FOREWORD: RECLAIMING THE FIRST AMENDMENT: CONSTITUTIONAL THEORIES OF MEDIA REFORM

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I. INTRODUCTION

Most law review articles are of interest only to a priesthood of scholars and law students, but occasionally one attains iconic status. Jerome Barron's 1967 "Access to the Press—A New First Amendment Right"[1] is in that special category. Developed against the egalitarian background and political turmoil of the 1960s, and reflecting a growing awareness of the threat posed by media consolidation to a diverse "marketplace" of information and ideas, Barron's article ambitiously proposed a constitutional right of public access not only to broadcast, but to print media.

The Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC* two years later, upholding the Federal Communication Commission's Fairness Doctrine, seemed to ratify Barron's thesis.[2] But since *Red Lion*, the First Amendment right of access has not had a happy career in the courts. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, just four years after *Red Lion*, rejected a constitutional or statutory right of access to broadcast outlets for political advertising;[3] and *Miami Herald Publishing Co. v. Tornillo*, the following year, rejected even a modest version of Barron's theory for print media by striking down a state right of reply statute that was limited to electoral candidates wishing to respond to personal attacks.[4] Barron argued the case.

Many pundits and policymakers also resisted the proposed right of access. Apart from political and doctrinal objections, some

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1. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).
2. 395 U.S. 367, 372-75, 400-01 (1969).
3. 412 U.S. 94, 130-32 (1973).
4. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 244, 258 (1974).

commentators foresaw massive logistical difficulties in implementing a system of public access, even when limited to political candidates or to a right of reply to personal attacks, and even if only applied to broadcasting. Subsequent experiences with public and leased access on cable television have to some extent confirmed their concerns, demonstrating the difficulties of trying to make public access a reality.

Forty years after Barron's groundbreaking work, however, the structural problems that he identified in our media system have only intensified. Time Warner, Comcast, Viacom, Clear Channel, News Corporation, and a handful of other industry giants mold public opinion and choose the information most Americans receive.[5] A growing media reform movement, supported by many scholars, is evidence of widespread concern that allowing a relatively few commercial corporations to control the information and ideas disseminated through our mass media represents a serious challenge to democracy.

The fortieth anniversary of Barron's article in 2007 was therefore an appropriate time to revisit the First Amendment right of access theory and the structural concerns that drove it. In early 2006, Hofstra Law School and the Free Expression Policy Project at the Brennan Center for Justice, NYU School of Law, began planning a one-day conference for just that purpose. "Reclaiming the First Amendment: Constitutional Theories of Media Reform," took place on January 19, 2007 and brought together scholars who have been thinking about these issues, about the broader challenge of media democracy, and about creative solutions to the First Amendment tensions and dilemmas that we face.

The Call for Papers for the "Reclaiming the First Amendment" conference noted that the problem of media consolidation that Barron identified has only intensified in the years since his article was published, and that "while the number of independent sources of media content dwindles, there is no affirmative First Amendment right to access or diversity; indeed, some argue that interfering with these marketplace trends would itself be a First Amendment violation."[6] One purpose of the conference was therefore to explore the First Amendment values and doctrines that might be developed to support a more decentralized, egalitarian, and accessible press.

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5. For a summary of mass media ownership and major policy issues, see Free Expression Policy Project, *Fact Sheet on Media Democracy*, Aug. 2006, http://www.fepproject.org/factsheets/mediademocracy.html.

6. *See* Free Expression Policy Project, *Scholars and Advocates Trade Ideas for Advancing Media Reform at "Reclaiming the First Amendment" Conference*, Jan. 22, 2007, http://www.fepproject.org/news/hofstraconf.html. A copy of the conference agenda can be found at http://www.fepproject.org/fepp/hofstraagenda.pdf (last visited Mar. 13, 2007).

II. BARRON'S CRITIQUE OF THE "ROMANTIC" FIRST AMENDMENT

Barron's 1967 article began boldly:

> There is an anomaly in our constitutional law. While we protect expression once it has come to the fore, our law is indifferent to creating opportunities for expression. Our constitutional theory is in the grip of a romantic conception of free expression, a belief that the "marketplace of ideas" is freely accessible. But if ever there were a self-operating marketplace of ideas, it has long ceased to exist.[7]

This romantic concept of the First Amendment, which Barron traced to the free speech opinions of Oliver Wendell Holmes, Jr., not only posits a free marketplace of ideas where truth will prevail, but a legal system in which it is enough, in serving the high purposes of the First Amendment, simply to make sure that government does nothing to abridge private individuals' and corporations' exercise of the freedom of speech.[8]

Barron took issue with the romantic concept against a background of political protest in the 1960s. The mass media, he noted, are averse to "novel and heretical" ideas; their main goal is profit, and controversy is bad for business.[9] The result is that much newsworthy information and political dissent does not get heard. In frustration, dissenters may resort to ever noisier and more disruptive protests. They learn that it is the best way to get media attention.[10] A right of access, therefore, would not only serve democracy—a fundamental purpose of the First Amendment—but prod the more disruptive forms of protest into more peaceful channels.[11]

Barron's constitutional argument did not come out of thin air. As early as 1943, the Supreme Court had recognized the importance of government action in controlling monopolistic and thus potentially speech-repressive activities by the private media. In *National Broadcasting Co. v. United States*, the Court upheld the FCC's power to impose "chain broadcasting" rules designed to reduce the dominance of

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

8. *Id.* at 1642-43. Barron observed that Holmes had no problem "remind[ing] his brethren in *Lochner v. New York* that the Constitution was not 'intended to embody a particular economic theory,'" yet "rather uncritically accepted the view that constitutional status should be given to a free market theory in the realm of ideas." *Id.* at 1643 (citing Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

9. *Id.* at 1646.

10. *See also* MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 183-94 (1978) (noting that the modern media tend to cover "events," rather than issues).

11. Barron, *supra* note 1, at 1649.

national networks over local programming.[12] Admittedly, this was a broadcasting case, whose rationale turned on the unique limitations of the electromagnetic spectrum and the consequent scarcity of licenses. Because licenses are not available to all, the Court said, it does not violate broadcasters' First Amendment rights to impose reasonable regulations in the "public interest, convenience, or necessity."[13]

Two years later in *Associated Press v. United States*,[14] however, the Court was more explicit, and the decision was not limited to broadcasting. In affirming an antitrust judgment that the Associated Press claimed violated its First Amendment rights, the Court, per Justice Black, famously explained:

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. *That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public* . . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom . . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.[15]

In his article, Barron relied on these precedents, but went further. Whether established by legislative action, administrative action, or direct court intervention, he argued, there should be a right of public access to privately owned media outlets as a necessary affirmative step toward realizing First Amendment values.

Barron recognized the logistical problems with implementing a right of access, but his exploration of this topic was relatively brief. Discussing the *United Church of Christ* case, in which representatives of the African American community in Jackson, Mississippi successfully challenged the broadcast license of a racist radio station,[16] he noted that having access turn on whether the petitioner "represents a significant

12. Nat'l Broad. Co. v. United States, 319 U.S. 190, 224-27 (1943).
13. *Id.* at 227 (internal quotation omitted).
14. 326 U.S. 1 (1945).
15. *Id.* at 20 (emphasis added).
16. Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

sector of the community" is "perhaps not a desirable test."[17] He suggested that "[p]erhaps the more relevant consideration is whether the material for which access is sought is indeed suppressed and underrepresented by the newspaper."[18] Dismissing fears that this could lead to a "floodgate[]" of access claims at the FCC or whatever agency was assigned the task of umpire, Barron quoted then-Judge Burger in the *United Church of Christ* opinion: "'The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out.'"[19]

Critiques of Barron's article were not long in coming. As he recounted in a reminiscence on *Tornillo*, "[t]he article drew much more attention than I would have ever dreamed possible. In fact, it drew immediate fire" from both the establishment press (including *The New York Times*) and one of the leading critics of media consolidation, Ben Bagdikian.[20] But it also gained enough credibility to be quoted favorably in Justice Brennan's plurality opinion in the 1971 defamation case of *Rosenbloom v. Metromedia, Inc.*[21] Giving the media heightened protection from defamation liability in the interest of encouraging fearless journalism would serve the First Amendment, Brennan said (as he had, of course, seven years earlier in the landmark *New York Times Co. v. Sullivan*[22] decision, but it also might justify a right of reply for those defamed. Brennan added: "One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion."[23] The writer in question, of course, was Barron.

III. *RED LION* AND *COLUMBIA BROADCASTING*

The judicial high-water mark for Barron's right of access was the Supreme Court's 1969 decision in *Red Lion Broadcasting Co. v. FCC*, upholding the Federal Communications Commission's Fairness Doctrine.[24] The Doctrine, with its origins in the Communication Act's

17. Barron, *supra* note 1, at 1677.
18. *Id.*
19. *Id.* (quoting *Office of Commc'n of United Church of Christ*, 359 F.2d at 1006).
20. Jerome A. Barron, *Creating a New First Amendment Right:* Miami Herald Publishing Co. v. Tornillo *and the Story of Access to the Media*, *in* DEFENDING THE FIRST: COMMENTARY ON FIRST AMENDMENT ISSUES AND CASES 1, 3 (Joseph Russomanno ed., 2005).
21. 403 U.S. 29, 47 n.15 (1971).
22. 376 U.S. 254, 270-83 (1964).
23. *Rosenbloom*, 403 U.S. at 47 n.15.
24. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969).

requirement that licensees provide coverage and fair treatment of controversial political issues,[25] had a long history at the FCC,[26] but it was only in the 1960s that the agency got more specific about what it meant. In 1967, the agency promulgated regulations to enforce rights of reply to broadcaster editorializing and personal attacks.[27] The industry's challenge to these rules was consolidated with the Red Lion Broadcasting Company's appeal from an FCC order that it give reply time to journalist Fred Cook, who had written a book criticizing Barry Goldwater and was subsequently attacked by the Christian Crusade's Billy James Hargis during a radio broadcast.[28]

A unanimous Supreme Court upheld the Fairness Doctrine against the industry's argument that it amounted to forced speech, in violation of the First Amendment. The twin, overlapping prongs of the Court's analysis were, first, the concept of "scarcity" and, second, an expansive view of the First Amendment that recognized society's interest in a broad diversity of ideas as a value at least as important as—and in the broadcast context, more important than—an individual's or corporation's interest in communicating its point of view.[29]

> The scarcity concept, going back at least to the Court's 1943 decision in *National Broadcasting*, held that because the number of frequencies on the electromagnetic spectrum that are available for broadcasting is limited, not everyone who would like to communicate over the public airwaves is able to do so. The airwaves are therefore a scarce resource, and nobody is entitled to a broadcast license "to the exclusion of his fellow citizens." Indeed, [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

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25. 47 U.S.C. § 315(a) (2000).

26. *See Red Lion*, 395 U.S. at 379-86; BENNO C. SCHMIDT, JR., FREEDOM OF THE PRESS VS. PUBLIC ACCESS 157-74 (1976).

27. Personal Attacks; Political Editorials, 32 Fed. Reg. 10,303, 10,305-06 (July 13, 1967).

28. *Red Lion*, 395 U.S. at 371-73. Benno Schmidt and other commentators have highlighted evidence later assembled by Fred Friendly that the Democratic National Committee "used the evolving reply right for partisan political purposes." SCHMIDT, *supra* note 26, at 186. According to Friendly, the DNC had been monitoring right-wing broadcasts in the hope of demanding reply time and either getting its messages on the air or discouraging the broadcasters from disseminating contrary messages. The first goal, getting equal time, would seem to be consistent with the spirit of the Fairness Doctrine and the right of access; the second, in terms of actual chilling effect, is speculative, as the Supreme Court noted in *Red Lion*, although it later accepted the argument and used it as one rationale for rejecting a broader right of access in *Columbia Broadcasting*. *Id.* at 186-88.

29. *Red Lion*, 395 U.S. at 384-86, 396-401.

necessity, be barred from the airwaves.[30]

The Court's second justification for the result in *Red Lion*, an expansive First Amendment rationale, was linked to scarcity analysis but also seemed to go beyond it. In response to the industry's First Amendment argument, the Court said that indeed, the Amendment is not "irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized" in barring the FCC from "interference with 'the right of free speech by means of radio communication.'"[31] But spectrum limitations and the consequent scarcity of licenses justify "restraints on licensees in favor of others whose views should be expressed on this unique medium." Furthermore—and here the Court embarked on a separate First Amendment rationale—"the 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."[32] The much-quoted language that followed forms the basis of a community- and listener-based view 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.[33]

Thus, the First Amendment rights of the "people as a whole" outweighed the First Amendment rights of the broadcasters.

Whether or not this and other language in *Red Lion*, affirming the public's right or interest in "an uninhibited marketplace of ideas" in which neither government nor private industry monopolizes the means of communication, was meant to have separate integrity from the scarcity rationale, it was short-lived. In *Columbia Broadcasting*, four years after *Red Lion*, a divided Court rejected any claimed constitutional right of access to the broadcast media beyond the contours of the FCC's interpretation of the Fairness Doctrine.

The two consolidated cases known as *Columbia Broadcasting* involved separate requests to broadcasters for editorial advertising time from the Democratic National Committee and Business Executives'

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30. *Id.* at 389.
31. *Id.* at 389-90.
32. *Id.* at 390.
33. *Id.* (citations omitted).

Move For Vietnam Peace.[34] After the broadcasters refused both requests, citing general policies against paid editorial ads, the two groups appealed to the FCC, which declined to order the broadcasters to accept the ads. The D.C. Circuit reversed the Commission, relying in large part on *Red Lion*. Judge Skelly Wright wrote for the appeals court:

> [*Red Lion*] went well beyond the scarcity rationale of the *National Broadcasting Co*. case. It justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the general public . . . .
>
> Of course, the *Red Lion* Court had to invoke the public's First Amendment interests for a narrow purpose only—to uphold legislative and administrative action already taken. It did not have to reach the issue, presented in these cases, of invoking those interests for a direct attack on broadcasters' policies approved by the Commission. However, the language used by the Court is significantly expansive. It spoke of a First Amendment "right" held by "the people as a whole." A constitutional "right" is hardly deserving of the name if it can function only to *permit* legislative and administrative action and if its content depends entirely upon the current policies of the legislative and executive branches.[35]

This was a reasonable reading of *Red Lion*, but it did not prevail. A majority of the Supreme Court reversed the D.C. Circuit and rejected the claimed right of access to broadcast stations for paid political advertising, either as a matter of First Amendment or statutory interpretation. Chief Justice Burger's opinion for a six-Justice majority noted that:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century.[36]

Thus, the fact that the FCC was on the other side of the access claim this time—in contrast to *Red Lion*—was a critical factor in the Court's decision.

But the *Columbia Broadcasting* opinion also turned on the First

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34. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 646-47 (D.C. Cir. 1971), *rev'd sub nom.* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

35. *Id.* at 650. The D.C. Circuit also found that the licensees' conduct, in these circumstances, amounted to state action. Four Justices of the Supreme Court in *Columbia Broadcasting* disagreed; three others found it unnecessary to decide the state action issue. *See* SCHMIDT, *supra* note 26, at 177.

36. *Columbia Broadcasting*, 412 U.S. at 102.

Amendment rights of broadcasters, the congressional decision not to turn them into common carriers, and the perceived logistical difficulties and potential chill on journalistic discretion that a right of access, as administered by the FCC, would create.[37] In direct contrast to *Red Lion*, Burger now said that "it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents."[38] There followed a long section of Burger's opinion outlining the likely chilling effects of a court—or agency—imposed right of access in these circumstances. Among the perceived dangers were that political ads could eat into regular programming; broadcasters' obligation to serve the public interest could be held hostage to the "private whim" of those wanting to place such ads; and enlarged government supervision "over the content of broadcast discussion of public issues" could invite politically biased decision making.[39]

IV. *TORNILLO* AND ITS AFTERMATH

After *Columbia Broadcasting*, the result in *Miami Herald Publishing Co. v. Tornillo* the following year could not have been surprising. The Court unanimously rejected a proposed right of access to the print media, even in the relatively narrow context of a state law that created such a right only for political candidates seeking to reply to personal attacks. The *Miami Herald* had run a relentless series of attacks on Tornillo, a local teachers' union leader and candidate for the state legislature. The *Herald* was the dominant newspaper not only in metropolitan Miami but throughout the state.[40] In violation of the statute, it refused to print any of Tornillo's replies.[41]

Barron has accurately characterized *Tornillo* as a decision "having

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37. *See id.* at 114-21.

38. *Id.* at 120. This portion of Burger's opinion was joined by only two other Justices, but Justice Douglas, in a separate concurrence, also advanced the First Amendment right of broadcasters, arguing that they should be free of all but the narrowest regulatory control. *Id.* at 148-70 (Douglas, J., concurring). All told, there were four separate concurrences in *Columbia Broadcasting*. Justices Brennan and Marshall dissented, arguing that "the exclusionary policy upheld today can serve only to inhibit, rather than to further, our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" and that the electromagnetic spectrum "is part of the public domain." *Id.* at 172-74 (Brennan and Marshall, JJ., dissenting) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

39. *Id.* at 124, 126-27.

40. Barron, *supra* note 20, at 10; *Tornillo*, 418 U.S. 241, 243 n.1 (1974).

41. *Tornillo*, 418 U.S. at 243-45.

two ends but no middle."[42] The first part of Chief Justice Burger's majority opinion states the case for access with considerable force: daily newspapers are big business; nearly half are owned by chains or conglomerates; there are many one-newspaper towns where monopolies effectively control local news; and the result of these economic changes has been "to place in a few hands the power to inform the American people and shape public opinion."[43] Burger quotes at length from the *Associated Press* decision of 1945 on the importance of government regulation when private actors threaten to repress "the widest possible dissemination of information from diverse and antagonistic sources."[44]

But, "[h]owever much validity may be found in these arguments," Burger then says, the remedy of governmental interference with editorial discretion "at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."[45] In sweeping terms, the opinion rejects the right of reply as a form of forced speech that is just as unconstitutional an interference with editorial discretion as governmental punishment for speech.[46] The opinion goes on to accept chilling effects arguments very similar to those it declined to consider in *Red Lion*: the compelled printing of a reply costs money and takes up space; moreover, faced with statutory penalties for refusing to print replies, "editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced."[47]

Nowhere in *Tornillo* did the Court cite *Red Lion*, even though, as Barron recounts, several amicus briefs had asked the Court to overrule it.[48]

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42. Barron, *supra* note 20, at 16. In a 1976 book, Benno Schmidt also criticized *Tornillo*, writing that:

> [T]he opinion offers virtually no reasons for its result. None of the cases that the Court cited had decided a question remotely germane to the constitutionality of an access statute directed at newspapers. The opinion wove together a series of incidental remarks from opinions dealing with a variety of other First Amendment questions, and the Court pronounced its judgment on access as if the rule had been the verdict of settled precedents.

SCHMIDT, *supra* note 26, at 12. The absolutism of Burger's approach, Schmidt said, contrasts with more nuanced and relativistic analyses in other First Amendment situations. *Id.* at 12-14.

43. *Tornillo*, 418 U.S. at 248-50.

44. *Id.* at 252 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

45. *Id.* at 254.

46. *Id.* at 258.

47. *Id.* at 257.

48. Barron, *supra* note 20, at 18. Barron also reflected that contemporaneous political events may have influenced the ruling:

> In the midst of his Watergate troubles, President Nixon's popularity was in rapid decline.

The tension between the Supreme Court's *Red Lion* and *Tornillo* decisions remains to this day, although the FCC has long since dispensed with the Fairness Doctrine.[49] It is still the law, however, that broadcasters are subject to greater regulation than print, cable, or the Internet: controls on ownership,[50] equal access mandates for political candidates, a minimal requirement of children's educational programming, restrictions on "indecency,"[51] and generalized public interest obligations, however loosely (or invisibly) they may be enforced. Of course, the non-broadcast media are hardly immune from regulation—antitrust law remains in effect for the media as for other industries; and cable TV operators must provide public and leased access channels, as well as broadcast stations (the so-called "must carry" requirement).[52]

It is a frequently heard understatement that the law of media regulation today is in disarray, with different standards for broadcast, print, Internet, and cable; with no coherent legal or constitutional approach to the regulation of new technologies; and with media corporations arguing that any regulation at all is a violation of their First Amendment rights. The continuing viability of the scarcity rationale, as well as other arguments for greater regulation of broadcasting, has been

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> He saw the press as the source of many of his problems. Therefore, practically on the eve of the oral argument in the Supreme Court in the *Miami Herald* case, President Nixon declared that he favored the enactment of a federal right-of-reply law. Senator McClellan of Arkansas, known for his law-and-order views, spoke on the floor of the Senate in favor of the enactment of such a law. With such friends, one did not need enemies.

Id. at 15. Some reasons for the mysterious absence of any mention of *Red Lion* in the *Tornillo* opinion have been provided by Angela Campbell. *See* Angela J. Campbell, *A Historical Perspective on the Public's Right of Access to the Media*, 35 HOFSTRA L. REV. 1027 (2007).

49. Syracuse Peace Council, 2 F.C.C.R. 5043, 5057 (1987), *aff'd*, Syracuse Peace Council v. FCC, 867 F.2d 654, 669 (D.C. Cir. 1989).

50. *See, e.g.*, FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 803-09 (1978) (upholding FCC rule against cross-ownership of broadcast stations and newspapers in the same market).

51. In 2006, the broadcast industry mounted a statutory and constitutional assault on the FCC's expansion of its "indecency" censorship regime to ban even "fleeting expletives." In June 2007, the U.S. Court of Appeals for the Second Circuit struck down the "fleeting expletives" rule as "arbitrary and capricious," and, in extensive dicta, warned that the agency's entire indecency regime is probably unconstitutional. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 446 (2007). A separate challenge to the indecency regime came in the wake of the 2004 Janet Jackson wardrobe malfunction. At this writing, the U.S. Court of Appeals for the Third Circuit had that case under advisement. *See* Brief of Respondent, CBS Corp. v. FCC, No. 06-3575 (3d Cir. Dec. 22, 2006).

52. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 667-68 (1994); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 224-25 (1997) (upholding the "must carry" law); Marvin Ammori, Esq., Georgetown Univ. Law Ctr., Presentation at Panel I for the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007). For video files of the conference presentations, see http://law.hofstra.edu/NewsAndEvents/Conferences/confer_mediareform.html.

questioned widely and at length.

The scholars who made presentations at the "Reclaiming the First Amendment" Conference, and whose work is published in the pages that follow, attack these issues from many angles—some theoretical and doctrinal, some detailed and technical, as befits our age of technological communication, and some offering practical proposals for policy change.

V. AN OVERVIEW OF THE CONFERENCE

We offer only a broad overview of the subjects and arguments made by the participants in the conference, many of which are reproduced in this volume. Our summary cannot do full justice to the presentations, and we therefore encourage a thorough perusal of this impressive body of work.

The conference was organized into four panels, a keynote address by Professor Barron, and a final presentation by Professor Angela Campbell on her research into the papers of Justice Harry Blackmun, recently opened to scholars, and focusing on the Supreme Court's decision-making process in the *Columbia Broadcasting* and *Tornillo* cases. Legal historian Paul Finkelman commented on Professor Campbell's paper and, more broadly, critiqued the overall pro-reform viewpoint of most conference participants.

The opening panel, "Media Regulation, Access, and the First Amendment," featured Professors Robert McChesney, C. Edwin Baker, Gregory Magarian, and Marvin Ammori. Professor McChesney's opening talk noted that with the currently expanding media reform movement, the United States is at a "critical juncture." Scholars and advocates alike are questioning the system of government favors and subsidies that support the large commercial media industry. (He mentioned copyright law as one such subsidy.)[53] Professor Baker followed with an argument that freedom of the press, under the First Amendment, means something quite different from freedom of speech for individuals: the "instrumental" role of the press in supplying the information essential for democracy requires heightened protection in some circumstances (for example, a reporter's privilege against disclosing confidential sources); but the press does not enjoy the kind of "individual autonomy" that prevents the government from requiring

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53. *See* Robert W. McChesney, Professor, Univ. of Ill. at Urbana-Champaign, Presentation at Panel I for the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); *see also* Robert W. McChesney, *Freedom of the Press for Whom?: The Question To Be Answered in Our Critical Juncture*, 35 HOFSTRA L. REV. 1433 (2007).

public access or other sorts of regulation in the interests of diversity.[54]

Professor Gregory Magarian critiqued the arguments of scholars whom he dubbed "regulatory reformers," who press for policy changes in the legislature and in administrative agencies, but give up on the courts as potential sources of public access obligations. Judges are largely immune from the political process whose "pathologies," beholdenness to the corporate media, and "lack of accountability" make true reform unlikely, Professor Magarian argued. Courts are not policymakers, to be sure, but they can announce standards that embody First Amendment values.[55]

Finally, Marvin Ammori argued for a revision of the First Amendment standards that now govern court challenges to media regulation. Under the Supreme Court's 1994 and 1997 decisions in *Turner Broadcasting System, Inc.*, *v. FCC*,[56] the government must justify even "content-neutral" regulations (there, a requirement that cable operators carry broadcast channels) with detailed evidence of necessity for the rule. The *Turner* standard, which is much more demanding than anything the Supreme Court has required in broadcast regulation cases, discourages regulations that are First Amendment-friendly because they aim to increase the diversity of content available from the mass media. When regulations (or laws) are designed to enhance rather than suppress content, they should not be subject to such a strict standard, Ammori said.[57]

First Amendment attorney Robert Corn-Revere, serving as moderator and commenter, expressed appreciation for the opportunity to "go slumming" at an academic conference. In reply to Professor Baker, and citing the examples of schools, libraries, and civil rights organizations, Corn-Revere argued that institutions must have the same First Amendment rights as individuals. Government regulation in the interest of increasing diversity has not worked in the past, he said; and referring to the FCC's dubious activity in policing "indecency" on the airwaves, he asked: "Can you imagine what the Internet would look like if it had been produced through a Notice of Proposed Rule Making at the

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54. *See* C. Edwin Baker, Professor, Univ. of Pa. Law Sch., Presentation at Panel I of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007) [hereinafter Baker, Presentation]; *see also* C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007).

55. *See* Gregory P. Magarian, Professor, Villanova Univ. Sch. of Law, Presentation at Panel I for the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); *see also* Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373 (2007).

56. *See supra* note 52 and accompanying text.

57. *See* Ammori, *supra* note 52.

FCC or any other government agency for that matter?"[58]

Professor Baker replied during the Q&A period by distinguishing nonprofit advocacy organizations, such as the NAACP, from media corporations.[59] Ammori pointed out that under longstanding "common carrier" rules, telephone companies cannot discriminate in the terms of access to their wires. "That's actually what the net neutrality debate is all currently about," he pointed out, in the first of many references to this policy issue during the conference.[60]

The second panel, "Media Regulation and Intellectual Property," featured Professors Ellen Goodman, Hannibal Travis, Alan Garfield, and Diane Zimmerman as moderator and commenter. Professor Goodman focused on the inherent conflict between "communications pluralists," who defend government regulation against First Amendment attack by media corporations, and "copyright pluralists," who argue that the First Amendment limits the extent to which government can regulate in favor of large corporate copyright owners. Citing Justice Stephen Breyer, she pointed out that government regulation tends to have free expression effects on both sides.[61] Although Justice Breyer's approach—balancing the free speech interests on both sides—is "fraught with indeterminacy" and the danger of "judicial caprice," Professor Goodman said it was still the best way to grapple with the conflicting interests honestly.[62]

Professor Hannibal Travis presented colorful evidence of the vast diversity of online speech today, including some fifty million blogs worldwide. He argued that our current intellectual property regime, which suppresses creative use of trademarks and provides very long terms of copyright protection, is inconsistent with the understanding of the Constitution's Framers. The Internet and blogosphere, he said, should be at least as free as the press was when the First Amendment was ratified in 1791.[63] Professor Alan Garfield, pointing to the

58. Robert Corn-Revere, Davis Wright Tremaine LLP, Presentation at Panel I of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007).

59. *See* Baker, Presentation, *supra* note 54.

60. Ammori, *supra* note 52.

61. Emblematic of this conflict is the fact that the *Turner* decisions have been vigorously attacked both as imposing too restrictive a standard on government regulatory efforts and as being unduly tolerant of them. *See* Ammori, *supra* note 52; *See, e.g.*, Erik Forde Ugland, *Cable Television, New Technologies and the First Amendment After* Turner Broadcasting System, Inc. v. FCC, 60 MO. L. REV. 799, 818-22 (1995) (*Turner* Court should have applied *Tornillo* "strict scrutiny," not "intermediate scrutiny" test of *United States v. O'Brien*, 391 U.S. 367 (1968)).

62. *See* Ellen P. Goodman, Professor, Rutgers Univ. Sch. of Law, Presentation at Panel II of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007) [hereinafter Goodman, Presentation]; *see also* Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L. REV. 1211 (2007).

63. *See* Hannibal Travis, Professor, Fla. Int'l Univ. Coll. of Law, Presentation at Panel II of

importance of free-expression safeguards within the copyright system, suggested a variety of reforms, including more specific rules for "fair use" of copyrighted material, and a reduction in the large potential money damages allowed by the law for copyright infringement.[64]

Professor Zimmerman, in response, expressed skepticism both about ad-hoc balancing by courts, and about Barron's access theory. Copyright is a political problem, she said; "don't put all the weight of this on the fragile backbone of the First Amendment."[65] Professor Goodman responded, again citing Justice Breyer, that the "crystalline approach" to First Amendment problems simply hides the balancing that goes on behind the scenes in any free expression case.[66] Professor Baker, from the floor, disputed Professor Goodman's argument that structural regulation of the media industry is in fact a regulation of speech.[67]

In his lunchtime keynote address, Professor Jerome Barron offered a combination of reminiscence and legal analysis. He recalled that after he lost the *Tornillo* case, his son complained: "Gee dad, nine to nothing!"[68] But in the years after *Tornillo*, he said, newspapers began a process of "soul-searching." Rights of reply and standards of fairness became parts of journalistic ethics in some quarters. Reviewing the few remaining provisions of federal law that require access to the broadcast media (for political candidates), he mused that today, "[p]oliticians provide access and reply to themselves but to no one else."[69]

Yet, Professor Barron said, big newspaper chains are breaking up, and some local groups are trying to buy local papers. Moreover, "[t]o some extent the aspirations of those of us who have advocated access for individuals in the opinion process have been realized in the Web."[70] But, he warned, we can already see developing "once again the issues that were raised long ago by the power of the broadcast networks and the

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the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); *see also* Hannibal Travis, *Of Blogs, Ebooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519 (2007).

64. *See* Alan E. Garfield, Professor, Widener Univ. Sch. of Law, Presentation at Panel II of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); *see also* Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169 (2007).

65. Diane Zimmerman, Professor, New York Univ. Sch. of Law, Presentation at Panel II of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007).

66. *See* Goodman, Presentation, *supra* note 62.

67. *See* Baker, Presentation, *supra* note 54.

68. Jerome A. Barron, Professor, George Washington Univ. Law Sch., Keynote Address at the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007) [hereinafter Barron, Address].

69. *Id.*; *see also* Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937 (2007).

70. Barron, Address, *supra* note 68.

chain newspapers."[71]

Professors Oren Bracha, Frank Pasquale, David Kohler, and Jennifer Chandler constituted the third panel, "The Communications Order and New Technologies"; Professor Robert Horwitz served as moderator and commenter. Professor Kohler, a self-described "luddite" and skeptic about media regulation, offered a variety of "self-help" theories in support of free speech. Rather than seek regulation, for example, those offended by offensive speech should avert their eyes and ears (as the courts have generally required). Likewise, a reporter's privilege not to disclose confidential sources should be recognized by the courts because it encourages the investigatory journalism necessary for democracy to function.[72]

Professors Bracha and Pasquale jointly presented their research on Internet search engines—both their importance as tools for disseminating speech, and their capacity for manipulation. Courts have not been hospitable to legal claims against search engine companies for manipulating their rankings in their own commercial interests or for other reasons. Professors Bracha and Pasquale argued that net neutrality principles should apply to search engines, that their search algorithms should be disclosed, and that the creation of a "transparent," publicly funded search engine should be considered.[73]

Professor Chandler also addressed the power of search engines as gatekeepers to information. Whether evaluating Internet filters, spam blockers, search engines, or other intermediaries, courts and policymakers need to consider the entire "communicative relationship." She stated the interests of online speakers in reaching an audience, the interests of audiences in accurate search results, and the interests of intermediaries in editorial discretion.[74]

In his comments, Professor Horwitz noted that "self-help" is not very effective when, for example, a website posts identifying information about abortion providers in a context that amounts to a

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71. *Id.*

72. *See* David C. Kohler, Professor, Sw. Law Sch., Presentation at Panel III of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); s*ee also* David Kohler, *Self Help, the Media and the First Amendment*, 35 HOFSTRA L. REV. 1263 (2007).

73. *See* Oren Bracha, Professor, Univ. of Tex. at Austin Sch. of Law, Presentation at Panel III of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); Frank A. Pasquale, Professor, Seton Hall Sch. of Law, Presentation at Panel III of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007).

74. *See* Jennifer A. Chandler, Professor, Univ. of Ottawa Faculty of Law, Presentation at Panel III of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); s*ee also* Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095 (2007).

genuine threat to their lives. (He was referring to the case of *Planned Parenthood v. American Coalition of Life Activists*, in which the U.S. Court of Appeals for the Ninth Circuit ruled that an anti-abortion website that listed identifying information for abortion providers, crossing out the names of those who had been murdered, was not protected by the First Amendment.)[75]

The last panel, "Proposals for Reform," included Professors Lili Levi, Malla Pollack, and Michael Epstein, attorney Cheryl Leanza, and Professor Laurence Winer as moderator and commenter. Professor Levi put forward "a middle ground" between regulation and hands-off approaches to improving the journalistic performance of broadcasters. Her recommendations include, first, creating better mechanisms for supporting nonprofit and alternative media; and, second, experimenting with structural reforms that would encourage commercial broadcasters to devote more resources to news and public affairs programming.[76]

Professor Leanza explored ways in which First Amendment case law relating to the "hecklers' veto" might be used to increase communications diversity. This line of cases requires government officials to protect unpopular speakers against hecklers who are trying to silence them. Ordinarily, when private individuals or corporations suppress speech, it is not a First Amendment problem, because there is no state action. The hecklers' veto cases are an exception to this principle: courts have required government action to prevent private censorship.[77]

Professor Pollack noted that the Supreme Court has, in recent cases, limited the theory of "forced speech"—that is, the notion that government cannot force private organizations to speak (or publish) against their will. This was a major element of the *Tornillo* decision. In *Rumsfeld v. FAIR*, for example, the Court rejected the argument of universities that being forced to allow military recruiters on campus "forced" them to promote the military's message of discrimination

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75. *See* Robert Horwitz, Univ. of Cal. San Diego, Presentation at Panel III of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc).

76. *See* Lili Levi, Professor, Univ. of Miami Sch. of Law, Presentation at Panel IV of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); s*ee also* Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321 (2007).

77. Cheryl A. Leanza, Esq., Managing Director, Office of Communication, Inc., United Church of Christ, Presentation at Panel IV of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007) [hereinafter Leanza, Presentation]; s*ee also* Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305 (2007).

against gay men and lesbians.[78] By the same token, Professor Pollack suggested, government could require websites to meet certain access requirements, for example, posting a link to a general online "public comment" space for the free expression of ideas.[79]

Finally, Professor Michael Epstein proposed a policy of "spectrum set-asides" under which the government would allow media corporations to exceed ownership limits in exchange for providing bandwidth for public access channels. Now that digital technology allows broadcasters to divide up their frequency into six separate channels, it would not be a hardship to devote one of them to the public's use. Professor Epstein acknowledged that allowing companies to grow even larger in return for allowing public access might be "a Faustian bargain."[80]

In reply, Cheryl Leanza said that she would not trade "something big" like ownership caps for public access broadcasting. Public access cable channels, to date, have not had a substantial audience, even though some of the content is very good.[81]

At the end of the day, Professor Angela Campbell reported on the Supreme Court's decision-making process in two cases—*Columbia Broadcasting* and *Tornillo*—based on her review of Justice Blackmun's papers in the Library of Congress. The *Columbia Broadcasting* case resulted in six separate opinions: a four-part main decision by Chief Justice Burger, and separate concurrences or dissents by Justices White, Blackmun, Douglas, Stewart, and Brennan.

Professor Campbell focused on Justice Douglas's separate opinion, which went through eighteen separate drafts before emerging as a concurrence (it was originally a dissent). The papers show that as Douglas's thinking evolved, he came to reject categorically the Supreme Court's 1969 *Red Lion* ruling upholding the Fairness Doctrine. Justice Douglas thought that the First Amendment barred any government interference with private media corporations' editorial decisions—including decisions about what advertising to accept.[82]

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78. Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S. Ct. 1297, 1313 (2006).

79. Malla Pollack, Professor, Univ. of Id. Coll. of Law, Presentation at Panel IV of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); *see also* Malla Pollack, *A Listener's Free Speech, A Reader's Copyright*, 35 HOFSTRA L. REV. 1457 (2007).

80. Michael M. Epstein, Professor, Sw. Univ. Sch. of Law, Presentation at Panel IV of the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); *see also* Michael M. Epstein, *Spectrum Set-Asides as Content-Neutral Metric: Creating a Practical Balance Between Media Access and Market Power*, 35 HOFSTRA L. REV. 1139 (2007).

81. *See* Leanza, Presentation, *supra* note 77.

82. *See* Angela J. Campbell, Professor, Georgetown Univ. Law Ctr., Presentation at the Hofstra Law School Conference: Reclaiming the First Amendment (Jan. 19, 2007); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 148 (1973) (Douglas, J., concurring).

Red Lion was also a focus of Professor Campbell's research into *Tornillo*, and the mystery of why the Supreme Court decision does not even mention *Red Lion*. Professor Campbell noted that Fred Friendly, in his book *The Good Guys, the Bad Guys, and the First Amendment*,[83] opined that although several of the justices wanted to distinguish *Red Lion* and explain why it should not be extended to the print media—but was still good law as to broadcasting—Justice Douglas would not have joined such an opinion because he was adamantly opposed to any statement from the Court affirming the continuing viability of *Red Lion*. Observing that Chief Justice Burger may have been eager to avoid the fractured result two years before in *Columbia Broadcasting*, Professor Campbell thought this explanation was plausible.[84]

VI. CONCLUSION

We are grateful to the many scholars who contributed to this conference, and hope that the ideas explored here will stimulate further discussion about policies, legal doctrines, and litigation strategies that can lead to a more vibrant, varied, and democratic media structure. As reformers have frequently noted, whatever the political or cultural issue in which we are engaged, the ways in which it is presented and debated in our media of mass communication go far toward determining the outcome.

Several speakers at the conference noted the semantic tensions between "First Amendment rights" and "First Amendment values" (or "interests"). Under First Amendment jurisprudence today—apart from the language about listeners' and viewers' "rights" in *Red Lion*—it is the corporate mass media, like other speakers—that have First Amendment rights.[85] Diversity of content and viewpoint are merely "interests" or "values" that are somehow lesser in magnitude than "rights." Such interests can only be pursued by government to a limited extent before infringing on speakers' "rights."[86] Barron sought to change all this—with limited success, thus far, in the courts.

Whether the courts will revisit their current semantic requisitioning of rights and values remains to be seen. Certainly there are important free speech interests on both sides of the equation. The articles that follow address these questions with depth and insight and will, we hope,

83. FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING (1976).

84. *Id.* at 195; s*ee* Campbell, *supra* note 82.

85. *Columbia Broadcasting*, 412 U.S. at 101-02.

86. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 680-82 (1994) (O'Connor, J., concurring in part and dissenting in part).

help to shape the ways in which we frame and answer the public policy questions raised by the structure and regulation of the media in the years to come.