida statute is unconstitutional and that the Court should not base its ruling on the *Red Lion* decision); Brief of the National Broadcasting Co., Inc., as Amicus Curiae Supporting Appellant at 3-12, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797) (arguing that a state statute that compelled newspapers to print reply material that it does not wish to publish violates the First Amendment); Brief of National Citizens Committee for Broadcasting, as Amicus Curiae Supporting Appellee at 23-43, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (No. 73-797) (arguing that the petitioner and its amici failed to demonstrate that the Florida Legislature is prohibited by the First Amendment from balancing between competing First Amendment interests).

280. Brief for Radio Television News Directors Ass'n, *supra* note 279, at 3.

The danger of such a rationale, if it were adopted by this Court, is that it would harden the holding of *Red Lion* even as knowledgeable FCC officials, jurists and other persons in positions to know the workings of the Fairness Doctrine are questioning the constitutionality of the doctrine.²⁸¹

Thus, RTNDA urged that “[f]or press freedom’s sake, this Court should, in reversing the judgment below, refrain from taking what may appear to be the easy way out offered by those who believe they can serve newspaper freedom by writing off the future freedom of broadcasters.”²⁸² Similarly, the National Association of Broadcasters (NAB) argued that “the possible scope of the *Red Lion* decision has been limited by [*CBS*]. Accordingly, any reliance upon *Red Lion* in determining . . . the instant case would necessitate a step backwards in solidifying a decision which has since become subject to some modification.”²⁸³

A public interest group, the National Citizens Committee for Broadcasting (NCCB), filed an amicus brief in support of Tornillo due to its concern that the “First Amendment principles involved in this case can potentially have a major impact on the public’s right to obtain access to diverse views.”²⁸⁴ NCCB’s brief observed:

This Court has not previously confronted a constitutional challenge to a legislative effort to balance the following two competing First Amendment interests: (1) a newspaper’s right to determine what it will not print and (2) the voting public’s right to receive information from the widest possible range of sources, specifically, the electorate’s right to be fully informed on electoral issues and the views of the candidates.²⁸⁵

It noted that “[o]rdinarily, the two First Amendment interests . . . coincide.”²⁸⁶ Here, however, given the “realities of communication in a modern, industrialized society,” newspapers such as the *Miami Herald* hold the power to exclude information from the public as well as inform it, thus causing injury to the First Amendment interest

281. *Id.* at 4.

282. *Id.*

283. Brief for National Ass’n of Broadcasters, *supra* note 279, at 10.

284. Brief for National Citizens Committee for Broadcasting, *supra* note 279, at 2.

285. *Id.* at 10.

286. *Id.* at 11.

in an informed electorate.²⁸⁷ In addition to urging the Court to uphold the Florida statute, NCCB opposed the request of amici RTNDA and NAB that the Court “decide the instant case without reference to *Red Lion*.”²⁸⁸ NCCB argued that “*Red Lion*’s definition of the competing First Amendment interests and their appropriateness for legislative resolution cannot be avoided.”²⁸⁹

2. The Opinions

All nine justices joined in the decision written by Chief Justice Burger to reverse the Florida Supreme Court decision. Part I set forth the facts of the case. Part II addressed the issue of finality. Part III summarized the contentions of the parties, with Part III.A devoting about a half page to the arguments of the *Miami Herald* and Part III.B spending more than six pages discussing the arguments of Tornillo and his supporters.²⁹⁰

Citing Professor Barron’s article, Part III.B noted that the “appellee and supporting advocates of an enforceable right of access to the press vigorously argue that the government has an obligation to ensure that a wide variety of views reach the public.”²⁹¹ It observed that when the First Amendment was ratified in 1791, “[e]ntry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.”²⁹² In contrast, today, “[n]ewspapers have become big business,” and the press had “become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events.”²⁹³

The Court observed that the “obvious solution” would be to have additional newspapers. “But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible.”²⁹⁴ Therefore, the “only effective way to insure

287. *Id.* at 12.

288. *Id.* at 29.

289. *Id.* at 30. NCCB also points out that the result in *CBS* “was premised in large measure on the continued existence and vitality of the broadcaster’s ‘public trustee’ duty under the fairness doctrine to meet the ‘public interest in being fully and fairly informed.’” *Id.*

290. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 243-54 (1974).

291. *Id.* at 247-48 & 248 n.8.

292. *Id.* at 248.

293. *Id.* at 249.

294. *Id.* at 251.

fairness and accuracy and to provide for some accountability is for government to take affirmative action.”²⁹⁵ It noted that the “[p]roponents of enforced access to the press take comfort” from several cases suggesting that “the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation.”²⁹⁶

Despite the lengthy and sympathetic discussion of the arguments for the public’s right of access, Part IV found that: “However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual.”²⁹⁷ The Court stated that “the problems relating to government-enforced access [were foreseen] as early as its decision in [*Associated Press*].”²⁹⁸ It quoted Part III in *CBS* for the point that the power of privately owned newspapers is bounded only by the acceptance of readers and the integrity of the publishers.²⁹⁹ It also noted that “[a]n attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by other Members of this Court in their separate opinions in that case.”³⁰⁰ It concluded that the “clear implication” of these cases is that the “compulsion to publish that which reason tells them should not be published is unconstitutional.”³⁰¹ While the Court agreed that a responsible press is a desirable goal, it could not be legislated.

The Court rejected Tornillo’s argument that the right-of-reply statute did not prevent the *Miami Herald* from saying whatever it wished as “beg[ging] the core question.”³⁰² The Court explained that requiring a newspaper to publish a reply exacted a penalty based on content “in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print.”³⁰³ The Court noted: “It is correct, as appellee contends, that a newspaper is not subject to the finite

295. *Id.*

296. *Id.* Here the Court discusses *Associated Press v. United States*, 326 U.S. 1, 20 (1945), *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 47 & n.15 (1971), but not *Red Lion. Id.* at 251-52.

297. *Id.* at 254.

298. *Id.*

299. *Id.* at 255.

300. *Id.* (citing Stewart’s concurring opinion and Brennan’s dissenting opinion).

301. *Id.* at 256 (internal quotations omitted).

302. *Id.*

303. *Id.*

technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of column space to accommodate the replies”³⁰⁴

The Court was concerned that editors might well conclude that the “safe course is to avoid controversy” and to blunt or reduce electoral coverage.³⁰⁵ Moreover, even if the statute imposed no additional cost, it still violated the First Amendment because it intruded into the function of editors. As the Court noted, “[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising.”³⁰⁶

Justice Brennan, joined by Justice Rehnquist, issued a short concurrence, noting that he joined the decision with the understanding that it addressed only “right of reply” statutes, not “retraction” statutes that allow a successful plaintiff in a defamation case to require publication of a retraction.³⁰⁷ Justice White (who had written the decision in *Red Lion*) issued a somewhat longer concurring decision. Without mentioning *Red Lion*, he distinguished newspapers from broadcasting in that a “newspaper or magazine is not a public utility subject to ‘reasonable’ governmental regulation in matters affecting the exercise of a journalistic judgment as to what shall be printed.”³⁰⁸ In his view, the Florida statute ran “afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.”³⁰⁹ However, he emphasized that while free to publish without censorship, newspapers were not entirely free from liability for what they chose to print. He went on to express concern that *Gertz v. Robert Welch, Inc.*³¹⁰ had gone too far in protecting newspapers against libel.³¹¹

304. *Id.* at 256-57.

305. *Id.* at 257.

306. *Id.* at 258.

307. *Id.* at 258 (Brennan, J., concurring).

308. *Id.* at 259 (White, J., concurring). He quotes *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966), about regarding how, under the Constitution, the press was designed to serve as antidote to government abuses of power. *Id.* at 259-60. While the press is not always accurate or fair, “the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed.” *Id.* at 260.

309. *Id.* at 261.

310. 418 U.S. 323 (1974).

311. *Miami Herald Publ’g Co.*, 418 U.S. at 262.

C. Insights from the Justices' Papers

In rereading *Miami Herald*, it struck me that the decision treats many of Barron's ideas sympathetically and at great length. This made me wonder whether there was some possibility that the case could have been decided differently. I also had hoped to discover why *Miami Herald* not only failed to distinguish *Red Lion*, but neglected to even mention or cite the case.³¹² Much of the scholarship in communications law has addressed the inconsistencies between the Supreme Court's 1969 unanimous decision in *Red Lion* and its 1974 unanimous decision in *Miami Herald Publishing Co. v. Tornillo*.³¹³

1. Could the Decision Have Come Out Differently?

The Chief Justice's lengthy discussion of Tornillo's arguments prompted Justice Blackmun's clerk to comment that "this is the only opinion I've seen this year that spends more space discussing the losing arguments."³¹⁴ However, I found no support in the Justices' papers for the theory that the Chief Justice may have originally written a decision upholding the Florida Supreme Court and later changed his mind.

Of course, had the majority agreed with the Florida Supreme Court, it could have denied certiorari or disposed of the case on non-constitutional grounds. The papers in Blackmun's files make clear that the Court wanted to hear the case on the merits. The Court held a conference in January to determine whether the Florida Supreme Court's decision was final. The Court decided to postpone consideration of

312. See, e.g., STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 166 (2001). In the notes following *Red Lion*, this case book observes that *Miami Herald* contained no discussion or even cite to *Red Lion*, and yet, "[a]t first blush, at least, all the arguments rejected in *Red Lion* seem to be the very ones accepted in *Tornillo*." *Id.* It asks if the Court declined to cite *Red Lion* because the two cases cannot be reconciled or because broadcasting has no bearing on print, and whether the Court was behaving irresponsibly or simply exercising restraint. *Id.* See also THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 155 (2d ed. 1998) ("Amazingly, the Court's 1974 *Tornillo* opinion contains no discussion of the 1969 *Red Lion* decision."); FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING 195 (1975) ("There seemed to be a stunning contradiction between the two cases, and communications lawyers read the *Tornillo* opinion in a futile search for a *Red Lion* citation."); Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 4 (1976) ("What seems so remarkable about the unanimous *Miami Herald* opinion is the complete absence of any reference to the Court's unanimous decision five years earlier in *Red Lion Broadcasting Co. v. FCC*.").

313. See, e.g., Bollinger, *supra* note 312, at 4.

314. Memorandum from RR [Robert I. Richter] to Justice Harry A. Blackmun, Re: Circulation by the Chief Justice (June 3, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress).

jurisdiction to the hearing on the merits.³¹⁵ An unidentified memo, which appears to be a clerk's summary of the reply regarding the finality question, observed that the Court could avoid the question by finding the decision non-final, but argued that the case was important enough that the Court should find it final.³¹⁶ Similarly the bench memo by Robert I. Richter, which recommended finding the judgment final, pointed out that the Court could "gracefully avoid the merits if for some reason it feels the time is not proper to reach this issue."³¹⁷ Justice Blackmun's own memo indicated:

Of course, decision on the main issue could easily be avoided if we choose to say that the judgment is not final. That would be an easy way out. While the case is not so easy as *Mills* on the finality point, I am inclined to go along with *Mills* and decide the constitutional issue.³¹⁸

The memos from Blackmun's clerk suggested excitement about taking the case because of the importance of the issue and the fact that Jerome Barron would be arguing it. Richter's memo for the November 30, 1974 conference on whether to grant a stay noted that the lawyer arguing in support of the Florida statute is "Jerome Barron, who is the biggest academic booster of the fairness doctrine and its broad application. He could make a good fight out of the case on the merits."³¹⁹ Richter's bench memo similarly mentioned that the "Appellee is represented by Prof. Jerome Barron, the academic father of right-to-reply theory, so the case is effectively presented on behalf of the statute.

315. *Miami Herald Publ'g Co. v. Tornillo*, 414 U.S. 1142 (1974).

316. See PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress) (the document is titled "Reply of App't on Question of Finality").

317. Bench Memorandum from Robert I. Richter to Justice Harry A. Blackmun, Re: The *Miami Herald Publishing Co. v. Tornillo*, at 13 (Apr. 10, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress) [hereinafter Richter Bench Memo].

318. Memorandum of Justice Harry A. Blackmun, Re: No. 73-797 – *Miami Herald Publishing Co. v. Tornillo*, at 2 (Apr. 15, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress) [hereinafter Justice Blackmun's Apr. 15, 1974 Memo]. Justice Blackmun notes that the other defenses that might be raised on remand were not significant and that the constitutional issue was "for all practical purposes, the decision of the case." *Id.* at 2-3. Also, taking the case would prevent a long and expensive trial. *Id.* at 3.

319. Memorandum from RR [Robert I. Richter] to Justice Harry A. Blackmun, Re: *Miami Herald v. Tornillo* (Nov. 29, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress) [hereinafter Richter Memo].

Unfortunately, the best direct authority for the arguments are Barron's own scholarly articles."³²⁰

Justice Blackmun's memo suggested some sympathy for Tornillo's position. He noted that Tornillo's claim that the Florida statute encouraged rather than inhibited speech was "a plausible and appealing possibility."³²¹ Blackmun further added:

We are, however, dealing with newspapers here. Much as I detest their deficiencies and their slanting of news, particularly here in the East (Washington and New York), the fact is that it has never been the province of the Government to insure that newspapers present the news fairly. For better or for worse, by the First Amendment, we have opted for the free press.³²²

He found that:

Obviously, the objective of Florida here is a high and lofty one. Nevertheless, a newspaper has never been considered a public utility. We have to accept them for what they are, warts and all. I would like to be able to say that if the situation gets reprehensibly unacceptable, then perhaps something is in order. I doubt if that will be possible under the First Amendment, but I suspect that it is a risk we must take and that I, for one, am willing to take.³²³

But Justice Blackmun also noted that it was "possible that a statute of this kind really inhibits or impairs the freedom of the press. I think what we are talking about, really, is the independence of the press. I am willing to maintain it."³²⁴ With respect to the argument that Florida was serving the compelling state interest in preserving the election process, Justice Blackmun commented: "Perhaps so, but no other State has chosen to preserve the election process in this manner."³²⁵ Ultimately, he concluded that "on the main issue, I am ready to reverse despite my personal exasperation at times with the local press. But this is a foundation stone of our governmental structure and I am willing to preserve it."³²⁶

320. Richter Bench Memo, *supra* note 317, at 2.

321. Justice Blackmun's Apr. 15, 1974 Memo, *supra* note 318, at 6.

322. *Id.* at 6-7.

323. *Id.* at 7.

324. *Id.*

325. *Id.*

326. *Id.* at 8. This argument is similar to that made by his clerk, Richter, that were the Court to affirm, it would cause major changes in American journalism. See *infra* note 352 and accompanying text.

At the end of the memo, Justice Blackmun speculated on the Court's action:

If we reverse, little will be changed. If we affirm, however, there necessarily will be an adjustment in American journalism. The courts will be involved. They will have to determine constantly when the reply obligation attaches under the statute. This could be avoided by the courts by having administrative bodies set up. This is not so good.³²⁷

He added, "[t]his is a difficult one, but I would not mind having a case of substance for a change this term. I have been given minor and statutory controversies."³²⁸

At the oral argument held on April 17, 1974,³²⁹ Justice Blackmun reportedly said, "I want to ask a question—no, I guess I want to make a statement—for better or for worse we have opted in this country for a free press, not fair debate."³³⁰ Yet, Justice Blackmun was apparently favorably impressed by Professor Barron's performance at oral argument, which he graded "A-."³³¹ Daniel Paul, who argued for the *Miami Herald*, received only a "B-."³³²

At the conference vote taken two days after the oral argument, Justice Blackmun voted to reverse the Florida Supreme Court. His notes show a negative sign indicating that a vote for reversal next to each Justice except Justice Powell, which was left blank.³³³ Under Powell's name, Blackmun wrote: "A flagrant intrusion on the press. But what's greater monopoly? Congress *ought* to place them under antitrust."³³⁴ Under the Chief Justice's heading, Blackmun noted: "telling what they must publish is equivalent to what they cannot." Under Justice Stewart's name, he wrote: "[C]an be a contradiction between free speech and free press. [P]aper different from media radio bands. [I]mpossible to start a

327. Justice Blackmun's Apr. 15, 1974 Memo, *supra* note 318, at 8.

328. *Id.*

329. For discussion of the oral argument, see FRIENDLY, *supra* note 312, at 194; L.A. Powe, Jr., *Tornillo*, 1987 SUP. CT. REV. 345, 372.

330. FRIENDLY, *supra* note 312, at 194.

331. Notes of Justice Harry A. Blackmun from Oral Argument in *Miami Herald Publ'g v. Tornillo* (Apr. 17, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress).

332. *Id.*

333. Notes of Justice Harry A. Blackmun from Conference Vote on *Miami Herald Publ'g v. Tornillo* (Apr. 19, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress). The minus sign appearing about half way down the box under Justice Marshall's name indicates Justice Blackmun's vote. *Id.*

334. *Id.* (as discerned as best as possible from Justice Blackmun's handwritten notes, which include ambiguous abbreviations).

newspaper. [T]herefore, spectrum is very limited. [B]ut state cannot do this. I have to be a literalist.”³³⁵

Despite Justice Blackmun’s desire to draft the opinion, the Chief Justice assigned the task of writing the opinion to himself. The Chief Justice circulated four drafts, with the first dated June 3, 1974.³³⁶ Despite the number of drafts, there are no significant substantive differences between the first draft and final opinion issued June 25, 1974.³³⁷ In particular, Part III.B, which summarized Tornillo’s arguments, was virtually unchanged from the first draft to the published version.³³⁸

The lack of changes may be explained in part by the shortness of time. The first draft was circulated on June 3, 1974, very close to the end of the term. Justice Douglas joined on the very day that the first draft was circulated.³³⁹ Justices Stewart and Blackmun joined the next day,³⁴⁰

335. *Id.*

336. First Draft (June 3, 1974); Second Draft (June 5, 1974); Third Draft (June 11, 1974); Fourth Draft (June 20, 1974), in PAPERS OF WILLIAM J. BRENNAN, Box 331, No. 73-797 (Library of Congress).

337. One of the biggest changes was to the opening paragraph. The first draft starts:

We set this case for plenary consideration to determine the constitutionality under the First and Fourteenth Amendments to the Constitution of a state statute which grants an electoral candidate a right to demand from a newspaper which criticizes the candidate’s character or official record, equal space in the newspaper to reply to the charges made.

1st Draft of Miami Herald Publ’g Co. v. Tornillo, at 1 (circulated June 3, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress). In contrast, the published opinion begins: “The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper, violates the guarantees of a free press.” Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 243 (1974). The fourth draft elaborates the point that enforcing a right of access could cause editors to reduce political and electoral coverage by adding a quote from *Mills v. Alabama* at the end of the second to the last paragraph, right after the quote from *New York Times Co. v. Sullivan* about dampening the vigor of public debate. 4th Draft of Miami Herald Publ’g Co. v. Tornillo, at 16 (recirculated June 20, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress). The quote states that “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course include discussions of candidates.” *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 216 (1966)).

338. One sentence referring to the “First Amendment *right* of the public to be informed,” was changed to the “First Amendment *interest* of the public in being informed.” Compare 1st Draft of Miami Herald Publ’g Co. v. Tornillo, at 10 (circulated June 3, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress) (emphasis added) with *Tornillo*, 418 U.S. at 251 (emphasis added). In the next paragraph, the phrase “Proponents of *guaranteed* access” was changed to “Proponents of *enforced* access.” *Id.*

339. Memorandum from Justice William O. Douglas to Chief Justice Warren E. Burger (June 3, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress).

340. Memorandum from Justice Potter Stewart to Chief Justice Warren E. Burger, Re: No. 73-797 – Miami Herald Publishing Co. v. Tornillo (June 4, 1974), in PAPERS OF HARRY A.

and Justices Powell and Rehnquist joined a few days later on June 6, 1974.³⁴¹ Justice Marshall joined on June 13, 1974.³⁴²

In sum, it seems that the Court took the case on the merits, even though it could have avoided doing so on the ground that the decision was not yet final, because it thought the case presented an important question that would be well argued on both sides. Before the oral argument, Justice Blackmun's memo reflected concerns about the power of the press and sympathy for the goal of the Florida statute as well as those treated unfairly by the press. Yet, he ultimately came out on the side of the traditional conception of the First Amendment.³⁴³

After oral argument, no Justice voted to uphold the Florida Supreme Court. Moreover, there was little change between the first draft circulated by the Chief Justice and the published opinion. The other Justices promptly signed on without any of the back and forth that occurred in the *CBS* case. Thus, I found no evidence suggesting that the outcome in this case was ever in doubt.

2. The Relevance of *Red Lion*

I also found nothing in the Blackmun papers indicating why *Red Lion* was not cited in *Miami Herald*. If anything, because the memos of Justice Blackmun and the law clerks clearly regarded *Red Lion* as providing the major support for Tornillo's position, the failure of the draft and published opinions to distinguish or discuss *Red Lion* seems all the more strange.

BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress) [hereinafter Justice Stewart's June 4, 1974 Memo]; Memorandum from Justice Harry A. Blackmun to Chief Justice Warren E. Burger, Re: No. 73-797 – Miami Herald Publishing Co. v. Tornillo (June 4, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress). Justice Stewart stated that he might write a brief concurring opinion. Justice Stewart's June 4, 1974 Memo, *supra*.

341. Memorandum from Justice Lewis Powell to Chief Justice Warren E. Burger, Re: No. 73-797 Miami Herald v. Tornillo (June 6, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress); Memorandum from Justice William H. Rehnquist to Chief Justice Warren E. Burger, Re: No. 73-797 – Miami Herald v. Tornillo (June 6, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress).

342. Memorandum from Justice Thurgood Marshall to Chief Justice Warren E. Burger, Re: No. 73-797 – The Miami Herald Publishing Co. v. Tornillo (June 13, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress). I did not find any correspondence from either Justice Brennan or Justice White. I did find early drafts of their concurring opinions, but they did not differ significantly from the published version.

343. Justice Blackmun's Apr. 15, 1974 Memo, *supra* note 318, at 8.

a. The Memos

The memos by law clerks repeatedly referred to *Red Lion*. For example, Justice Powell circulated a memo by his clerk regarding a request to stay the Florida Supreme Court decision. The memo noted that the state court had cited *Red Lion* as standing for the proposition that the purpose of the First Amendment is to preserve an uninhibited market place of ideas.³⁴⁴ It also described the appellant as arguing that the Florida decision below was wrong because it relied on the Court's upholding the Fairness Doctrine in *Red Lion* and *CBS*, when the Fairness Doctrine could be sustained "only because of the unique characteristics of electronic communication."³⁴⁵ This memo also noted that while dicta in *Red Lion* suggested that the Fairness Doctrine would be inapplicable to the press, the issue was "not free from doubt."³⁴⁶

Richter's bench memo for Justice Blackmun recommended reversal, but noted that Tornillo had presented some "strong contentions" and that "Appellee's strongest argument seems to be the *Red Lion* case."³⁴⁷ The other two arguments were based on *CBS* and Justice Brennan's plurality opinion in *Rosenbloom v. Metromedia, Inc.*³⁴⁸

Richter observed that Justice White "was extremely careful in *Red Lion* to limit the case to broadcasting, where the limited frequencies and government licensing create a unique First Am[endment] situation and the simple answer to appellee's *Red Lion* argument is that it only applies to broadcasting."³⁴⁹ But, he noted that "much language in Justice

344. Memorandum from James B. Ginty to Justice Lewis Powell, Re: January 11, 1974 Conference, at 2 (Nov. 20, 1973), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress) [hereinafter Ginty Memo]. Like the Ginty Memo, a preliminary memo dated January 2, 1974, which was prepared for the January 11, 1974 conference, notes that the Florida Supreme Court relied heavily on *Red Lion* and the Appellant argued that *Red Lion* should be limited to broadcasters. Preliminary Memorandum, Re: January 11, 1974 Conference, at 3-4, in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress).

345. Ginty Memo, *supra* note 344, at 3.

346. *Id.* at 4. Ginty concludes that he would be inclined to grant the stay even though there was no immediate danger of significant injury. *Id.* Justice Powell's cover memo notes that after conferring with the Chief Justice, he granted a temporary stay and "in view of the importance of the case," referred the matter to the November 30, 1973 conference. Justice Blackmun's clerk, Robert Richter, thought the issue of whether to grant the stay was "tough," but on balance agreed with Ginty. After reviewing the reply to the stay application, Richter recommended in a supplemental memo that Powell's stay be continued since the appellee did not object. Richter Memo, *supra* note 319.

347. Richter Bench Memo, *supra* note 317, at 15.

348. *See id.* 16-17.

349. *Id.* at 15.

White's opinion" supported Tornillo's position. For example, in concluding that the Fairness Doctrine advanced rather than inhibited public debate, the *Red Lion* decision supported Tornillo's claim that the Florida right to reply statute enhanced public debate. Moreover, the *Red Lion* decision rejected a "vagueness challenge similar to the one advanced by [*Miami Herald*]."³⁵⁰ Richer suggested:

Although *Red Lion* was emphatically limited to broadcasting, if the [Court] wanted to, it is not an impossible task to argue that the same considerations apply to the press, where there is one newspaper in most cities. Although newspapers are, in fact, at least as scarce as broadcasting frequencies today in most places, newspapers are not now and hopefully will never be subject to a licensing requirement. Broadcasters, by technological necessity exist at the behest of the [government]. From this necessity flows the obligations such as the Fairness Doctrine which serves as a check on the [government] control as much as it does on the broadcaster. Newspapers have always depended on an existence free of government] control and for that reason, I would not extend *Red Lion* to cover the press.³⁵¹

Richter cited several other reasons for not extending *Red Lion* to newspapers. He concluded:

If the case is reversed, the effects will not be profound. The press will remain as it is, good and bad, with no fairness obligations. If the case is affirmed the implications will be somewhat more significant, particularly if the Congress or other states follow the lead of [Florida]. Assuming this occurs, I think that the nature of American journalism will be significantly altered.³⁵²

Richter was troubled by "the specter of pervasive judicial supervision" or in the alternative, the possibility of an FCC-like administrative body at the state level.³⁵³ He pointed out that broadcast journalists viewed the Fairness Doctrine as inhibiting television reporting. Thus, "[w]hile this cost might be necessary in broadcasting, it would be a shame to carry it over to the press where there is no governmental licensing."³⁵⁴ He also thought that Barron's brief assumed

350. *Id.*

351. *Id.* at 15-16.

352. *Id.* at 21. He cites as an example, that partisan, ideological journals and newspapers would be forced to open their editorial pages to opposing viewpoints. *Id.* at 21-22.

353. *Id.* at 22.

354. *Id.*

that all newspapers were inherently irresponsible and beholden to political interest groups, when in his view, most were responsible.³⁵⁵

Justice Blackmun's memo agreed with much of Richter's analysis. For example, he considered the same three prior decisions, *Red Lion*, *CBS*, and *Rosenbloom*. He noted that *Red Lion* was of "primary" significance, and described it as holding that the Fairness Doctrine "did not violate the First Amendment."³⁵⁶ Blackmun noted: "The amendment is relevant to public broadcasting, but what is paramount is the right of the viewing and listening public, and not the right of the broadcasters. The First Amendment does not protect private censorship by the broadcasters."³⁵⁷ He observed that while *Red Lion* was a unanimous decision, Justice Douglas had not participated.³⁵⁸

Justice Blackmun next described *CBS* as holding "that neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements."³⁵⁹ He noted that the "Court was somewhat fractionated on the routes by which this conclusion was reached."³⁶⁰

After discussing these cases, Justice Blackmun noted that the Florida statute was "the only one of its kind," and that "[s]trangely enough," it had been challenged only recently despite being on the books since 1913.³⁶¹ Next, he noted:

In simplistic terms, the statute would force the private newspaper to print material it does not want to print. And this is so even with non-libelous material. We have gone far with *New York Times* and its progeny in protecting the press from law suits for libel, and have allowed those suits to proceed only in the face of actual malice where public officials, public figures, and now, perhaps, public issues are involved. How may we protect there and not protect here? The easy answer is to say that the *New York Times* and its reasoning compels a reversal here. That would do the job and be a brief and easy solution.

There are, however, some opposing arguments, and, in my view, they deserve mention and full treatment.

355. *Id.*

356. Justice Blackmun's Apr. 15, 1974 Memo, *supra* note 318, at 3.

357. *Id.*

358. *Id.*

359. *Id.* at 3-4.

360. *Id.* at 4.

361. *Id.* at 5.

1. The first is the reliance by the appellee on the *Red Lion* case. It says in almost so many words that the fairness doctrine advances rather than inhibits public debate. It also rejects a vagueness challenge similar to the one advanced by the newspaper here. One can draw a parallel between limiting broadcasting bans on the one hand and single newspaper municipalities on the other. Yet there is a difference. Newspapers are not licensed and never have been. Broadcasters, by physical necessity, are licensed, and exist by permission of the Government. Newspapers in this country have always been free of governmental control. Perhaps the answer to *Red Lion* is that it is, and should be, limited to broadcasters. There are only so many frequencies available. The fairness doctrine is bred from necessity.

2. The *CBS* case of last term deserves passing mention. The result there, that the First Amendment does not require broadcasters to accept paid advertisements on political subjects, clearly supports the newspaper here. On the other hand, the primary ground of the decision was that the FCC had not required this, and there was an implication that if the FCC had required it, the result possibly might be different. The case is probably not fatal, however.³⁶²

b. The Draft Opinions

As discussed above, there was little change between the Chief Justice's first draft circulated on June 3, 1974, and the published opinion. None of the four drafts mentioned or cited *Red Lion* even though they mentioned the other cases that Justice Blackmun's memo identified as relevant.³⁶³ For example, Part III.B, which summarized *Tornillo's* contentions, quoted language from *New York Times Co. v. Sullivan*, recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

362. *Id.* at 5-6. The third point he discusses is the implication in *Rosenbloom* that a right of reply statute as an alternative to libel suits would be constitutional. Justice Blackmun notes that while he joined in Justice Brennan's plurality opinion, he did not feel bound by the implication and suggests that *Rosenbloom* could be limited to libel cases. *Id.*

363. Because the four drafts are similar, these examples are drawn from the first draft. For example, in Part II.B which summarizes *Tornillo's* contentions, the draft refers to *New York Times Co. v. Sullivan* and the plurality decision in *Rosenbloom v. Metromedia, Inc.* 1st Draft of Miami Herald Publ'g Co. v. Tornillo, at 11 (circulated June 3, 1974), in PAPERS OF HARRY A. BLACKMUN, Supreme Court File, 1918-1999, Box 189, No. 73-797 (Library of Congress) [hereinafter 1st Draft of Miami Herald Publ'g Co. v. Tornillo]. This paragraph is unchanged in the published decision. Compare *id.* with Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 252 (1974).

open.”³⁶⁴ It also noted that *Tornillo* cited the plurality decision in *Rosenbloom v. Metromedia, Inc.*,³⁶⁵ suggesting that it “seemed to invite experimentation by the States in right to access regulation of the press.”³⁶⁶

CBS was discussed in Part IV, which quoted a passage from the plurality opinion in Part III of *CBS*:

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.³⁶⁷

It went on to observe, “[a]n attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by several members of this Court in their separate opinions in that case.”³⁶⁸ The footnote to this sentence quotes passages from the concurring opinion of Justice Stewart and the dissent of Justice Brennan.³⁶⁹

Not only was there no mention of *Red Lion* in the Chief Justice’s draft opinion for the Court, but there was no mention of it in the drafts of the concurring opinions circulated by Justices Brennan and White.³⁷⁰ I was particularly surprised that Justice White, who wrote the *Red Lion* decision, failed to mention *Red Lion*. Instead of focusing on the inconsistent treatment of the right of reply under *Red Lion* and *Miami Herald*, Justice White complained that *Miami Herald*, along with

364. 1st Draft of *Miami Herald Publ’g Co. v. Tornillo*, *supra* note 363, at 11 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). *New York Times* is cited again in Part IV of the draft, which rejects an enforceable right of access as inconsistent with the First Amendment. The draft states: “Government enforced right of access, appellant argues, inescapably ‘dampens the vigor and limits the variety of public debate.’” *Id.* at 16 (citing *New York Times Co.*, 376 U.S. at 279). The published decision drops the phrase “appellant argues.” *Compare id. with Tornillo*, 418 U.S. at 257.

365. 1st Draft of *Miami Herald Publ’g Co. v. Tornillo*, *supra* note 363, at 11.

366. *Id.* This paragraph is unchanged in the published decision. *See Tornillo*, 418 U.S. at 257.

367. 1st Draft of *Miami Herald Publ’g Co. v. Tornillo*, *supra* note 363, at 13-14 (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973)).

368. *Id.* at 14. In the published opinion, the word “several” is changed to “other.” *Compare id. with Tornillo*, 418 U.S. at 255.

369. 1st Draft of *Miami Herald Publ’g Co. v. Tornillo*, *supra* note 363, at 14 n.23. The quote from Justice Brennan points out that unlike electronic media, the newspaper industry is not extensively regulated. *Id.*

370. Justice Brennan’s papers included two drafts of his concurring opinion and two drafts, one typewritten and another one labeled first draft, of Justice White’s concurring opinion. *See PAPERS OF WILLIAM J. BRENNAN*, Box 331, No. 73-797 (Library of Congress). The drafts and the published opinions in both cases are virtually identical.

another case decided the same day, *Gertz v. Robert Welch, Inc.*,³⁷¹ made it very difficult for private citizens who were libeled to obtain any remedy.³⁷²

Thus, it appears that the decision to not discuss *Red Lion*, if indeed it was consciously made, occurred before any draft opinions were circulated. While Justice Blackmun's memo indicates that he would have preferred to limit *Red Lion* to broadcasting, there is nothing in his papers explaining why the Court chose to refrain from making this obvious distinction.

c. A Possible Explanation

While the Justices' papers do not explain why the decision in *Tornillo* fails to distinguish or even cite *Red Lion*, Fred Friendly, the former President of CBS news, has offered an explanation in his book:

The omission was no accident. Several of the Justices wished to explain why *Red Lion Broadcasting* and the rest of the broadcast industry were not entitled to the protections accorded to the *Miami Herald* under the First Amendment, but Chief Justice Burger and the majority thought it essential to make *Tornillo* a unanimous decision. However, the inclusion of language in *Tornillo* reaffirming *Red Lion* as being a different problem because of the scarcity issue would have cost the votes of Douglas and Stewart. Douglas, who supported the *Miami Herald* absolutely, made it clear that he would not vote for an opinion which would have the effect of strengthening the Fairness Doctrine.³⁷³

Because I had access only to the papers of three Justices, and even those are likely incomplete, it is impossible to reconstruct what actually happened. Justice Blackmun's papers do suggest that he drew a distinction between *Red Lion* and *Miami Herald* in his own thinking, but I found no evidence that he sought to have the opinion written to reflect that distinction.

371. 418 U.S. 323 (1974).

372. Professor Bernard W. Bell, who served as Justice White's clerk in the 1982 term, has argued that the court's failure to distinguish *Red Lion* in *Tornillo* was not so remarkable, and that "Justice White's jurisprudence suggests his answer to these critics' claims that *Red Lion* and *Tornillo* conflict: *Red Lion* involved use of a government resource while *Tornillo* did not." Bernard W. Bell, *Judging in Interesting Time: The Free Speech Clause Jurisprudence of Justice Byron R. White*, 52 CATH. U. L. REV. 893, 907 (2003).

373. FRIENDLY, *supra* note 312, at 195. Friendly cites no sources for this claim.

Moreover, I found nothing suggesting that the Chief Justice would have been troubled by losing Justice Douglas's vote.³⁷⁴ Even if Justice Douglas would not have voted for an opinion that would have had the effect of strengthening the Fairness Doctrine, at most, he would have written a concurrence, not a dissent. On the other hand, the Chief Justice may have been anxious to avoid a repeat of the experience in *CBS*, with all of its separate opinions. In his concurring opinion in *CBS*, Douglas had demonstrated both his strong disagreement with *Red Lion* and his willingness to draft a highly critical concurrence. Thus, nothing in the Justices' papers either undermines or supports Friendly's account of the Supreme Court's failure to cite *Red Lion* in *Miami Herald*.

V. CONCLUSION

Barron's insight that constitutional law is anomalous in protecting expression but indifferent to creating opportunities for expression is evident in the Supreme Court's decisions in both *CBS* and *Miami Herald*. Despite expansive language about the public's First Amendment rights in *Red Lion*, the Court declined to extend the public's rights beyond what the Fairness Doctrine required in *CBS* and it declined to extend the right to reply to newspapers in *Miami Herald*.

The papers of Justices Blackmun, Brennan and Douglas help explain the lack of consensus that led to six different opinions in *CBS*. They show that the Chief Justice sought to convince the other Justices to reject the First Amendment claims for lack of state action, due to his concern that finding state action would set a precedent for finding state action in a variety of other contexts, including newspapers.³⁷⁵ However, only Justices Stewart and Rehnquist ended up joining this part of the decision.

Justice Blackmun, joined by Justice Powell, concurred stating that it was unnecessary to decide the state action issue because even assuming state action, the Fairness Doctrine sufficiently protected the public's First Amendment right to a diversity of views. Justice White also concurred, suggesting that he thought there was state action, but that the First Amendment had not been violated.

374. It was not unusual for Justice Douglas to dissent. During his long tenure on the Court, from 1939 to 1975, he dissented in nearly forty percent of the cases. James Ryerson, *Dirty Rotten Hero*, N.Y. TIMES, Apr. 13, 2003, § 7 (Book Review), at 19.

375. See discussion *supra* Part III(C) (analyzing Justice Blackmun's papers and the positions taken by the Justices in deciding *CBS*).

Justice Douglas initially drafted a dissent, but changed it to a concurring opinion after the Chief Justice circulated his opinion finding no government action. Justice Douglas's often-cited concurring opinion, which argued that *Red Lion* was wrongly decided and that broadcasters should not be treated differently than newspapers under the First Amendment, thus appears to have been premised on a "holding" of no government action that in the end, failed to garner five votes.

Although the majority in *CBS* placed great reliance on the Fairness Doctrine and *Red Lion* to conclude that the Constitution did not require broadcast stations to accept paid editorials, when asked to review the constitutionality of a right-to-reply statute similar to the Fairness Doctrine in *Miami Herald*, the Court unanimously found the Florida right-to-reply statute unconstitutional.³⁷⁶ Although both Part III.B of the opinion for the Court, and Justice Blackmun's memo evinced sympathy toward Barron's argument that a public right of access was needed because modern, monopoly newspapers could control and even distort public discussion, the Justices were unwilling to depart from the traditional (in Barron's terms "romantic") notion that freedom of expression is best advanced by keeping the government's hands off newspapers.

It is clear from his papers that Justice Blackmun recognized the tension between *Red Lion* and *Miami Herald* and thought that *Red Lion* should be limited to broadcasting.³⁷⁷ Yet, neither the opinion for the Court nor the two concurring opinions, in either draft or final form, distinguish or even cite *Red Lion*. Unfortunately, nothing in the Justices' papers directly explain the reason for this omission.

376. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

377. See *supra* note 362 and accompanying text.