

Minority interests may also be protected by means which do not impinge upon the majority's rights of expression.<sup>72</sup> The state may, for example, require corporations to pay a special dividend to shareholders who object to corporate political expenditures.<sup>73</sup> The state may also permit only those corporate political expenditures financed by voluntary shareholder contributions. State authorization of corporately administered political funds supported by voluntary contributions may be sufficient to vindicate individual speech and associational rights. Segregated, voluntary political funds allow members of the corporate family to speak and associate while permitting dissenting shareholders to decline support of the association's political expression.<sup>74</sup> Corporate political expenditure bans qualified by the availability of such political action committees achieve a balanced accommodation of the rights and interests of majority and minority shareholders and should withstand constitutional challenge.<sup>75</sup>

3. *Media Right of Access.*—Many of the Supreme Court's recent decisions defining the content and scope of first amendment protection have involved not the soapbox orator or the lonely pamphleteer, but rather representatives of the established

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corporate political expression depends, in part, on one's confidence in the ability of the normal channels of corporate democracy to resolve political and business policy differences between corporate managers and majority shareholders. State regulation of corporate government processes and the availability of judicial remedies to curb unauthorized acts may be sufficient to protect the state and shareholder interest in representative corporate political expression.

<sup>72</sup> See 98 S. Ct. at 1426; *United States v. UAW*, 352 U.S. 567, 596 (1957) (Douglas, J., dissenting); *United States v. CIO*, 335 U.S. 106, 149-50 (1948) (Rutledge, J., concurring). The Court suggested the use of judicial remedies to protect the interests of minority shareholders. 98 S. Ct. at 1426; see *Cort v. Ash*, 422 U.S. 66, 84 (1975). Actions to remedy ultra vires acts and the breach of fiduciary duty, however, can afford only partial protection for shareholders. Many corporate political expenditures to which shareholders object will be authorized by the corporate charter.

<sup>73</sup> See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237-42 (1977); *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 120-24 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 755 (1961). One commentator has suggested that the free rider problem may make this system unfeasible. See Comment, *supra* note 58, at 158-59.

<sup>74</sup> Federal legislation permitting the formation and operation of such funds, 2 U.S.C. § 441b (1976), is described in Comment, *Corporate Political Action Committees: Effect of the Federal Election Campaign Act Amendments of 1976*, 26 *CATH. U.L. REV.* 756 (1977); Note, *supra* note 26, at 299-301.

<sup>75</sup> This analysis suggests that the Federal Corrupt Practices Act provision regulating corporate and union political expenditures, 2 U.S.C. § 441b (1976), is constitutional. Note, *supra* note 26, at 303-14.

news media.<sup>1</sup> Such cases present not only general issues involving freedom of speech but also questions of the particular role of the press in the constitutional scheme. Last Term both types of issues were raised when a broadcasting company challenged restrictions on access to a California prison. Although the Supreme Court had earlier ruled that members of the media "have no constitutional right of access to prisons or inmates beyond that afforded the general public,"<sup>2</sup> it did not make clear whether this "equal access" rule applied to all cases or only those in which the public already had adequate access.<sup>3</sup> In *Houchins v. KQED, Inc.*,<sup>4</sup> the Court once again announced that the press enjoyed no special right of access beyond that of the public,<sup>5</sup> but did nothing to clarify what right, if any, the public had.

Broadcasting company KQED had sought permission to enter and photograph an area of the Alameda County jail at Santa Rita known as "Little Greystone," an infamous detention area and the scene of a recent inmate suicide.<sup>6</sup> Sheriff Houchins informed the company that it was prison policy not to allow such access, and KQED sued for preliminary and permanent injunctive relief, claiming that the prison's policy violated its first amendment rights. After the commencement of litigation, Houchins announced a program of monthly prison tours open to the public, including members of the media. The tours did not include Little Greystone, and no cameras or recording devices were permitted.<sup>7</sup> Holding these measures to be inadequate, the district court issued a preliminary injunction prohibiting the sheriff from denying responsible media representatives reasonable access, with cameras and recorders, to all portions of the jail, including Little Greystone.<sup>8</sup> This action was upheld by the Ninth Circuit.<sup>9</sup>

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<sup>1</sup> See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). See also Stewart, "Or of the Press," 26 *HASTINGS L.J.* 631, 632 (1975).

<sup>2</sup> *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (newsmen have no right to interview specific prison inmates); see *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (same).

<sup>3</sup> See *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1344 (1977) (grant of stay) (Rehnquist, Circuit Justice).

<sup>4</sup> 98 S. Ct. 2588 (1978).

<sup>5</sup> *Id.* at 2597.

<sup>6</sup> See *id.* at 2591. See also *Brenneman v. Madigan*, 343 F. Supp. 128, 133 (N.D. Cal. 1972).

<sup>7</sup> The tour program is described in the Court's opinion. See 98 S. Ct. at 2591-92.

<sup>8</sup> *KQED, Inc. v. Houchins*, 18 *CRIM. L. REP. (BNA)* 2252, 2253-54 (N.D. Cal. 1975).

<sup>9</sup> *KQED, Inc. v. Houchins*, 546 F.2d 284 (9th Cir. 1976).

The Supreme Court reversed in a 4-3 decision.<sup>10</sup> Chief Justice Burger, who wrote a plurality opinion joined by two other Justices, concluded that the media has no special right of access beyond that enjoyed by the general public.<sup>11</sup> Though acknowledging the Supreme Court's observation in *Branzburg v. Hayes*<sup>12</sup> that "news gathering is not without its First Amendment protections,"<sup>13</sup> the Chief Justice argued that nothing in that case supported the view that the press had a special right of access to sources of the news. Indeed, the Court in *Branzburg* explicitly stated that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."<sup>14</sup> Furthermore, in *Pell v. Procunier*<sup>15</sup> and *Saxbe v. Washington Post Co.*,<sup>16</sup> the Court relied on *Branzburg* to deny the existence of a press right to interview specific inmates, concluding that the Constitution does not require government officials "to make available to journalists sources of information not available to members of the public generally."<sup>17</sup> Chief Justice Burger believed that the broadcaster's claim in the present case was precisely for the same special privilege of access, and accordingly voted to reverse on the basis of *Pell* and *Saxbe*.<sup>18</sup>

Justice Stewart concurred in the judgment of reversal because he agreed that the lower court injunction was overbroad in granting the press access to areas not open to the public,<sup>19</sup> but he disagreed that "equal access" meant that no distinctions could be drawn between the press and public.<sup>20</sup> Noting the "critical role" of the press in American society and its special mention in the Constitution, Justice Stewart argued that the press must not only be admitted to the same areas as the public, but also be ad-

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<sup>10</sup> Chief Justice Burger's plurality opinion was joined by Justices White and Rehnquist. Justice Stewart filed a separate opinion concurring in the judgment, while Justices Brennan and Powell joined in the dissent authored by Justice Stevens. Justices Marshall and Blackmun did not participate in the case.

<sup>11</sup> 98 S. Ct. at 2597.

<sup>12</sup> 408 U.S. 665 (1972) (newsmen denied testimonial privilege not to disclose confidential sources to grand jury).

<sup>13</sup> 98 S. Ct. at 2595 (quoting *Branzburg v. Hayes*, 408 U.S. at 707).

<sup>14</sup> 408 U.S. at 684; see 98 S. Ct. at 2595.

<sup>15</sup> 417 U.S. 817 (1974).

<sup>16</sup> 417 U.S. 843 (1974).

<sup>17</sup> *Pell v. Procunier*, 417 U.S. at 834; see *Saxbe v. Washington Post Co.*, 417 U.S. at 850.

<sup>18</sup> 98 S. Ct. at 2597.

<sup>19</sup> *Id.* at 2598-99 (Stewart, J., concurring). See also *Pell v. Procunier*, 417 U.S. at 833-34 (Stewart, J.).

<sup>20</sup> 98 S. Ct. at 2598 (Stewart, J., concurring).

mitted in such a manner as to allow effective reporting.<sup>21</sup> Justice Stewart would have upheld an injunction granting the press access "on a more flexible and frequent basis" than the monthly public tours, and permitting journalists to use cameras and recording equipment, even though these were denied the public. He specifically kept open the possibility of this relief to KQED on remand.<sup>22</sup>

Justice Stewart's argument is similar to that advanced in some court opinions<sup>23</sup> and commentary<sup>24</sup> to the effect that the press should enjoy a privileged status not because of its own right but as a vehicle for effecting the public's right.<sup>25</sup> The Chief Justice found no support for the proposition that the press is entitled to special constitutional protection to vindicate the public's right to information.<sup>26</sup> On the contrary, the press has traditionally been viewed as an independent institution not subject to any particular obligation to the public.<sup>27</sup> Moreover, Chief Justice Burger disagreed with Justice Stewart's assumption that the press is best qualified to implement the public right.<sup>28</sup> This line of argument would make asserted press rights depend upon an evaluation of press performance. Such an evaluation, however, would conflict with established notions of a press free from government scrutiny. Yet this evaluation would seem to follow from claims

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<sup>21</sup> *Id.* ("[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.")

<sup>22</sup> *Id.* at 2598-99.

<sup>23</sup> *See, e.g.,* *Pell v. Procunier*, 417 U.S. at 840 (Douglas, J., dissenting) (quoting *Branzburg v. Hayes*, 408 U.S. at 721 (Douglas, J., dissenting)) ("The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."); *KQED, Inc. v. Houchins*, 546 F.2d at 294 (Duniway, J., concurring).

<sup>24</sup> *See, e.g.,* Note, *The Public's Right to Know: Pell v. Procunier and Saxbe v. Washington Post Co.*, 2 *HASTINGS CONST. L.Q.* 829 (1975); Note, *Bans on Interviews of Prisoners: Prisoner and Press Rights After Pell and Saxbe*, 9 *U.S.F. L. REV.* 718, 730-35 (1975); Note, *The Rights of the Public and the Press to Gather Information*, 87 *HARV. L. REV.* 1505, 1509-10, 1522 (1974). *See also* Brief of National Newspaper Ass'n as Amicus Curiae, *Houchins v. KQED, Inc.*, 98 S. Ct. 2588 (1978).

<sup>25</sup> *See* 98 S. Ct. at 2598 (Stewart, J., concurring) (a journalist's purpose is "to gather information to be passed on to others, and his mission is protected by the Constitution").

<sup>26</sup> 98 S. Ct. at 2596.

<sup>27</sup> *See* *Chicago Joint Bd., Amalgamated Clothing Workers of America v. Chicago Tribune Co.*, 435 F.2d 470, 474 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 134-35 (9th Cir. 1971).

<sup>28</sup> 98 S. Ct. at 2596-97.

grounding special press rights in the media's supposed ability to vindicate public rights. If the press fails to vindicate the public right, then, under Justice Stewart's theory, it might forfeit its claim to special protection.

While Justice Stewart sought to draw a distinction between granting the press greater rights of access and granting it more effective and flexible access to the same areas open to the public,<sup>29</sup> this distinction seems difficult to grasp. The injunction Justice Stewart indicated he would uphold would grant the press rights of access not available to the public generally: the right to enter the prison at "reasonable times and hours," the right to photograph prison facilities, and the right to use recording equipment.<sup>30</sup> Whether one calls these greater rights than are available to the public or more flexible implementation of the same rights seems largely a matter of semantics.

Although it may be argued that specific mention of the press in the first amendment entitles it to special rights,<sup>31</sup> the press clause probably was intended not to afford the media any greater protection, but rather to ensure that the general freedom of expression guaranteed by the first amendment would not be forfeited by the act of publication.<sup>32</sup> The assertion that the press has special rights as vindicator of the public right carries with it the danger that concomitant responsibilities might be recognized, responsibilities that would endanger a free press far more than the denial of privileged status as the public's representative.<sup>33</sup> The privilege of using the airwaves granted to broadcast media has been cited as the justification for imposing duties of fair reporting and rights of reply.<sup>34</sup> Recognizing a special privilege of access for the media might well provide the justification for imposing similar duties on journalists who avail themselves of special ac-

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<sup>29</sup> *Id.* at 2598-99 (Stewart, J., concurring).

<sup>30</sup> *Id.*

<sup>31</sup> See *id.* at 2598; *Saxbe v. Washington Post Co.*, 417 U.S. at 863 (Powell, J., dissenting); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 639-40 (1975); Stewart, *supra* note 1, at 633.

<sup>32</sup> See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-19, at 675 n.5 (1978); Van Alstyne, *Comment: The Hazards to the Press of Claiming a "Preferred Position"*, 28 HASTINGS L.J. 761, 769 n.16 (1977). In any event, it seems that nothing definite can be said of the Framers' intent since they themselves "had no very clear idea as to what they meant by 'the freedom of speech or of the press.'" Chafee, *Book Review*, 62 HARV. L. REV. 891, 898 (1949). See also L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 221, 224-25, 236-38 (1960).

<sup>33</sup> See L. TRIBE, *supra* note 32, § 12-19, at 675 n.5; Van Alstyne, *supra* note 32, at 764-69.

<sup>34</sup> See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

cess.<sup>35</sup> Finally, according the press special rights presents the insolvable problem of determining who qualifies as "the press." Any meaningful definition of the press would involve the state in choosing among media representatives in a potentially unconstitutional manner.<sup>36</sup>

While Chief Justice Burger and Justice Stewart felt that the case turned on the issue of what rights the press had beyond those of the public, the dissenting Justices took a substantially different view of the case. Even granting the proposition that the press should have no special rights, Justice Stevens, writing for the dissent, felt the question still remained whether or not the *pub-*

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<sup>35</sup> In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court struck down a Florida statute granting rights of reply to political candidates who were criticized in a newspaper editorial. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), however, the Court upheld rulings and regulations by the FCC which imposed similar rights of reply on broadcast media. The only apparent distinction between the two cases is that "[u]nlike broadcasting, the publication of a newspaper is not a government conferred privilege." *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 136 (9th Cir. 1971). According to this logic, granting special access to the press might justify governmental regulation of the sort permitted in *Red Lion*, at least over the reporting derived from such access. A special right of access based on the press' asserted role as vindicator of the public right might thus carry with it a fiduciary obligation.

<sup>36</sup> See *Branzburg v. Hayes*, 408 U.S. at 704 (if special press rights were recognized, it would "be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (freedom of the press protects "every sort of publication which affords a vehicle of information and opinion"). The problem of government selection among media representatives has arisen most frequently in the context of the issuance of press passes. In such cases, first amendment concerns may be implicated in the process of selection, even if there is no first amendment right to the access in question. See, e.g., *Dayton Newspapers, Inc. v. Starick*, 345 F.2d 677 (6th Cir. 1965) (cause of action was stated in complaint alleging violation of first amendment rights when the police denied a particular reporter access to an area open to other members of the press); *Forcade v. Knight*, 416 F. Supp. 1025, 1038 (D.D.C. 1976) ("denial of White House access to differing viewpoints of the press deprives the public of the uninhibited, robust debate which is at the heart of the First Amendment"), modified *sub nom.* *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977); *Borrea v. Fasi*, 369 F. Supp. 906, 909-10 (D. Hawaii 1974); *Quad-City Community News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 14 (S.D. Iowa 1971).

In the present case, the lower court injunction directed the sheriff to allow access to "responsible" representatives of the media, see *KQED, Inc. v. Houchins*, 18 CRIM. L. REP. (BNA) at 2253. Allowing first amendment rights to turn on the interpretation of such vague and subjective guidelines by government officials presents serious first amendment problems, see *Forcade v. Knight*, 416 F. Supp. at 1035; *Quad-City Community News Serv., Inc. v. Jebens*, 334 F. Supp. at 17.

*lic's* right was infringed by Sheriff Houchins' denial of access. The plurality dealt with this issue only tangentially, and in the limited context of deciding that the press had no special rights. Chief Justice Burger interpreted precedent stressing the importance of informed public opinion and free public discussion<sup>37</sup> as guaranteeing only the right to communicate,<sup>38</sup> not the right of access to information in the government's control.<sup>39</sup> *Pell* and *Saxbe*, according to the Chief Justice, "assumed that there is no constitutional right of access."<sup>40</sup> *Zemel v. Rusk*,<sup>41</sup> which held that no first amendment right was violated by the government ban on travel to Cuba, was also cited for the proposition that "[t]he right to speak does not carry with it the unrestrained right to gather information."<sup>42</sup> Since the Chief Justice did not distinguish in his analysis between a special press right and the general public right of access, it is unclear whether his discussion was intended to preclude a general public right as well as a special press right. Nonetheless, Chief Justice Burger broadly concluded that the opening of governmental institutions to the public was a task for legislative resolution through political processes, rather than for the Court.<sup>43</sup>

The dissenters argued that a constitutional right of public access, available to all including the press, followed inevitably from the system of self-governance contemplated by the Framers.<sup>44</sup> One purpose of the first amendment was to ensure "the existence of an informed citizenry"<sup>45</sup> able to make responsible decisions.<sup>46</sup> Such a goal could not be achieved if there were no

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<sup>37</sup> *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

<sup>38</sup> This right was reaffirmed last Term in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). In that case, Virginia had sought to impose criminal penalties on a newspaper for publishing information concerning the proceedings of a commission reviewing possible judicial misconduct. Such publication violated a state statute making it a crime for anyone to divulge information concerning the proceedings. The Court held that, at least as applied to a non-participant in the proceedings who divulges truthful information obtained by lawful means, the statute violated the first amendment.

<sup>39</sup> 98 S. Ct. at 2594-95.

<sup>40</sup> *Id.* at 2595.

<sup>41</sup> 381 U.S. 1, 16-17 (1965).

<sup>42</sup> 98 S. Ct. at 2595 (quoting *Zemel v. Rusk*, 381 U.S. at 17).

<sup>43</sup> 98 S. Ct. at 2596.

<sup>44</sup> *Id.* at 2605-06 (Stevens, J., dissenting).

<sup>45</sup> *Id.* at 2605.

<sup>46</sup> *Id.* See also *Saxbe v. Washington Post Co.*, 417 U.S. at 863 (Powell, J., dissenting); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1505-06

protection for the acquisition of information, as well as for its communication once acquired.<sup>47</sup> Justice Stevens further argued that access to prisons particularly merited protection, since concealment might undermine public confidence in the criminal justice system or endanger the constitutional guarantee of freedom from cruel and unusual punishment.<sup>48</sup>

The dissenting Justices disagreed with Chief Justice Burger's interpretation of the relevant precedent. In their view, *Zemel v. Rusk* denied only the "unrestrained right to gather information,"<sup>49</sup> and *Branzburg* did recognize some right to gather news.<sup>50</sup> Finally, although *Pell* and *Saxbe* seemed to deny rights of access,

(1974). In his opinion for the Court in the recent case of *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), see note 38 *supra*, Chief Justice Burger wrote that the first amendment was adopted to protect vital interests "in public scrutiny and discussion of governmental affairs," 435 U.S. at 839. While these same interests would seem to support a first amendment right of access, however limited, to sources of information within government control, the Chief Justice was careful to note that *Landmark* involved no question of "any constitutionally compelled right of access for the press," *id.* at 837.

<sup>47</sup> 98 S. Ct. at 2606 (Stevens, J., dissenting).

<sup>48</sup> *Id.* at 2608-09. The Chief Justice himself has recognized the importance of public awareness about prison conditions, asserting that we cannot "continue . . . to brush under the rug the problems of those who are found guilty and subject to criminal sentence," Burger, *Our Options Are Limited*, 18 VILL. L. REV. 165, 167 (1972), and that a "visit to most prisons will make you a zealot for prison reform," Address by Chief Justice Burger, Centennial Convocation of the Association of the Bar of the City of New York, Feb. 17, 1970, 25 REC. A.B. CITY NEW YORK 14, 20-21 (Supp. Mar. 1970). For additional judicial expressions of the public interest in scrutinizing the prison system, see *Saxbe v. Washington Post Co.*, 417 U.S. at 861 (Powell, J., dissenting); *Morales v. Schmidt*, 489 F.2d 1335, 1346 & n.8 (7th Cir. 1973) (Stevens, J., dissenting); *Nolan v. Fitzpatrick*, 451 F.2d 545, 547-48 (1st Cir. 1971); *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727, 728-30 (S.D.N.Y. 1967).

<sup>49</sup> 98 S. Ct. at 2603 n.15 (Stevens, J., dissenting) (quoting *Zemel v. Rusk*, 381 U.S. at 17) (emphasis added by Stevens, J.). In addition, *Zemel* can be distinguished as turning on the dubious distinction between "action" and "speech", see *Saxbe v. Washington Post Co.*, 417 U.S. at 858 (Powell, J., dissenting), or as involving "judicial unwillingness to interfere with congressional and executive control over foreign affairs," Note, *supra* note 46, at 1520.

<sup>50</sup> 98 S. Ct. at 2603 n.15 (Stevens, J., dissenting); see *Branzburg v. Hayes*, 408 U.S. at 709 (Powell, J., concurring); *Saxbe v. Washington Post Co.*, 417 U.S. at 859 (Powell, J., dissenting); Note, *supra* note 46, at 1531-32. Justice Powell's concurrence was necessary to sustain the Court's judgment in *Branzburg*, and some state and lower federal courts have interpreted *Branzburg* along the lines suggested in the concurrence, viewing it not as denying the existence of a first amendment right to gather information, but rather as engaging in a balancing process that implies the existence of such a right. See, e.g., *Baker v. F & F Inv.*, 470 F.2d 778, 783 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Bursey v. United States*, 466 F.2d 1059, 1083, 1091 (9th Cir. 1972); *State v. Peter*, 132 Vt. 266, 268-70, 315 A.2d 254, 255 (1974). See also Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 145-46 (1972).



it was important in those cases that significant alternative means of access existed, and that the denials in question were "not part of an attempt by the state to conceal the conditions in its prisons."<sup>51</sup> *Pell* and *Saxbe* need not be taken to mean that broad and consistent denials of access, of a sort not present on their records, entail no constitutional problem.<sup>52</sup>

While the dissent correctly reached the fundamental issue of whether or not there is a *public* right of access, which would include any right of the press, it gave little guidance for determining the scope of this right. A right of access based on grand but indeterminate notions such as self-governance, without other limits, could be used to justify access in virtually every case where it is sought. It is precisely this indeterminacy which led the plurality to reject a first amendment right of access on the grounds that it would permit "hundreds of judges . . . to fashion ad hoc standards . . . according to their own ideas of what seems 'desirable' or 'expedient.'"<sup>53</sup> Yet, contrary to the plurality view, the prior development of first amendment doctrine does provide standards for limiting the right of access within workable bounds.

Any right of access, like other first amendment rights, would be subject to limitation in the face of countervailing government or private interests.<sup>54</sup> Here the state has a legitimate interest in maintaining prison security and discipline, protecting the privacy of inmates, and promoting the penological goals of incarceration.<sup>55</sup> The recognition of rights of access should not interfere with the proper functioning of a prison system. As Justice Black noted, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."<sup>56</sup> Asserted rights of access

<sup>51</sup> 98 S. Ct. at 2604 (Stevens, J., dissenting) (quoting *Pell v. Procunier*, 417 U.S. at 830).

<sup>52</sup> 98 S. Ct. at 2604 (Stevens, J., dissenting).

<sup>53</sup> 98 S. Ct. at 2597.

<sup>54</sup> See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . can justify incidental limitations on First Amendment freedoms"); *Quaker Action Group v. Morton*, 516 F.2d 717, 725-26 (D.C. Cir. 1975); *Garcia v. Gray*, 507 F.2d 539, 543 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975).

<sup>55</sup> See 98 S. Ct. at 2592 n.2; *Procunier v. Martinez*, 416 U.S. 396, 404 (1974).

<sup>56</sup> *Adderley v. Florida*, 385 U.S. 39, 47 (1966). In *Adderley*, the Court upheld the convictions of students under a Florida trespass statute. The students had gathered on the county jail curtilage to protest the jailing of fellow students. Despite broad language in the opinion to the effect that the state can control its property for its proper uses, *id.* at 47-48, the case is not dispositive of the present case. *Adderley* involved protests interfering with prison functions, and considered the right to use the jail as a forum for protest. *Id.* See also *Brown v. Louisiana*, 383 U.S. 131, 166 (1966) (Black, J., dissenting). The claim in *Houchins v. KQED*,

must somehow be reconciled with these state interests. One approach, that suggested by Sheriff Houchins, would have the Court defer to the expertise of prison officials rather than embroil the judiciary in the complex tasks of prison administration.<sup>57</sup>

The usual constitutional approach when first amendment rights conflict with valid government interests is not, however, one of general deference to the government authority but rather a balancing of the competing rights and interests.<sup>58</sup> A government interest incidentally infringing on a first amendment right will be upheld "if the incidental restriction . . . is no greater than is essential to the furtherance of that interest."<sup>59</sup> This "least restrictive alternative" test entails a balancing of the benefits in additional "speech" against any costs to the prison system associated with proposed alternatives, since no alternative is likely to serve the government interest in precisely the same fashion.<sup>60</sup> However one would strike the balance in accommodating a public right of access with valid prison objectives, it seems clear that the sheriff's prelitigation policy of a blanket exclusion of all would be overbroad.<sup>61</sup>

Perhaps the main reason the plurality did not reach this conclusion was that it did not consider general public rights to be at issue, but only special rights of the press beyond those of the public.<sup>62</sup> General pronouncements in the plurality opinion that

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*Inc.* was not for general access to stage protests, as it was in *Adderley*, but rather for limited access, appropriately tailored so as not to interfere with prison functions, for the purpose of gathering information. See generally *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 110, 140-41 (1967).

<sup>57</sup> Brief for Petitioner at 21-22. See also 98 S. Ct. at 2594 ("the courts . . . are 'ill-equipped' to deal with problems of prison administration"); *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) (prison problems "require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches").

<sup>58</sup> On the inappropriateness of total deference, see *Procunier v. Martinez*, 416 U.S. 396, 405 (1974); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978) (Burger, C.J.) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise . . . the function of the First Amendment as a check on legislative power would be nullified."). A policy of deference would seem particularly dangerous when first amendment questions of access are involved. Without public access to scrutinize the performance of the prison authorities, it would be impossible to determine if deference to the expertise of the officials were justified.

<sup>59</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>60</sup> See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-86 (1975).

<sup>61</sup> This is particularly true since the policy of several prisons around Santa Rita has been one of more open access, without any deleterious consequences. See Brief for Respondents at 10-15, 53.

<sup>62</sup> See 98 S. Ct. at 2596 ("The issue is a claim [of] special privilege of access which the Court rejected in *Pell* and *Saxbe* . . .").

seem to deny any public right clearly should be read in context as denying anyone *special* rights, since only this latter issue was argued and analyzed,<sup>63</sup> and the district court's order granted injunctive relief only to representatives of the media.<sup>64</sup> The cases relied on by KQED and the dissent do "not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally,"<sup>65</sup> but this does not dispose of the more fundamental issue of what must be open to the public generally. *Pell* and *Saxbe* are seen as standing for the proposition "that there is no constitutional right of access" because of their holding that the media have "no constitutional right of access beyond that afforded the general public,"<sup>66</sup> when this holding would be perfectly consistent with a wide range of public access rights.<sup>67</sup>

Indeed, far from rejecting any first amendment right of public access, certain characteristics of the plurality opinion seem to imply the existence of such a right. The Chief Justice went to considerable lengths, as Justice Stewart had gone in the majority opinions of *Pell*<sup>68</sup> and *Saxbe*,<sup>69</sup> to list the range of alternative means of access to information about prisons available to the public.<sup>70</sup> Such a listing of alternatives would have been irrelevant if there were indeed no right of access, and the sheriff could

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<sup>63</sup> KQED's argument was based on "the right of the public to receive the information, and the right of the press to seek it out," Brief for Respondents at 24; *see id.* at 17. No argument was made for a *public* right to seek out the information, a right the press could have shared in. *See* Petition for Certiorari at 5 ("KQED did not allege, and the District Court did not find, that the access to the inmates and facilities afforded the members of the public at large was in any way inadequate.")

<sup>64</sup> KQED, Inc. v. Houchins, 18 CRIM. L. REP. (BNA) at 2253-54.

<sup>65</sup> 98 S. Ct. at 2595.

<sup>66</sup> *Id.*

<sup>67</sup> This same confusion of the issues was evident in the *Pell* case: since the challenged regulation "does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protections that the First and Fourteenth Amendments guarantee," 417 U.S. at 835. As Justice Powell noted in his dissent to *Pell* and *Saxbe*, "[f]rom all that appears in the Court's opinion, one would think that any governmental restriction on access to information, no matter how severe, would be constitutionally acceptable to the majority so long as it does not single out the media for special disabilities not applicable to the public at large," 417 U.S. at 857 (Powell, J., dissenting).

<sup>68</sup> 417 U.S. at 823.

<sup>69</sup> 417 U.S. at 849.

<sup>70</sup> Some of the Court's suggested alternatives were the availability of reports from visiting committees, task forces, grand juries, and other inspection boards, as well as various means of obtaining information from present or former inmates. *See* 98 S. Ct. at 2596-97. Petitioner's argument stressed the availability of such alternatives. Brief for Petitioner at 5-12; *see* Petition for Certiorari at 5-20.

have completely sealed off the prison from the public. Alternatives for "speech" are highly relevant, however, in balancing a first amendment right against conflicting state or private interests.<sup>71</sup> Chief Justice Burger's listing of alternatives thus suggests the existence of a first amendment right of access to be balanced against the legitimate government concerns of prison security and discipline. Furthermore, Sheriff Houchins actually began admitting the public to certain areas of the prison after litigation commenced, a point noted by the Chief Justice,<sup>72</sup> and this may have been considered adequate to satisfy any first amendment right of access. In any event, Sheriff Houchins himself recognized that there was a first amendment right of public access. His argument was not that no such right existed, but rather that, balancing the right against the various prison administration interests, his present practice represented a proper accommodation.<sup>73</sup>

*Houchins v. KQED, Inc.*, therefore, should not be considered as standing for the proposition that there is no first amendment right of public access to government-controlled institutions such as prisons.<sup>74</sup> The only ruling tested by argument and analyzed by the plurality was that the press enjoys no first amendment right of access beyond that accorded the public, a proposition seemingly settled by previous cases. The determination of the extent of the first amendment right of access held in common by the public and press must await future consideration by the Court.

4. *Attorney Solicitation.* — The Court's 1977 decision in *Bates v. State Bar*,<sup>1</sup> limiting the states' authority to prohibit truthful advertising of legal services, explicitly left open the question of whether in-person solicitation of clients would be accorded an equal measure of first amendment protection.<sup>2</sup> In two cases decided last Term, the Court returned to that question and considered first amendment challenges by attorneys who had been disciplined for violating state regulations prohibiting solicitation by members of the bar. In its tandem consideration of the vastly different cases, the Court established a dual standard of

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<sup>71</sup> See, e.g., *Greer v. Spock*, 424 U.S. 828, 839 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

<sup>72</sup> 98 S. Ct. at 2591-92.

<sup>73</sup> See Brief for Petitioner at 12, 20-26.

<sup>74</sup> The delicate alignment of the Court reinforces this. Indeed, four of the Justices — the three dissenters and Justice Stewart — would have upheld a more narrowly drawn injunction against the sheriff.

<sup>1</sup> 433 U.S. 350 (1977).

<sup>2</sup> *Id.* at 366.