IV. Regulation of the Mass Media to Improve the Political Process

"A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution. ..."

Miami Herald Publishing Co. v. Tornillo

418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).

A Florida statute required a newspaper to print, at no cost, with equal space and in as prominent a position and typeface as the original story or editorial, any response that political candidates may make to the paper's charges concerning his or her official conduct or personal character. In 1972, the *Miami Herald* published two editorials critical of the candidacy of Pat Tornillo, Jr., for the state house of representatives. The *Herald* refused Tornillo's request to print his rebuttal. He then sued in a state court, but the trial judge held the statute violated the First Amendment. Florida's supreme court reversed, reasoning that the right-of-reply statute enhanced rather than abridged the rights to freedom of communication protected by the First Amendment. The *Herald* appealed to the U.S. Supreme Court.

Mr. Chief Justice **BURGER** delivered the opinion of the Court. ...

III ...

B

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that government has an obligation to ensure that a wide variety of views reach the public. ... It is urged that at the time the First Amendment to the Constitution was enacted in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the spectre of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national

newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated "interpretive reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. ... In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership. ...

Access advocates note that Mr. Justice Douglas a decade ago expressed his deep concern regarding the effects of newspaper monopolies:

> "Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude—and to make money." "The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse." ...

IV ...

... A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" begs the core question. ... The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. Grosjean v. American Press Co. (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted 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. ...

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, 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. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate," New York Times v. Sullivan (1964). ...

... [T]he Florida statute [also] fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. ...

Reversed.

Mr. Justice **BRENNAN,** with whom Mr. Justice **REHNQUIST** joins, concurring. ...

Mr. Justice **WHITE,** concurring.

... According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. New York Times v. United States (1971). A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. Mills v. Alabama (1966). We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press. ...

Editors' Notes

(1) **Query:** How helpful is a *textualist approach* in settling the problems raised here? How much assistance does a *structural approach* emphasizing the role of the press in informing the American people and contributing to meaningful debate? To what extent was *Miami Herald* congruent with the demands of democratic theory? To what extent did this case provide an example of *reinforcing representative democracy*? How does it foster robust debate to allow the sole newspaper in a community to print only one side of an issue?

(2) **Query:** Red Lion Broadcasting Co. v. Federal Communications Commission (1969) sustained the FCC's "fairness doctrine," which required radio and television stations to allow time for response by people personally attacked in broadcasts or by political candidates whose opponents a station may have endorsed. Conceding the First Amendment was relevant to broadcasting but noting far more people were seeking licenses to broadcast than there were

frequencies available, the Court held: "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." Thus, the Court upheld a limited right of access to the broadcasting media, finding that such access would "enhance rather than abridge the freedoms of speech and press." Is it possible to reconcile *Red Lion* and *Miami Herald?* Which would be financially more difficult to start, a new radio station or a daily newspaper? Is the answer to that question relevant to constitutional interpretation? Constitutional interpretation by whom?

(3) Although the Court upheld the fairness doctrine in *Red Lion*, the FCC dropped the requirement in 1987, stating that it unconstitutionally "chilled" the First Amendment rights of broadcasters.

(4) Three years earlier, FCC v. League of Women Voters (1984) had thrown additional doubt on *Red Lion*. A group of litigants, including the League of Women Voters and the Pacifica Foundation, which operated several stations and received federal grants, challenged § 339 of the Public Broadcasting Act of 1967. That section forbade educational broadcasting stations receiving grants from the federal government to "engage in editorializing" about political campaigns or candidates. For the majority, Brennan applied "most exacting scrutiny." He acknowledged that the federal government had authority to regulate the "scarce and valuable national resource" of limited frequencies and that that authority was more extensive than over newspapers. Nevertheless, "broadcasters are engaged in a vital and independent form of communicative activity" that fell under the First Amendment's shield, and he found § 339's ban was much too sweeping, restricting "precisely that form of speech which the Framers of the Bill of Rights were most anxious to protect."

(5) **Query:** Of what relevance is technological change to understanding the First Amendment's protection of freedom of the press? Economic change surrounding the press and mass media?

(6) **Query:** Is the Internet more like newspapers (and *Miami Herald*) or more like the broadcasting medium (and *Red Lion*). In Reno v. American Civil Liberties Union (1997), which invalidated certain provisions of the Communications Decency Act of 1996 on the ground that they abridged freedom of speech (see Editors' Notes following American Booksellers Association, Inc. v. Hudnut (1985; reprinted above, p. ___), the Court rejected any analogy between the Internet and the broadcasting medium. The Court stated that decisions like *Red Lion* "relied on the history of extensive government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and its 'invasive' nature. Those factors are not present in cyberspace." Accordingly, the Court concluded that the cases "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."