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POOL COVERAGE, PRESS ACCESS, AND PRESIDENTIAL DEBATES: WHAT'S WRONG WITH THIS PICTURE?

Every four years voters across the United States elect a president. Various factors influence voter preference,[1] but perhaps none is so persuasive as a candidate's performance on nationally televised debates just prior to the election.[2] Newspapers and television news programs generally attempt to provide thorough coverage of the debates,[3] further augmenting[4] the effect of good or bad candidate performances.[5] In this way, the news media fulfill the traditional role of edu-

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[1] For a detailed study of how voters' decisions are made, see P. Lazarsfeld, B. Berelson & H. Gaudet, The People's Choice (3d ed. 1968). See also V. Key, Public Opinion and American Democracy 197 (1961) (In addition to the candidate's party affiliation, stand on issues, and incumbent status, voters also are influenced by their own "education, income, occupation, and other demographic characteristics.").

[2] "The Democrats' only true opportunity to gain victory against the overwhelming odds [against the incumbent Ronald Reagan in 1984] was in the televised debates, which were actually joint press conferences." Pomper, The Presidential Election, in The Election of 1984, at 60, 75 (M. Pomper ed. 1985). See also M. Cassata & T. Skill, Television: A Guide to the Literature 83 (1985) ("No one can deny, for instance, that in the televised 1960 presidential campaign debates, Nixon's haggard appearance, capped by a heavy growth of 'five o'clock shadow,' tipped the 1960 election scales in favor of the more alert, clean-cut Kennedy."); Lipton, Campaign '88 and TV: America Speaks Out, TV Guide, Jan. 23-29, 1988, at 3, 6 (magazine poll conducted with a scientifically selected cross section of 1,000 adults shows that "[e]ighty-four per cent of Americans say they will be influenced greatly or at least moderately by a candidate's performance in [the debate] forum."); N.Y. Times, Oct. 7, 1984, at A1, col. 3 (debate is seen as Walter Mondale's only opportunity to sway voters); N.Y. Times, Oct. 8, 1976, at A1, col. 6 ("[W]ithin a matter of a few hours, Mr. Ford [had] damaged himself" with respect to one of his major campaign themes—his command of foreign policy—by saying during the previous night's debate that there was "no Soviet domination of Eastern Europe.").

[3] Network panel discussions and interviews following the debates and similar activities on local stations, which assess each candidate's performance, and newspapers which print the full text of the debates the morning following the event are examples of this coverage. See Meadow, Televised Campaign Debates as Whistle-Stop Speeches, in Television Coverage of the 1980 Presidential Campaign 89, 97-99 (W. Adams ed. 1983) (detailing next-day network news coverage of the 1980 debates between incumbent Jimmy Carter and challenger Ronald Reagan); see also N.Y. Times, Oct. 8, 1984, at B4, col. 1 (transcript of first debate between Ronald Reagan and Walter Mondale); N.Y. Times, Sept. 23, 1976, at A37, col. 6 (schedules for debate summaries and analysis on networks after the debates). The debates so dominate regular news coverage that even people who do not view the debates in their entirety can be swayed.

[4] "The harmful effects of the President's mediocre performance [in his first debate against challenger Walter Mondale] were exaggerated by adverse press commentaries. As the week went on, the public came to believe not simply that Mondale had won one contest but that there had been no contest." Pomper, supra note 2, at 76. See also Chaffee & Dennis, Presidential Debates: An Empirical Assessment, in The Past and Future of Presidential Debates 75, 79-85 (A. Ranney ed. 1979) (discussing the influence of postdebate news coverage).

[5] Indeed the debate, like any other television appearance, is a performance.

cating the public and enabling voters to make better informed decisions about elected officials.[6] However, the same technology which brings live debates into millions of living rooms across the nation also limits the availability of debate coverage by use of "pool" coverage.

Pool coverage is the sharing of news coverage with other news organizations.[7] The alternative is unilateral coverage, in which each news organization covers the event independently. Most events subject to pool coverage ("pool events") are so planned by the sponsors because of space limitations or safety concerns for prominent people attending or participating in the events.[8] Since the television media

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> The TV candidate . . . is measured not against his predecessors—not against a standard of performance established by two centuries of democracy—but against Mike Douglas. How well does he handle himself? Does he mumble, does he twitch, does he make me laugh? Do I feel warm inside?
>
> Style becomes substance. The medium is the massage and the masseur gets the votes.

J. McGinniss, The Selling of the President 1968, at 29-30 (1969). See also M. Cassata & T. Skill, Television: A Guide to the Literature (1985).

> The point has been repeatedly made that today's candidates are not so much measured against their political predecessors—the Roosevelts, Trumans, and Eisenhowers—as they are against today's television entertainment personalities—Johnny Carson, Phil Donahue, and Dick Cavett. It has even been hinted that the reason the Republican party—at a time when it badly needed to improve its image—chose smooth, polished, actor-politician Ronald Reagan as its standard-bearer was that he had been trained all his life to be a showman.

Id. at 83.

[6] This is consistent with the "watchdog" function of the press, which helps hold the government accountable to the people and enables citizens to react when they disapprove of governmental actions. See Meiklejohn, The First Amendment Is An Absolute, 1961 Sup. Ct. Rev. 245, 255 ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.").

[7] The practice of pool coverage originated during World War II, when news organizations desperately wanted news from the battlefront. The idea of many reporters accompanying the troops presented logistical problems for the military and the press, so a compromise was arranged; a few reporters would cover for the many who desired information. See P. Knightley, The First Casualty 318 (1975) ("A.B. Austin of the *Daily Herald* . . . covered for the entire London press on a pool basis."); J. Mathews, Reporting the Wars 254 (1957) ("By World War II, if [the correspondent was] lucky enough to be selected for an important assignment, he represented a 'pool,' and his information had to be shared with his colleagues."); M. Mayes, The Development of the Press in the United States 80 (1935) ("[W]ith the ordinary lanes of information cut off . . . . [eventually] pooling of efforts was the only alternative, and in this way the American newspapers worried through the war-news problem."); R. Rutland, The Newsmongers: Journalism in the Life of the Nation 1690-1972, at 359 (1973) (discussing problems encountered by a pool reporter during World War II); M. Stein, Under Fire: The Story of American War Correspondents 120 (1969) ("In cases where the military can only take one correspondent on a particular mission, it usually selects a wire service reporter because of the number of newspapers and other media he serves.").

[8] See, e.g., WPIX v. League of Women Voters, 595 F. Supp. 1484, 1485 (S.D.N.Y. 1984) ("Based on the recommendation of its media consultant . . . and after considering issues of

require more people and more equipment than their print counterparts,[9] television usually is affected more frequently by pool arrangements.

When typical pool situations arise,[10] one of the major networks[11] covers the event as the pool representative. A "feed" is created[12] so other broadcasters may have access to the same coverage (and for a live event, at the same time) as the network running the pool.[13] The networks then split the cost of the coverage,[14] and other media orga-

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space and security, the [sponsor] decided to arrange for pooled television coverage."); Cable News Network, Inc. v. ABC, 518 F. Supp. 1238, 1239 (N.D. Ga. 1981) ("[s]ometimes . . . space limitations or other considerations require limiting the number of media representatives who may cover a given event); see also Wall St. J., Oct. 11, 1984, at 10, col. 1 (discussing reasons for pool coverage of military operations).

[9] Each television crew generally includes at least one camera operator, one sound technician and one reporter and/or field producer—often a lighting technician also is required. Cordtz, Why TV News Is So Expensive, N.Y. Times, Apr. 3, 1987, at A31, col. 3. Larger events mean more crews, as news organizations endeavor to provide their viewers with more complete coverage than the competition. See, e.g., M. Green, Television News: Anatomy and Process 264 (1969) ("CBS, for example, used approximately 800 employees at Miami Beach [for the 1968 Republican convention], published a special 33-page convention telephone directory to help them keep in touch with one another, and issued a 90-page manual solely to describe the CBS technical systems, which had taken 30 days to set up and had been many months in the planning.").

[10] Generally networks pool only for news events of national significance because these events create the biggest demand for news coverage. House and Senate committee hearings on Capitol Hill become pool events for broadcasters when more than a specific number of camera crews want access. Hearing rooms can accommodate a given number of crews, but beyond that, the room becomes crowded and the media become distracting.

Typical pool situations also include White House ceremonies or photo opportunities in which one print reporter, one broadcast reporter, one still photographer and one camera crew generally are admitted. They, in turn, provide their colleagues with news from the event. Next time they will rely on other reporters for coverage. See, e.g., N.Y. Times, Oct. 9, 1976, at A7, col. 1 ("[President] Ford, about to enter his limousine, spoke briefly to a small group of so-called 'pool' reporters."). Presidential speeches and press conferences generally involve pool coverage because of space limitations and security precautions.

[11] For the purposes of this Note, the major networks are ABC, CBS, and NBC.

[12] WPIX v. League of Women Voters, 595 F. Supp. 1484, 1491 (S.D.N.Y. 1984). The feed is the technical way in which the pool representative provides live pool material to those wishing to obtain it. It may be transmitted by cable, by telephone lines, or by microwave or satellite transmission.

[13] This explains why viewers who switch channels on their television sets during a pool event see the identical picture on all networks covering the event.

[14] This network monopoly of event coverage also has significant antitrust implications, which are beyond the scope of this Note. See, e.g., WPIX v. League of Women Voters, 595 F. Supp. 1484, 1485 (S.D.N.Y. 1984) (alleging pool organization violates §§ 1 and 2 of the Sherman Antitrust Act); see also Broadcast Music, Inc. v. CBS, 441 U.S. 1, 34 (1978) ("Since the record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single, blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably.") (Stevens, J., dissenting); Associated Press v. United States, 326 U.S. 1, 15 (1945) ("The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound

nizations wishing to purchase the coverage may do so.[15]

Pool coverage of a presidential debate means that only one television news organization, the pool representative, has access to the event.[16] Individual broadcasters are unable to cover the event in their own way[17] and, consequently, to convey a unique account to their viewers;[18] they must purchase and use coverage provided by the pool representative or have no coverage at all.[19] In this way, the pool system limits the newsgathering ability of television news organizations.

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to reduce their competitor's opportunity to buy or sell the things in which the groups compete [i.e., coverage of presidential debates].").

15 The networks air the entire debates live, in lieu of their regular entertainment programs. Consequently, the cost of producing the event is much greater than the cost of coverage which other news organizations seek for their evening newscast. See *WPIX*, 595 F. Supp. at 1491. WPIX claimed the pool charged $15,000 for coverage which its INN division could have obtained for a cost of $3,000. Id. at 1486. For a discussion of the relationship between WPIX and INN, see infra note 110.

16 " 'Pooled coverage allows every television news organization access to the same pictures and sounds of an event by assigning one organization to cover the event and make its coverage available to all.' " *WPIX*, 595 F. Supp. at 1489 (quoting media consultant).

17 This denial of access translates into an inability to show any part of the debate during the nightly newscast. This, in turn, diminishes the credibility of a news organization that is unable to inform its viewers about the major news event of the day—namely the presidential debate. In a medium that depends on visual accounts of news events, such a deficiency can cause viewers to watch other, more complete newscasts.

The networks participate in pool coverage reluctantly. See infra notes 18-20. The fact that every news organization must work with the same pool coverage renders them unable to compete with each other by obtaining their own, unique coverage as they do for other stories.

18 "News is the only thing that really differentiates the networks. It's what they do. The other stuff [entertainment programs] is what they buy." Reuven Frank, NBC News producer and former NBC News president, quoted in The Wash. Post, Feb. 9, 1987, at A4, col. 4. See infra note 19 (discussing competitive nature of television news); see also A. Latman, R. Gorman & J. Ginsburg, Copyright for the Eighties (2d ed. 1985) (discussing the originality and copyrightability of various creative works).

> When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes 'authorship.'

Id. at 71.

19 The goal of news organizations is to get a good story and to get it first—especially in television, where seconds count. Consider the example of the 1980 Republican convention, in which NBC reporter Chris Wallace was first to report that George Bush would be Ronald Reagan's running mate. Later, reporter Linda Ellerbee asked him about the widely reported eight-second scoop: " 'Actually, Linda,' said Chris, 'it was forty seconds.' " L. Ellerbee, "And So It Goes" 136 (1986).

Scoops such as Chris Wallace's help to improve the network positions in the all-important ratings. See E. Epstein, Between Fact and Fiction: The Problem of Journalism 182 (1975) ("In the case of national television, the essential need of each network is to amass a huge national audience, as measured by the biweekly Nielsen ratings, which exceeds or is at least competitive with that of its rivals."); see also American Enterprise Institute, Choosing Presidential Candidates: How Good Is the New Way? 13 (1979) (comments of A. Ranney) ("We should realize . . . that the maximum objective and dream of television journalists is to get everyone watching their coverage of the convention or their nightly news, and no one watching any of the other

Thus the networks participate reluctantly.[20]

Pool coverage denies viewers an opportunity to gain maximum insight from the debate. Indeed, the first amendment freedoms afforded the press exist largely to ensure that the public benefits from the free flow of information.[21] The Supreme Court has noted that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."[22]

This Note asserts that a pool system, when employed to cover debates between presidential nominees of the major political parties, violates the first amendment. The Constitution's mandate for a free press allows restrictions on press coverage only when there is a compelling governmental interest at stake.[23] Presidential debates involve

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networks."); N.Y. Times, Nov. 17, 1984, at 46, col. 5 (a dispute between ABC and CBS as to which network won election night ratings).

20 See WPIX v. League of Women Voters, 595 F. Supp. 1484, 1490 (S.D.N.Y. 1984) ("CBS made very clear [its] preference for providing its own coverage, and each of the pool members had previously sought from the League access for its own cameras."); see also Mitchell, Background Paper for the Twentieth Century Fund Task Force on Televised Presidential Debates, in With the Nation Watching 19 (1979). "During the 1976 debates, considerable friction arose between the League and networks because the League refused to allow the networks to 'cut away' during the broadcasts to 'audience reaction shots' and insisted that coverage be provided by 'pool' cameras alone, which meant that each network received the same pictures." Id. at 53.

21 The first amendment promotes and protects "uninhibited, robust, and wide-open" debate on public issues. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). When news organizations provide several different accounts of the story, the public will discern for itself what "really" happened. See infra notes 128-29 and accompanying text.

22 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (citations omitted). See also F. Graham, Press Freedoms Under Pressure 7 (1972) ("[T]he public has the biggest stake of all in seeing to it that the nation's press is protected against governmental intrusion or pressure.").

23 To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (footnotes omitted).

The compelling governmental interest is essential because it creates a high standard which must be met before the first amendment rights of the press may be compromised. See, e.g., infra notes 58-67 and accompanying text (discussing the balancing of the press' first amendment rights against the sixth amendment rights of a criminal defendant to a fair trial); see also supra note 8 and accompanying text (must weigh the first amendment rights against the need to ensure the safety of the president and his family).

Without such a standard, access could be denied for almost any reason and the first

no interest sufficient to justify the admission of one news organization to the exclusion of all others.

Part I of this Note provides a framework for analysis, initially finding the requisite state action for a first amendment violation, then addressing the general question of access. Part II discusses selective access and how it relates to pool coverage of presidential debates, concluding that in such situations, a pool system is unconstitutional. Finally, Part III proposes an alternative to pool coverage which increases the number of broadcasters allowed access, while taking into account the problem of physical space limitations inherent in any debate location.

I. THE FIRST AMENDMENT

The first amendment provides, in part, that "[c]ongress shall make no law . . . abridging the freedom of speech, or of the press."[24] The constitutional question raised by pool coverage is whether some members of the press can be selectively excluded from a news event while the pool representative is free to cover it.[25] Since the first amendment prohibits only the government[26] from interfering with a free press, governmental or state action must be established before examining the merits of an alleged violation.

A. *State Action*

The state action requirement for a first amendment violation is well established,[27] but the standards by which such activity is defined are not so clear.[28] Courts have held, however, that the state action

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amendment rights of the press could be violated almost at will. See, e.g., infra notes 47-94 and accompanying text (discussing attempts to limit press access and illustrating the vital role of the compelling interest test in assessing appropriate circumstances for denying access).

[24] U.S. Const. amend. I.

[25] See infra notes 93-94 and accompanying text.

[26] See Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (The Constitution "erects no shield against merely private conduct, however discriminatory or wrongful."); see also Chemerinsky, Rethinking State Action, 80 Nw. U.L. Rev. 503, 511 (1985) ("The Constitution did not apply to private conduct because it was thought that the common law protected individual rights from private interference.").

[27] See Near v. Minnesota, 283 U.S. 697 (1931) (applying the state action criteria to challenges against the first amendment and freedom of the press); see generally, The Civil Rights Cases, 109 U.S. 3 (1883) (articulating the basic principle that protection of constitutional rights applies only to government actions, not to actions by individuals).

[28] "There still are no clear principles for determining whether state action exists." Chemerinsky, supra note 26, at 503-04. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974) ("[T]he question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer."); Reitman v. Mulkey, 387 U.S. 369, 378 (1967) ("This Court has never attempted the 'impossible task' of formulating an

requirement can be satisfied when private organizations or individuals act on behalf of the government.[29] Traditionally, this so-called state action by private actors has been divided into broad categories—those in which the private actor performs a government function, those in which the private activity is encouraged by the government, and those in which there is a symbiotic relationship between the government and the private actor.[30] In each case, the private actors subject themselves to the same first amendment restrictions as those imposed on the government.[31] Further examination of the circumstances surrounding the nominee debates will illustrate how the sponsors, broadcasters, and even some debate participants should be considered state actors, thus satisfying the state action requirement for a first amendment violation.

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infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private [activities]."); Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 91 (1967) ("What is settled is only the highest level generality—the amendment deals with 'state' and not 'private' action.").

The Supreme Court seemed content to handle state action questions on a case-by-case basis. "[T]he line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority. . . . 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.' " CBS v. Democratic Nat'l Comm., 412 U.S. 94, 115 (1973) (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)). Lower courts, however, sought to establish a more concrete basis for evaluation. Examples of lower court attempts to define some limits of state action include Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968) ("[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.") and New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 859 (2d Cir. 1975) (there should be a "showing that the government is substantially, or even minimally, involved in the adoption or enforcement of [the] policies").

[29] First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). This rule provides a framework for decisionmaking but still requires case-by-case determinations. Only by looking to the specific facts and circumstances can there be a determination as to whether a person "may fairly be said to be a state actor." Id. at 937.

[30] See *Lugar*, 457 U.S. at 937 (A person may be a state actor "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."); see also Jackson v. Statler Found., 496 F.2d 623, 629 (2d Cir. 1974) (discussing factors which are significant in determining state action).

[31] "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966). See also J. Nowak, R. Rotunda & J. Young, Constitutional Law § 12.2, at 426 (3d ed. 1986) ("The state cannot free itself from the limitations of the Constitution in the operation of its governmental functions merely by delegating certain functions to otherwise private individuals.").

1. State Action Through Regulation

While presidential debates are not required by federal law,[32] they nevertheless are an influential factor in the electoral process.[33] Thus, federal laws exist to regulate debates when they occur.

Regulations surrounding the debates stem primarily from the Federal Communications Commission and the Federal Election Commission. These agencies dictate, inter alia, participant selection and permissible sponsors, while regulating the airwaves over which the events are broadcast.[34] This regulatory legislation creates a "pre-

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32 "The decision whether or not to engage in debates is one that will be made, in the future as in the past, by the presidential candidates." Kirkpatrick, Presidential Candidate "Debates": What Can We Learn from 1960?, in The Past and Future of Presidential Debates 3 (A. Ranney ed. 1979).

33 "Outstanding performance in political debates can provide a tremendous boost to campaigns, while a gaffe can be a fatal blow to a candidate's election hopes." Chemerinsky, Changing the Rules of the Game: The New FCC Regulations on Political Debates, 7 Comm/Ent L.J. 1, 1-2 (1984). See supra note 2; see also Mitchell, supra note 20, at 21 ("Not only is [the debate] comparison useful for evaluating candidates, but more importantly, it brings those persons predisposed to favor one candidate into unavoidable contact with the other candidate.").

34 The impact of televised debate regulations perhaps is best illustrated by the fact that without an act of Congress there would have been no Kennedy-Nixon debates. Though no federal laws specifically prohibited such debates, the Communications Act of 1934 and its equal time requirements effectively would have prevented such a debate from taking place. 47 U.S.C. § 315 (1982).

The Communications Act of 1934 provided that a broadcaster who affords one candidate for public office any airtime must provide the same opportunity for other candidates. Id. § 315(a). It was irrelevant, for purposes of the Act, whether the candidate receiving the equal time truly was a viable contender. Thus the airing of the Kennedy-Nixon debates would have necessitated providing the same time for other presidential candidates, or even including them in the debates. Not only would this diminish confrontation between the two major candidates, it would significantly decrease the news value of the event because most viewers would not care about what the "lesser" candidates thought about various issues. This lack of viewer interest, in turn, would make it less likely that a broadcaster would find it worthwhile to air the debates at all.

Recognizing this problem, Congress passed an amendment to the Act in 1959, which created an exemption for broadcasters in some circumstances. The amendment allowed broadcasters to cover candidates without equal time requirements provided that such coverage was part of a

> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto.

Id. § 315(a).

In 1960, Congress went even further by actually suspending operation of § 315(a). Joint Resolution of Aug. 24, 1960, Pub. L. No. 86-677, 74 Stat. 554 (1960). This removed all doubt of any equal time obligations that could have been incurred by a broadcaster airing the Kennedy-Nixon debates. See M. Franklin, Cases and Materials on Mass Media Law 795 (3d ed.

sumption of the constitutionality [or appropriateness] of . . . the constitutional interest the state has supported."[35] Consequently, when sponsors and broadcasters abide by the regulations, they may be considered state actors.[36]

Because broadcasters deal with a vital area of our communications system,[37] regulations require their actions to be consistent with the public interest.[38] Through its regulations, the government can be said to encourage the final debate "product." The Supreme Court has found such "encouragement" to constitute state action,[39] and has ac-

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1987) (stating that it was easier to have a two-candidate debate in 1960 because "[t]here was no incumbent and no major third-party candidate" who also would merit inclusion).

FCC involvement in formulating debate policy continued to evolve. After determining that debates fell within the bona fide news event category of § 315, the FCC still required third-party sponsorship of the events. Broadcaster sponsorship was not allowed because a bona fide news event would not consist of something organized by the broadcaster; broadcasters *cover* news events, they do not *create* them. However, it would be legitimate for broadcasters to cover news events arranged by unaffiliated organizations. Eventually, even this requirement was eliminated and today broadcasters are able to sponsor candidate debates.

The basis for FCC regulation of televised debates lies in the agency's mandate to ensure use of the limited broadcast airwaves in a way that will best serve the public interest. In this spirit, the FCC regulations actually require broadcasters to provide programming like debates, which constitute "reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315(a) (1982).

Despite the FCC's ability to regulate televised debates, it is not the only federal agency so empowered. The Federal Election Commission ("FEC") also has authority to establish rules for the debates—debates which first were broadcast even before the FEC existed. 2 U.S.C. § 437c(b) (1982).

Although the FEC did not come into existence until 1976, the stage already was set for its involvement with presidential debates. In 1975, the FCC held that presidential debates constituted bona fide news events and exempted broadcasters from equal-time requirements otherwise imposed by § 315. *In re* Aspen Inst. Program on Communications and Soc'y, 55 F.C.C.2d 697 (1975), aff'd sub nom. Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976). Having established the broadcasters' ability to cover debates, the focus then turned to third-party sponsorship of the contests. And the FEC was there to make certain that sponsorship fell within legal parameters. Currently the FEC regulates participant selection and which organizations may stage the debates. 11 C.F.R. § 110.13 (1987).

35 Marshall, Diluting Constitutional Rights: Rethinking "Rethinking State Action," 80 Nw. U.L. Rev. 558, 566 (1985).

36 "When state legislation commands a certain activity, or officially recognizes its legitimacy, there is no question but that state action is present whenever someone follows the guidelines of the statute." J. Nowak, R. Rotunda & J. Young, supra note 31, § 12.3, at 432.

37 CBS v. Democratic Nat'l Comm., 412 U.S. 94, 116 (1973).

38 See 47 U.S.C. § 309(a) (1982) (stating that the "public interest, convenience, and necessity" shall be considered when determining whether a broadcast license shall be granted); see also 47 U.S.C. § 312(a)(7) (1982) (The FCC may revoke the license of a broadcaster "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.").

39 Reitman v. Mulkey, 387 U.S. 369 (1967) (government's repeal of law forbidding housing discrimination encouraged discrimination). But see Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974) ("The mere fact that [an activity] is subject to state regulation does not by

cepted the notion that, in some instances, "broadcasters are instrumentalities of the Government for First Amendment purposes, relying on the thesis, familiar in other contexts, that broadcast licensees are granted use of part of the public domain and are regulated as 'proxies' or 'fiduciaries' of the people."[40]

As " 'proxies' or 'fiduciaries' of the people," it seems appropriate that broadcasters should be considered "instrumentalities of the Government," particularly when they have complied with mandatory government regulations. Consequently, to the extent that broadcasters are denied access to pool events by other broadcasters, the first amendment's state action requirement is satisfied.

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itself convert its action into that of the State . . . ."). See also Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 783 (1972) (notion that regulation of broadcasting constitutes state action is "not entirely satisfactory"). Further, the absence of any explicit regulation prohibiting favoritism can be considered additional state "encouragement" of discrimination against broadcasters who are denied access. "State involvement sufficient to support a finding of state action may be predicated on mere failure to act." Ludtke v. Kuhn, 461 F. Supp. 86, 94 (S.D.N.Y. 1978).

In the case of press coverage, there may be good reason for the absence of any strict guidelines. It could stem from a government desire to avoid first amendment problems that would be created if the government tried to dictate certain kinds of press coverage. See Gottlieb, The Role of Law in the Broadcast of Political Debate, 37 Fed. B.J. 1, 13 (1978) ("It is simply inappropriate, in First Amendment terms, to see the government role as prescribing the whole of broadcast political content in detail, weight or thrust. The intrusion is too great."). But the government cannot tolerate situations when others, acting in its stead, disrupt press coverage and violate the first amendment. See Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). *Burton* involved a privately-owned restaurant which discriminated against blacks. Id. at 716. Because the restaurant leased its premises from a municipal agency, the Supreme Court found that the discrimination constituted state action. Id. at 724. "By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." Id. at 725. See generally, Chemerinsky, supra note 26, at 520-27.

> Under positivism, all rights are derived from the government. There is no inherently private realm of individual behavior. Everything that is allowed occurs because of the state's decision not to prohibit the activity. Thus all private violations of liberty occur because they are sanctioned by the state's common law, and hence by state action.

Id. at 527 (footnote omitted). But see *CBS*, 412 U.S. at 119 ("The First Amendment does not reach acts of private parties in every instance where the Congress or the [Federal Communications] Commission has merely permitted or failed to prohibit such acts.") (opinion of Burger, C.J., Stewart, J., and Rehnquist, J.).

[40] Id. at 115 (quoting Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 652 (1971), rev'd sub nom. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973)). The issue was whether broadcasters could, in effect, deny individuals or organizations the opportunity to be heard on national television. In *CBS*, the Court did not specify the precise circumstances in which broadcasters would be considered government actors. The Court held that broadcasters were sufficiently independent to make their own decisions about selling commercial time. But the issue is different with respect to the debates.

2. The Candidates as State Actors

Apart from the sponsors and broadcasters, candidates themselves—particularly those already holding public office—could be considered state actors. Courts have found state action "in the decisions of a private entity because public officials work behind the scene to influence a particular result, or because powerful and influential public officers add the prestige of their office to the actions . . . of a private institution."[41] When a public official agrees to participate in debates which will be televised using pool coverage, he sanctions pool implementation. He also sanctions the inherent denial of access to news organizations other than the pool representative. Thus, debate participation by a government official and his implicit approval of debate procedures may be said to constitute state action.[42]

Another way in which debate participants can be considered state actors lies in the use of federal funds to finance their campaigns.[43] Courts have held that government funding, alone, does not constitute state action.[44] However, if government funds help support the denial of debate access to broadcasters, the candidates could be considered state actors.[45] Such is the case with presidential debates. Federal funding supports general office work and staff assistants, who work to inform candidates on important campaign issues which will be discussed during the debates. Because this work also is helpful for

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[41] Crowder v. Conlan, 740 F.2d 447, 452 (6th Cir. 1984). See also Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (state action can exist even if defined initially by a private agreement); Jackson v. Statler Found., 496 F.2d 623, 635 (2d Cir. 1974) (participation of government officials in private organization can constitute state action), cert. denied, 420 U.S. 927 (1975).

[42] See Borreca v. Fasi, 369 F. Supp. 906 (D. Haw. 1974). In *Borreca*, a mayor's attempt to exclude a certain reporter from news events that were open to all other reporters constituted state action. The court reasoned: the mayor's "oral order to his staff to exclude [the reporter] from his office is an executive directive by him in the exercise of his authority as mayor which authority he derives from the constitution and laws of the State of Hawaii." Id. at 910. Similarly, in Griffin v. Maryland, 378 U.S. 130 (1964), the Supreme Court held that, to the extent an off-duty policeman working as a security guard appeared to be acting in his capacity as a police officer, his actions constituted state action. Id. at 135.

[43] 26 U.S.C. § 9034 (1982) (providing for payment of federal funds to eligible candidates).

[44] "We do not suggest that a State violates its constitutional duty merely because it has provided *any* form of state service that benefits private schools said to be racially discriminatory." Norwood v. Harrison, 413 U.S. 455, 465 (1973) (emphasis in original).

[45] See id. The issue in *Norwood* was whether the State of Mississippi, by providing textbooks to private schools, was fostering the discriminatory practices of these schools. "When, as here, [the textbook] expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination." Id. at 464-65. The Court did not suggest that a state violates its constitutional duty merely by providing any form of state service that benefits private schools. Id. Rather, the court observed that "[t]extbooks are a basic educational tool." Id. at 465. Thus, financially supporting an essential element of the private school constituted state action.

other campaign appearances, the candidate's strength is greatly enhanced by the government dollars backing his campaign. Consequently, it would be extremely difficult to separate the money used for debate appearances from that used for general campaign expenditures. Ultimately, these federal funds would help to support the denial of debate access to broadcasters. Thus debate participants who use federal funds should be considered state actors.[46]

B. *The Right to Access*

In all seven articles and twenty-six amendments, the Constitution expressly protects only one profession—the press.[47] This demonstrates the founding fathers' belief that a free press is a necessary tool for a successful government "of the people, by the people, [and] for the people."[48]

The Supreme Court has stopped short of holding that there is a first amendment right to gather information.[49] Yet, if the press is to perform its role of informing the public, members of the press must have some access to information.[50] Moreover, equal protection con-

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[46] In establishing a state action test, the Second Circuit Court of Appeals considered factors similar to those set forth in this Note. Jackson v. Statler Found., 496 F.2d 623, 629 (2d Cir. 1974). The court evaluated

> (1) the degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms.

Id. The court added that "[e]ach of these factors is material; no one factor is conclusive." Id. A New York district court used this test and found the possibility of state action in WPIX v. League of Women Voters, 595 F. Supp. 1484, 1488-89 (S.D.N.Y. 1984), a pool coverage case discussed infra notes 108-19 and accompanying text.

[47] See supra note 24 and accompanying text. See also Stewart, "Or of the Press," 26 Hastings L.J. 631, 633 (1975) ("The publishing business is, in short, the only organized private business that is given explicit constitutional protection.").

[48] A. Lincoln, The Gettysburg Address (Nov. 19, 1863), reprinted in 7 The Collected Works of Abraham Lincoln 22 (R. Basler ed. 1953). Cf. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 (1980) ("[T]he Constitution's draftsmen . . . were concerned that some important rights might be thought disparaged because [they were] not specifically guaranteed.").

[49] "The [first amendment] right to speak and publish does not carry with it the unrestrained right to gather information." Zemel v. Rusk, 381 U.S. 1, 17 (1965). See also Van Alstyne, The Hazards to the Press of Claiming a "Preferred Position," 28 Hastings L.J. 761, 762 (1977) ("[N]othing on the face of the first amendment expressly establishes any right of access to particular places or to particular sources of information."); cf. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581 (1983) ("Clearly, the First Amendment does not prohibit all regulation of the press.").

[50] "[N]ewsgathering is an integral part of news dissemination." Dietemann v. Time, Inc.,

cerns[51] dictate that the press must be afforded access to information on an equal basis. When there is no equal access, the situation is one of selective access.[52]

In evaluating access cases, courts have considered two factors: first, whether there is a compelling governmental interest which necessitates a denial of access; and second, whether there is a less restrictive means by which that interest may be furthered.[53] When these access issues arise, the burden is on the government to justify its actions.[54]

Traditional access questions have revolved around the media's right to obtain information in various newsgathering operations. Cases have involved the rights of reporters to obtain access to public property,[55] private property,[56] and various kinds of government information.[57] But much of the relevant case law on media access stems from cases contesting the denial of access to courtroom proceedings. In these cases, the compelling governmental interest test has proven valuable, providing insight into the important stature of the media's first amendment right of access, as courts balance that right against

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449 F.2d 245, 249 (9th Cir. 1971). See also Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.").

51 "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. But see J. Nowak, R. Rotunda & J. Young, supra note 31, § 14.1, at 524 ("There is no equal protection clause that governs the actions of the federal government, and the Court has not attempted to make the clause itself applicable to federal acts."). See also Quad-City Community News Serv., Inc. v. Jebens, 334 F. Supp. 8, 17-18 (S.D. Iowa 1971) ("If standards are contrived which effectively deny eligibility to all members [of one news organization's] staff, they will undoubtedly be subject to attack by the organization in question on . . . Equal Protection grounds . . . ."); J. Nowak, R. Rotunda & J. Young, supra note 31, § 14.2, at 525 ("The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government.").

52 See infra notes 68-133 and accompanying text.

53 See infra notes 58-67 and accompanying text; see also Part II of this Note.

54 See text accompanying infra note 59.

55 See Pell v. Procunier, 417 U.S. 817 (1974), in which the Supreme Court denied journalists access to a state prison for a prisoner interview. "[S]ecurity and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations." Id. at 826.

56 "The First Amendment is not a license to trespass . . . . Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) (denying press access to private property by deception). See also Branzburg v. Hayes, 408 U.S. 665, 682 (1972) ("It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.").

57 See, e.g., United States v. Weber Aircraft Corp., 465 U.S. 792, 802 (1984) (recognizing a need for confidentiality "to ensure frank and open discussion and hence efficient governmental operations"); Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) ("[T]he First Amendment [does not mandate] a right of access to government information or sources of information within the government's control.").

the defendant's sixth amendment right to a fair trial.[58] The Supreme Court has noted that

> the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access . . . it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.[59]

Indeed the Supreme Court had employed the test prior to this 1982 articulation. Cases such as *Sheppard v. Maxwell*,[60] in which a man was accused of killing his pregnant wife, allowed the Court to demonstrate its concern for press access to criminal trials. *Sheppard* was one of the first cases in which extensive media coverage was blamed for an unfair trial. But the Court did not even hint that the solution to such a problem necessitated exclusion of the press. Instead, the Court stated that the trial court could have struck a balance by instituting courtroom procedures "sufficient to guarantee Sheppard a fair trial."[61] Thus the trial judge could have protected the defendant's rights in a manner less restrictive for the press than total exclusion. Further, the trial judge could have "considered . . . means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence."[62]

Other cases continued to show the usefulness of the two-pronged

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58 See, e.g., Waller v. Georgia, 467 U.S. 39, 46 (1984) ("explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public"); Gannett Co. v. DePasquale, 443 U.S. 368, 376 (1979) ("[T]he trial judge stated that, in his view, the press had a constitutional right of access . . . however, the judge emphasized that it had to be balanced against the constitutional right of the defendants to a fair trial.").

While the analogy between access to criminal trials and access to pool events is a useful one, it must be noted that there exists no countervailing constitutional consideration in the latter case. Consequently, the circumstances should be more heavily justified prior to compromising the constitutional protection of the press, in favor of some consideration lacking such protection.

59 Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982). But see Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 n.18 (1976) ("Reasonable regulations of the time, place, and manner of protected speech, where those regulations are necessary to further significant governmental interests, are permitted by the First Amendment.").

60 384 U.S. 333 (1966).

61 Id. at 358.

62 Id. Examples of these procedures included limiting the number of reporters in the courtroom "at the first sign that their presence would disrupt the trial." Id. This illustrates a presumption, by the Court, of the media's right to access. Other suggestions made by the Court included preventing the press from going inside the bar or from handling exhibits during recesses, insulating witnesses from interviews at the will of the media, and an effort by the court "to control the release of leads, information, and gossip to the press by police officers, witnesses and the counsel for both sides." Id. at 359.

test. When the state interest in denying access was not compelling, the decision was an easy one.[63] But when the governmental interest at stake was compelling, attention focused on the second part of the test: Was there a less restrictive way to safeguard the governmental interest? Frequently, the lower courts overreacted and implemented overly stringent press limitations.[64] However, when trial courts moved to protect the defendant in a manner which imposed appropriately narrow burdens on the press, the Supreme Court upheld the action.[65] The usefulness of this test in criminal trials has led to its

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[63] See Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986). In this case, the compelling governmental interest standard was dictated by state statute to be a "substantial probability" that press access would interfere with the defendant's right to a fair trial. The trial court erred, however, by denying access when only a lesser test—that of "reasonable likelihood"—had been met. Since the state standard for compelling interest was not met, the denial of access was reversed on appeal. Id. at 2739.

[64] See Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984). The Supreme Court acknowledged that, during voir dire proceedings, there may be a compelling interest in keeping the responses of prospective jurors out of the public domain. Id. at 511. However, the Court also found that such concerns could be protected without a mandatory closure of the proceedings, as was implemented at trial. Id. at 512. Thus, the denial of access was disallowed because there was a less restrictive way to achieve the government's goal. Id. at 513; see also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). The issue in this case was whether the public could be excluded from a criminal trial "without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure." Id. at 564. The Court held that such actions were not permissible. Id. at 581.

Stating that "the right to attend criminal trials is implicit in the guarantees of the First Amendment," the Court expressed displeasure with the trial court's inadequate treatment of the situation. *Richmond Newspapers*, 448 U.S. at 580 (footnote omitted). The lower court failed to set forth findings which supported closure, failed to inquire about solutions short of closure, and did not recognize a constitutional right of attendance for the public or the press. Id. at 580-81. For the first time, the Supreme Court held that such "arbitrary interference" with courtroom access would not be tolerated. Id. at 583 (Stevens, J., concurring) ("Today . . . the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.").

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), did not involve an effort to exclude the press from courtroom proceedings. Instead, to avoid undue prejudice, the trial judge issued a restraining order which prevented publication of information that was disclosed during the trial. Id. at 542. The Supreme Court struck down the order, finding that the judge's objectives could have been met in a less restrictive way. "There is no finding that alternative measures would not have protected [the defendant's] rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate." Id. at 565.

[65] See Gannett Co. v. DePasquale, 443 U.S. 368 (1979). In *Gannett*, the Court upheld the total exclusion of the press from a pretrial evidentiary hearing in a murder case. Once again, defense attorneys had argued that "adverse publicity had jeopardized the ability of the defendants to receive a fair trial." Id. at 375. Given that "[t]he whole purpose of [pretrial] hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury," the judge excluded the press and the public. Id. at 378. Likewise, the Supreme Court found a compelling governmental interest in upholding the denial, and affirmed.

application in civil trials[66] and other situations to resolve questions of press access.[67]

These courtroom access cases demonstrate that the interests of the press can be sufficient to overcome the constitutional protection of a defendant's right to a fair trial. Thus press access to a presidential debate—which involves no countervailing constitutional rights—is an easier case.

II. SELECTIVE ACCESS

The situation discussed thus far has been one of "all or nothing" access, in which either all members of the press were allowed to cover news events or none were allowed access. In other cases, however, the issue has not been whether there should be press access, but which members of the press should be afforded access.[68] And in these cases

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> [W]e are asked to hold that the Constitution itself gave the petitioner an affirmative right of access to this pretrial proceeding, even though all the participants in the litigation agreed that it should be closed to protect the fair-trial rights of the defendants. . . . we hold that the Constitution provides no such right.

Id. at 394.

[66] See Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984):

> Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs. . . .
>
> Therefore, to limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest.

[67] North Broward Hosp. Dist. v. ABC, 13 Media L. Rep. (BNA) 1509-11 (Fla. Cir. Ct. 1986) (after attorneys and guardians for a comatose patient gave consent to have news cameras film the patient, there was no compelling governmental interest sufficient to deny access to a public hospital).

[68] An illustrative example of such a dilemma existed when courts began to distinguish between the print and broadcast media in affording access. Initially, the Supreme Court took a hard line against broadcasters and denied access to court proceedings. See Estes v. Texas, 381 U.S. 532 (1965) (defendant was denied a fair trial despite the construction of a booth for television cameras and confinement of broadcast activity to that area). In *Estes*, the Court went so far as to say that "[t]he television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom." Id. at 585 (Warren, C.J., concurring). Sixteen years later, the Court took a more moderate view and upheld the right of broadcasters to cover courts on an experimental basis, as provided by state law. See Chandler v. Florida, 449 U.S. 560, 565, 582 (1981) (the experiment initially required the consent of all parties to the proceedings; later, the electronic media were permitted to cover all judicial proceedings in Florida without regard to the consent of the parties).

When access is granted to part of the press (the print media) and denied to others (broadcasters), the situation is similar to, yet distinguishable from, pool situations. The similarity is that both are occasions of selective access. See infra notes 72-133 and accompanying text. It is the basis for this selection, however, which distinguishes the print/broadcast access questions from access allowed in pool situations. The difference is twofold: First, in print/broadcast cases, the access determination was based on objective, easily determinable criteria—paper and pens were allowed, cameras and microphones were not; second, there was a bona fide reason

of selective access, the compelling interest test has been equally appropriate.

A. *An Overview*

Freedom for the media has not come easily or completely—despite the Constitution's provision for a press unencumbered by government regulation.[69] While there is no first amendment right of access to information,[70] the denial of access resulting from selective access infringes upon the the rights of those who are turned away.[71] Situations in which certain *select* news organizations are "chosen from a number or group by fitness or preference"[72] provide an example of difficulties encountered by some members of the press. "Although the press cannot command access wherever, whenever, and however it pleases, neither can government arbitrarily shroud genuinely newsworthy events in secrecy."[73]

To determine when access is awarded improperly, the compelling interest test[74] provides a useful measure. Perhaps the situation in which selective denial of access most clearly fails is in a case like *McCoy v. Providence Journal Co.*,[75] when access to public records was denied to one newspaper, then granted to another for no apparent reason.[76] But such denials are equally unacceptable when a public

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for excluding cameras from the courtroom—broadcasters and their equipment created disruption in the courtroom—and print reporters did not.

One may agree or disagree with the different allowances for access, but the distinctions were drawn objectively. For a discussion of the first amendment violations inherent in a subjective, and consequently arbitrary allowance of press access, see Part II of this Note.

69 See supra notes 47-48 and accompanying text.

70 See supra note 49 and accompanying text.

71 "[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983). See also Graham, Background Paper for the Twentieth Century Fund Task Force on the Government and the Press, in Press Freedoms Under Pressure 115 (1972) ("[W]hen access has been granted to some reporters, the courts have uniformly held that it cannot be arbitrarily denied to others.").

72 Webster's Third New International Dictionary 2058 (1971).

73 D'Amario v. Providence Civic Center Auth., 639 F. Supp. 1538, 1543 (D.R.I. 1986), aff'd, 815 F.2d 692 (1st Cir.), cert. denied, 108 S. Ct. 172 (1987).

74 See supra note 23.

75 190 F.2d 760 (1st Cir.), cert. denied, 342 U.S. 894 (1951).

76 The *Journal* repeatedly had sought access to public records held by the Pawtucket (R.I.) city council. "[I]n every instance the request [was] met with postponement, evasion or rebuff." Id. at 762. Three weeks after the newspaper's request, Pawtucket's mayor announced that the same information had been released to a competing newspaper. Id. at 762. At that time, the city council passed an ordinance which prevented release of those records to any person without the city council's permission. Id. Thus the city went out of its way to prevent the *Journal* from obtaining the information that it had given to the competition. Id. The First Circuit

official discriminates against a reporter he does not like[77] or when, for whatever reasons, certain news organizations are deemed unworthy of equal treatment.[78]

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found that the city council's actions constituted a denial of equal protection. Id. at 766. Strangely, the first amendment was not used in this appeal and was mentioned only briefly in the lower court. Providence Journal Co. v. McCoy, 94 F. Supp. 186 (D.R.I. 1950), aff'd, 190 F.2d 760 (1st Cir.), cert. denied, 342 U.S. 894 (1951).

[77] See Borreca v. Fasi, 369 F. Supp. 906 (D. Haw. 1974). This case involved the city hall reporter for Honolulu's leading newspaper. Id at 907. The mayor excluded Borreca from news events but said that any other reporter from the same newspaper would be welcomed. The newspaper, however, refused to send another reporter. Id. at 908.

Evidence indicated that the mayor objected to the reporter primarily because of what the mayor viewed as bias in the reporter's previous stories. Id. at 908. Further, the mayor said that his own actions did not constitute a first amendment violation because the newspaper still had access to city hall news via another reporter of its choosing. The court disagreed: "Requiring a newspaper's reporter to pass a subjective compatibility-accuracy test as a condition precedent to the right of that reporter to gather news is . . . a form of censorship." Id. at 909-10. The court said it expressed no opinion on "implications of de facto discrimination against individual news gatherers or against selected segments of the news media." Id. at 911. Instead, the court seemed particularly preoccupied with, and disturbed by, the mayor's attempt to rid himself of unfavorable press coverage. The court acknowledged the mayor's right to criticize the press but stated that unless there is a compelling governmental interest, a constitutional violation will occur "when criticism transforms into an attempt to use the powers of governmental office to intimidate or to discipline the press . . . because of what appears in print." Id. at 910. The court held in favor of the reporter because there was "[n]o compelling governmental interest" to support a denial of access. Id.

[78] See Quad-City Community News Serv., Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971). This case involved an "underground" newspaper which was denied access to police department records that were made readily available to the other media. Id. at 12. The newspaper, "CHALLENGE," located at a residential address, was run by a non-profit organization. It had a voluntary staff and a biweekly circulation of more than 1,000. The case makes no reference to any ideology espoused by the publication. Id. at 10-11. Newspaper staff members also were denied press passes, further limiting their ability to cover news vis-à-vis other reporters. Id. at 16-17.

The chief of police testified that he did not believe the publication was an "established" newspaper, but the court deemed that irrelevant:

> The history of this nation and particularly of the development of many of the institutions of our complex federal system of government has been repeatedly jarred and reshaped by the continuing investigation, reporting and advocacy of independent journalists unaffiliated with major institutions and often with no resource except their wit, persistence, and the crudest of mechanisms for placing words on paper.

Id. at 17. Once again, the court found for the press because there was no "compelling governmental interest" in denying access. Id. ("[A]ny classification which serves to penalize or restrain the exercise of a First Amendment right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."). See also Consumers' Union of United States, Inc. v. Periodical Correspondent's Ass'n, 365 F. Supp. 18 (D.D.C. 1973), rev'd on other grounds, 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051 (1976). In this case, the character of the publication was not assailed, but admission was denied because of the magazine's reputation for advocacy. 365 F. Supp. at 22-23.

Both houses of Congress provide gallery facilities for members of the press who cover Capitol Hill. These facilities provide a workplace for the Capitol Hill press corps, equipped with desks, typewriters, telephones, and even a message-taking service for members who repre-

Questions of selective access become increasingly difficult as distinctions are drawn between information that shall be available to the general press and that which an individual reporter or news organization has obtained through special effort.[79] Such distinctions are necessary because they preserve the ability to "scoop" the competition.[80]

This distinction between public and private information was elucidated in *ABC v. Cuomo*.[81] The case arose during the New York City mayoral primaries, when ABC's camera crews were denied the same access to campaign facilities that CBS and NBC enjoyed.[82] The candidates maintained that their premises were private and that access was granted by invitation only.[83] The Second Circuit Court of Appeals disagreed: "[O]nce the press is invited, including the media operating by means of instantaneous picture broadcast, there is a dedication of those premises to public communications use. It is idle to speak of privacy when the affair is publicly transmitted by broadcast to millions of viewers."[84] The court concluded "that the First Amendment rights of ABC and of its viewing public would be impaired by their exclusion from the campaign activities."[85]

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sent accredited news organizations. Exclusion from the gallery denied Consumer Reports many advantages other publications enjoyed while covering Capitol Hill, including access to a special press gallery from which to view the floors of the House and Senate. The defendants claimed that the publication still could have access to congressional proceedings by using the public viewing galleries, but the court was not satisfied: "Exclusion from the press galleries constitutes a permanent disadvantage with regard to the gathering of news and has a significant impact when measured in terms of the First Amendment, both upon the publication excluded and others in similar situations." Id. at 26. A declaratory judgment was issued in favor of the publication's right of access because there was no "compelling legislative interest" which mandated denial of access. Id.

79 See *McCoy*, 190 F.2d at 764 ("[The news organization] cannot be heard to complain of the denial by the state of the equal protection of its laws merely on a showing that another has been fortunate enough to be the recipient of a favor at the hands of municipal officials, or under a local ordinance, which they have been denied."); see also C. Bernstein & B. Woodward, All the President's Men (1974). Woodward and Bernstein's Watergate stories provide a good example of results derived from special effort. Much of their success was attributed to a secret source named "Deep Throat." Id. at 71-73. No one would dispute the privilege of Deep Throat to maintain his exclusive arrangement with Bob Woodward. But such situations must be distinguished from those in which the converse is the case—i.e. when the relevant information is widely disseminated but one, or one group of news organizations is excluded.

80 If the disclosure of any information to one reporter necessitated universal disclosure to all, there would be little or no incentive for investigative reports or attempts to beat the competition to a good story.

81 570 F.2d 1080 (2d Cir. 1977).

82 At the time, ABC was involved in a labor dispute with its technicians. Strikers "picketed several of the headquarters of the Democratic candidates and engaged in other secondary activity for the purpose of causing the ABC management television crew[s], who were then inside the several campaign facilities by invitation of the candidates, to be ousted." Id. at 1082.

83 Id. at 1083.

84 Id.

85 Id.

While courts have found for the press in most selective access cases, this is not to say that the press has an automatic right of access.[86] Indeed, there has been at least one situation in which denial of equal access was upheld. The case, *Sherrill v. Knight*,[87] involved a reporter who sought to obtain a White House press pass. After a Secret Service investigation, the reporter's application was denied[88] and repeated attempts to learn the reason for denial were unsuccessful.[89] The court upheld the denial because of the compelling governmental interest in the president's safety.[90] At the same time, however, the District of Columbia Circuit Court was careful to provide safeguards against arbitrary and unjust application of selective access, saying that the Secret Service must "make publicly known the actual standard employed in determining whether an otherwise eligible journalist will obtain a White House press pass."[91] Further, the court stated that "[n]ot only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily

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[86] But see supra note 50 and accompanying text.

[87] 569 F.2d 124 (D.C. Cir. 1977).

[88] To obtain a White House press pass, applicants must have passes for the House and Senate press galleries, must reside in the Washington, D.C. area, and must need to report on a regular basis from the White House. Id. at 126. Mr. Sherrill, a correspondent for The Nation magazine, seemed to have met these qualifications. A security check by the Secret Service also is required, including an FBI background investigation. "Whether a pass is then issued depends solely on the recommendation of the Secret Service." Id. (footnote omitted).

[89] The traditional explanation is "for reasons relating to the security of the President and/or the members of his immediate family." Response to Plaintiffs' First Interrogatories (Kelley), No. 27. Add. 22, Brief for Appellee, quoted in *Sherrill*, 569 F.2d at 127. Sherrill was told: " 'We can't tell you the reasons.' " Affidavit of Robert Sherrill, at Add. 37, Brief for Appellee, quoted in *Sherrill*, 569 F.2d at 127. Sherrill filed a Freedom of Information Act request to obtain the reasons, but the request was denied. In denying the appeal to obtain that information, a Treasury Department official wrote: " 'For Mr. Sherrill's information, he has been arrested and fined for physical assault in the State of Florida.' " Add. 5, Brief for Appellee, quoted in *Sherrill*, 569 F.2d at 127.

[90] Id. at 130 (quoting Watts v. United States, 394 U.S. 705, 707 (1969)) ("Clearly, protection of the President is a compelling, 'even an overwhelming,' interest."). Certainly protection of the president would be a concern in the case of presidential debates. It must be noted, however, that Sherrill was denied a press pass because he, as an individual, was considered a security risk. Such a concern should be a valid reason to similarly deny access to a presidential debate.

[91] Id. at 130. The lower court had gone even further, saying that denial of a White House press pass is a first amendment violation unless it "is guided by narrow and specific standards which advance a compelling state interest." Forcade v. Knight, 416 F. Supp. 1025, 1033 (D.D.C. 1976) (quoting Quad-City Community News Serv., Inc. v. Jebens, 334 F. Supp. 8, 17 (S.D. Iowa 1971)), modified on other grounds sub nom. Sherrill v. Knight, 569 F.2d 124 (D.C. Cir. 1977).

excluded from sources of information."[92]

The problem with selective access is the potential for abuse by arbitrary exclusion. No matter how many members of the press are allowed access, the decision to shut out others is a subjective call[93]—one which the first amendment and the compelling interest test are intended to avoid.[94] Pool coverage involves such a decision.

B. *The Pool Problem*

The selective access aspect of pool coverage may be less obvious because everyone who wants the coverage (and can afford the pool fee) may obtain it.[95] The fact remains, however, that all news organizations except the pool representatives are denied access. The others must take what they can from the pool or be left without coverage. If the pool—as the only source of coverage—does not provide a particular image, it is lost to all viewers.[96]

The first amendment problem arises when television news organizations are denied unilateral[97] access to the debates because of the pool access afforded others.[98] This denial renders certain networks unable to provide viewers with thorough, indeed any, significant event coverage in a medium in which the picture tells the story.

To assess the situation, the first question must be whether there is a compelling governmental interest which necessitates limited access to the debates. If there is such a need, the court must determine whether pool coverage is the alternative which is least offensive to the spirit of the first amendment. Courts must balance "the interest to be served by the newsgathering activity . . . against the interest served by denial of that activity."[99]

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92 569 F.2d at 129-30.

93 See supra notes 72-92 and accompanying text.

94 "Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information." Anderson v. Cryovac, Inc., 805 F.2d 1, 9 (1st Cir. 1986) (district court erred in granting one broadcaster exclusive access to discovery materials).

95 Supporters of pool coverage claim that there is no exclusion because all news organizations may obtain access via the pool. See WPIX v. League of Women Voters, 595 F. Supp. 1484, 1489 (S.D.N.Y. 1984); Cable News Network, Inc. v. ABC, 518 F. Supp. 1238, 1239-40 (N.D. Ga. 1981). But see supra note 15. The reality is that access to pool coverage can be prohibitively expensive for smaller news organizations, thus effectively denying access due to the excessive cost. Moreover, access to the same version of the event is not the same thing as access to the event. See infra notes 125-31 and accompanying text.

96 "[C]amera shots not selected for transmission are not preserved in any form." *WPIX*, 595 F. Supp. at 1491.

97 See supra text accompanying note 7.

98 See supra notes 16-19 and accompanying text.

99 *WPIX*, 595 F. Supp. at 1489.

By protecting the press from governmental interference, the founding fathers sought to preserve the public's ability to receive information essential to a democracy.[100] Individuals do not have the wherewithal to amass a wide variety of information, so the press does it for them.[101] Some commentators suggest that the purpose of a free press is precisely to inform citizens about matters of public concern.[102] Others, however, believe that the press must do more than simply provide information; this view is that the value of a free press lies in its ability to foster a marketplace of ideas in which the best options prevail.[103] No matter what their views, most commentators agree that communication of a political nature is especially valuable.[104]

Presidential debates embody all these considerations. Not only

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100 "What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny." Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting). See 9 The Writings of James Madison 103 (G. Hunt ed. 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."); see also 2 Z. Chafee, Government and Mass Communications 546 (1947) ("Liberty of the press is not the property of some newspapers or even of all newspapers. It belongs most to the readers."); supra note 22 and accompanying text (the public has a right to appropriate access to information).

101 The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). See also Note, The Right of the Press to Gather Information, 71 Colum. L. Rev. 838, 838 (1971) ("[N]o single individual has the time or the resources to gather firsthand all the information he needs to have in order to form intelligent opinions regarding political, social, and economic affairs. The information media have assumed the burden of providing this factual material.").

102 "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). See also Meiklejohn, supra note 6, at 255 (The first amendment "protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility.").

103 "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." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1968). See also Associated Press v. United States, 326 U.S. 1, 20 (1945) (The first 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, that a free press is a condition of a free society.").

104 FCC regulations further illustrate the special quality of political speech. For a discussion of the evolution of these regulations, see supra note 34.

do candidates provide information[105] about matters of utmost interest, they also offer diverse views on how to approach the major issues.[106] The discussions themselves take place in a highly political context with the nation's highest office at stake. And without the ability of television to bring the candidates and their discourse directly to voters, the impact of the event would be greatly reduced.[107] Indeed, the debates might not even take place.[108]

The only case dealing specifically with the denial of independent access due to pooled coverage of a debate between presidential nominees is *WPIX v. League of Women Voters*,[109] in which WPIX sought access for its television cameras[110] to the debates between incumbent Ronald Reagan and challenger Walter Mondale in 1984.[111] As debate sponsor, the League of Women Voters[112] previously had arranged with the networks for pool coverage of the event. But despite the pool

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105 Indeed, sometimes candidates provide viewers with misinformation. See N.Y. Times, Oct. 9, 1976, at 1, col. 1 ("President Ford apologized today to the leader of a major Polish-American organization for having said [during a televised presidential debate] that Eastern Europe was not dominated by the Soviet Union.").

106 "The debate setting . . . is one of the few formats that allows comparison of political information, and the meaning of a statement clearly varies depending on the alternative statement with which it is juxtaposed." Chaffee & Dennis, supra note 4, at 78. "[T]he debates might well have been the only mechanism that would supply . . . information [about the candidates and their positions] to a significant number of these people, despite their apparent need for it in connection with the impending vote." Id. at 89.

107 "During debates, the usual media gatekeepers are bypassed; pre-edited stories do not confine the audience to the second-hand reports of campaign hoopla that characterize the evening news." Meadow, supra note 3, at 89. See also P. Boller, Jr., Presidential Campaigns 299 (1984) (discussing the impact of the 1960 televised debates between John F. Kennedy and Richard Nixon). "Radio listeners had the impression that Nixon did as well as, if not better than, Kennedy in the confrontation; but televiewers, including Nixon's own fans, generally agreed that Kennedy came out ahead in the first debate." Id. at 298.

108 See N.Y. Times, Sept. 28, 1976, at 29, col. 1. During the first debate between then-President Gerald R. Ford and challenger Jimmy Carter, a technical problem resulted in a 27-minute inability to televise the event. When the cameras stopped rolling, the candidates stopped talking. Their behavior, compounded by the fact that "[m]ore than half of the seats in the [theater] . . . were empty because their view was obstructed by television cameras or by a five-foot wall erected as a background" provides compelling evidence as to the importance of the television audience. Otherwise the debate, itself, would have continued despite the technical problem.

109 595 F. Supp. 1484 (S.D.N.Y. 1984).

110 WPIX sought access on behalf of its Independent Network News division ("INN"). INN syndicates USA Tonight, a daily national news program, to more than 100 independent television stations across the country. These independent stations are not affiliated with a major network. INN's "cost-saving techniques" enable these stations to obtain, at a low cost, national news coverage that otherwise would not be available to them. 595 F. Supp. at 1485.

111 WPIX also sought access to the vice presidential debates between then-Vice President George Bush and Congresswoman Geraldine Ferraro. Id. at 1486.

112 The League also had arranged the presidential and vice presidential debates in 1976 and 1980. Id. at 1485.

arrangements, WPIX wanted access for its own cameras.[113] The news organization filed for a temporary restraining order to enjoin the League from denying access.[114]

In assessing the case for a temporary restraining order, the *WPIX* court found "a substantial possibility" of state action,[115] a "substantial" question of possible first amendment violation,[116] and found that there was a potential for irreparable harm.[117] Further, the court stated that restrictions on broadcasters "have been upheld only when [the court is] satisfied that the restriction is narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues."[118] Nevertheless, the WPIX claim fell short because, given the dilatory way in which the action was pursued, the court determined it would be inequitable to grant WPIX its desired relief.[119] Ultimately, pool coverage of the debates

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113 INN sought independent access because it claimed an ability to obtain the coverage at a much lower cost than the pool charged and because INN wanted "the opportunity to provide its additional and unique coverage of the debate[s]." Id. at 1491.

114 Id. at 1486.

115 Id. at 1489. For a discussion of various ways to find state action in the case of televised presidential debates, see supra notes 27-46 and accompanying text.

116 Id. at 1491.

117 WPIX had couched its original claim for relief in terms of "reasonable access" to the debates. Id. The court deemed pool access to be reasonable access and found no irreparable harm on the basis of that claim. Id. Since WPIX claimed that INN's coverage would have been different, a denial of access meant the loss of that different coverage forever. Hence the court found a "colorable allegation of harm," and held that "no court should find a lack of irreparable injury when a purveyor of news and opinion to the American public is able to make a colorable case that its message will not otherwise be conveyed." Id. at 1491, 1493.

118 Id. at 1491 (quoting FCC v. League of Women Voters, 468 U.S. 364, 380 (1984)).

119 Id. at 1494. Equitable remedies, such as the preliminary injunction sought by WPIX, require "a special blend of what is necessary, what is fair, and what is workable." Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (footnote omitted).

In denying the injunction, the court placed special emphasis on the fairness of equitable relief, determining that the plaintiff's conduct weighed against awarding the injunction. *WPIX*, 595 F. Supp. at 1493-94. The court found that WPIX's prayer for relief in this case was rooted more in its desire to save money than its concern for a first amendment right to its special news coverage techniques. Id. at 1493.

Further, the court expressed its displeasure that INN, as WPIX's news division responsible for debate coverage, (1) did not attend the meeting between the League and the networks when the decision was made to make the debate a pool event; (2) did not make any proposal or voice its concerns when the pool was organized; (3) did not demand of the League access to the event prior to instituting the lawsuit; and (4) waited until three weeks after the pool arrangement was made to begin the litigation. Id. at 1494.

Ultimately, it was WPIX's delay in bringing the action that seemed most troublesome to the court because equity does not aid "those who slumber on their rights." Id. (quoting C. Wright & A. Miller, Federal Practice and Procedure § 2946, at 417 (1973)). Consequently, WPIX's failure to vigorously pursue its meritorious claim probably cost it the case. "For courts to award last-minute relief in situations such as this can only encourage disruptive actions by dissatisfied entities, sometimes as a conspicuously selected means of pressure to obtain favorable settlements." Id. at 1495.

continued as originally planned.[120]

Broadcast coverage of the debates is not the issue. Rather, the question is how many broadcasters will be allowed to provide *their own* coverage. Among access issues, the situation is unique because physical space limitations, not questions of compelling governmental interests, dictate the possible amount of access. Given television's ability to further the informational and marketplace-of-ideas goals of the first amendment, debate coverage should be as diverse as possible. This comports with the compelling interest test,[121] which mandates the least possible restriction of press freedom.

The limited space problem presented by debate facilities is analogous to that which existed in *Preferred Communications, Inc. v. Los Angeles*.[122] The *Preferred* court addressed the issue of whether one cable television company could have exclusive use of public utility poles to string cables. The court said no, finding that the "serious risk that city officials will discriminate among cable providers . . . . [could] be reduced, if not eliminated, by means less destructive of First Amendment rights."[123] The *Preferred* problem is similar to that posed by limiting presidential debate access to one news organization—neither situation allows for all those desiring access, yet there is room for more than one.[124] The *Preferred* court did not tolerate an arbitrary denial of cable access. Any attempt to sanction a similar denial of access to presidential debates is equally improper.

Most people who were interested in the debates and wanted to see them were able to do so because the pool feed was widely available. But no matter which channel viewers watched, the story was the same and so was the picture. No viewer was able to get a different story because pool coverage sent the same, limited version to everyone.

What difference does it make whether viewers saw a "tight

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120 Other than *WPIX*, the only case to address pool coverage specifically is Cable News Network, Inc. v. ABC, 518 F. Supp. 1238 (N.D. Ga. 1981). CNN sought to become a member of the network pool in which responsibility rotated for coverage of pool events at the White House. Id. at 1239-40. However, the court never decided the issue of CNN's pool membership. Instead, the networks' own inability to determine the pool representative for a certain event led to a White House refusal to allow any broadcast coverage of the event. Id. at 1240. Consequently the networks brought suit to prohibit this White House action. The court held that the White House must allow a broadcast pool for the event. Id. at 1246. The case did not discuss an independent right of access to pool events.

121 See supra note 23.

122 754 F.2d 1396 (9th Cir. 1985), aff'd, 106 S. Ct. 2034 (1986).

123 Id. at 1406.

124 Id. at 1402 (the city did not deny the "capacity to accommodate more than one . . . system").

shot"[125] of the president or a "two-shot"[126] of both candidates at a given time? The answer depends on what happens, when it happens, and whether the pool director anticipated it or was fortunate enough to have captured it anyway.[127]

It may be argued that none of this matters. The important thing, the argument goes, is that viewers will know generally what happened.[128] According to this line of reasoning, the number of news organizations covering an event—and even which ones—would be irrelevant. But courts have held differently: "[I]t is impossible to treat two news services as interchangeable, and . . . it is only by crosslights from varying directions that full illumination can be secured."[129]

When news organizations send their own cameras to events, these organizations generally have discretion to determine the camera's position and are free to determine what they will shoot and when.[130] Consequently, no two camera crews will generate the same video and the chance that viewers will get diverse accounts is greatly increased.[131]

Undoubtedly, there are some circumstances in which pool coverage is the only way to cover an event.[132] But these few situations must not foster a casual acceptance of pool implementation in other situations. The press remains protected by the first amendment and infringement of those rights must not be tolerated except in the rarest of circumstances—and then only to the extent absolutely necessary.[133]

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125 A tight shot is a close-up shot that shows facial expressions and reactions more clearly than a picture that included more background.

126 A two-shot is a picture with two people in it; an example would be one that had both debate participants in it. Such shots may not distinguish subtle facial expressions.

127 See supra note 96 and accompanying text.

128 The assassination of President John F. Kennedy provides a compelling example. Everyone knows what happened in Dallas on November 22, 1963; the president was killed. But was there one gunman or more than one? Exactly how did it happen? These questions may never be answered satisfactorily. We would not know as much as we do about the killing but for the home movies taken that day by Abraham Zapruder. More cameras shooting from different angles might have shed more light on the event and on exactly what happened. Sometimes a cursory knowledge of what happened simply is inadequate.

129 United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

130 Frequently event sponsors will reserve a special area for cameras. When this occurs, cameras must be within that area but cameramen may use discretion to determine their precise location.

131 See supra notes 100-04 and accompanying text. See generally The Media Institute, CNN vs. The Networks: Is More News Better News? (1983) (comparing coverage of business and economic news of ABC, NBC, CBS, and the Cable News Network on the basis of balance, sensationalism, depth, and priority).

132 See supra note 10.

133 "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation [of first amendment freedoms]." Thomas v. Collins, 323 U.S. 516, 530 (1945).

In the case of presidential debates, there are less restrictive measures than those which are presently employed.

III. A SOLUTION

It is highly probable that, no matter where the presidential nominees debate, the demand for media access would exceed space limitations. But this is not to say that all but pool representatives must be turned away. This Note proposes a solution which respects the right of news organizations to cover the debates, while taking into account the physical space limitations of the debate site.

Broadcast media representation at news events of national importance usually is dominated by the domestic networks,[134] by their affiliates,[135] by independent broadcasters,[136] and by foreign and domestic news services.[137] The same first amendment concerns which militate against pool coverage also preclude establishing any preferred status among these broadcasters; there is no way to determine which are most worthy of access because all have an equal right to be there. There is, however, a way to deny access to one group—network affiliates—while preserving their ability to obtain debate coverage. The network affiliates could have access to the debates via their networks. Since these affiliates rely on network coverage for many major events,[138] similar reliance on network coverage for presidential debates seems appropriate. This would have the doubly-desirable effect of providing coverage, yet preserving space for others.

This Note suggests dividing the remaining broadcasters into four

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134 This group would include any broadcaster which simultaneously airs daily newscasts in more than fifty cities around the country. Thus the group would include ABC, CBS, NBC, the Cable News Network ("CNN"), and the Public Broadcasting System ("PBS").

135 Network affiliates are the local stations in cities across the country which air network programming. Because of the tremendous competition among the news divisions of these local affiliates, many of those from larger cities (those with the biggest budgets) try to beat competitors by sending their own camera crews to cover big national stories. By doing so, they try to show their viewers that the affiliate is on top of the news wherever it occurs.

136 Independent broadcasters are those which are not affiliated with one of the networks. WPIX and its INN division are examples of independent broadcasters.

137 Just as the Associated Press and United Press International are news services for newspapers, similar institutions exist for broadcasters. Perhaps the largest is C-SPAN, which, among other things, provides daily coverage from the floors of the United States Senate and House of Representatives. There are many other news bureaus which, for a fee, will cover events for clients. Because of the international attention that focuses on this country's presidential campaigns, it is important that foreign news organizations, too, be represented at the debates by their own news service.

138 A typical example is the coverage of daily White House events. A network affiliate in Tulsa, Oklahoma, for example, does not have its own reporter and camera crew at the White House, yet it does want to inform viewers of newsworthy events. Consequently, it uses the coverage provided by its network.

categories: (1) domestic networks, (2) foreign news services, (3) domestic news services, and (4) independent broadcasters. This would ensure an equal opportunity for broadcasters with different orientations to obtain access.

Of course, each broadcaster would want to use as many cameras as possible to provide their viewers with the most complete coverage. To maximize the number of news organizations afforded access, however, the number of cameras could be limited; probably no more than two per broadcaster would be necessary.[139] Depending on the space available, one, two, maybe even three broadcasters from each of the four groups would be granted access by lottery.[140] If, as is generally the case, there are several debates rather than just one,[141] even more broadcasters could be accommodated by making each eligible to cover only one of the debates.

It is still possible that some broadcasters would be denied access, and to a point, that is unavoidable. But the critical point is that all would have an equal opportunity to gain entry. And in the end, the viewers will benefit, for they will have seen different debate coverage and, ultimately will be better informed. This is the ultimate goal of press freedom—which must not be sacrificed for the sake of convenience.

CONCLUSION

The value of the first amendment provision for a free press lies in

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139 One camera would be able to capture the head-on shot of the event, while the second picked up any other interesting activity. There would be nothing to prevent informal trading among the broadcasters if one ended up with a shot the others found desirable. This practice has become commonplace among smaller broadcasters which, because of their size, are unable to cover every aspect of all news stories. They effectively "pool" their efforts; two of these smaller news organizations cover different stories or different camera positions for a specific event and then they trade their video, enabling each to have more detailed news coverage.

In other cases, one news organization may simply make its news coverage available to others for the appropriate credit—or price. This practice is commonly employed to supply coverage for the sports segments of daily newscasts. Frequently video will be shown of sporting events that were covered by other news organizations. To indicate when this occurs, the words "Courtesy ABC Sports" or "Courtesy NBC Sports," for example, are superimposed over the video. Nothing would preclude either the trading or lending of video for news coverage of a presidential debate. Indeed, none of this "recovery" of video would be possible in a strict pool system; if the pool representative misses a good picture, it is gone forever. See supra note 96.

140 Equal representation among broadcasters would be similar to the equal representation of reporters from the various media who serve as questioners during the debates. See E. Kirkpatrick, supra note 32, at 14-15 (questioners consisted of reporters from newspapers, wire services, news magazines, radio, and television).

141 See, e.g., Mitchell, supra note 20, at 31 (In 1960, there were four debates between John F. Kennedy and Richard Nixon.).

its protection of "debate on public issues [which is] uninhibited, robust, and wide-open."[142] Nothing is so appropriate for news coverage as a full-fledged political debate on public issues between contenders for this nation's highest office.

Rarely do two people view an event in the same manner and it is equally rare that two news organizations will present a story in the same way.[143] This disparity does not necessarily reflect bias. It simply means that the story emphasis may vary and the accompanying video may be different. Therein lies the value of a free press in presenting diverse views. Pool coverage, however, frustrates the public debate by presenting only one view. As Judge Learned Hand once wrote:

> [The press] serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to . . . the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.[144]

Debate coverage of presidential nominees should not be the exclusive privilege of one broadcast news organization simply because there is not room for all those desiring access. This Note proposes a viable alternative to pool coverage which helps to ensure debate coverage "from as many different facets and colors" as possible. Anything less than that violates the first amendment's provision for a free press and must not be tolerated.

Wendy S. Zeligson

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142 See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); see also supra notes 21-22 and accompanying text (the public's right of suitable access to social, political, and other ideas is paramount).

143 Indeed, some news organizations may provide no coverage of an event which others deem newsworthy. See N.Y. Times, Feb. 3, 1988, at A10, col. 1 (ABC, CBS, and NBC refuse to provide live coverage of a presidential speech which they deem not newsworthy, but the Cable News Network covers the event.).

144 United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).