Chapter 5

ACCESS TO THE MASS MEDIA: AN ALTERNATIVE TO THE ESTABLISHMENT MEDIA

5.1 INTRODUCTION

There exists one medium which, if it becomes fully developed and used, can present an alternative to the Establishment press: public access cable television. One measure of the significant potential of this new communications experiment is the hostility to it on the part of the national and local power structures in may parts of the country. The more effectivly public access is used, the greater will be the attempt to co-opt it, weaken it, or destroy it.

Public access television is a recently developed medium and is only one of the many means the people have used to try to obtain a large, mass audience for what they have to say, both at the local and national levels. The subject of access to the mass communications media has received

increasing attention in the U.S. the last two decades. Individuals, government regulatory agencies, various citizen groups, organizations representing the owners of the mass media, students of law and journalism, and particularly members of the bar have expressed great interest. The subject is creating increasingly expanded attention and controversy.

There are different types of access which are discussed in relation to the mass media, only one of which is the type which will mainly be considered in this dissertation.

1. Access to the communications service--people having radio, television and newspapers made available to them in sufficient quantity to provide for certain information and entertainment needs.
2. Access to information--the problem of newsmen being able to obtain information they need in order to do their job.
3. Access to an audience--the means by which people other than those who own and operate the communications facilities may be provided time or space in these facilities to present their views.

This third form of access is the one which is the

subject of this chapter and can also be considered from four aspects.

1. Direct access--where space and time from the media are given to individuals or groups to make use of as they desire in communicating directly to the audience.
2. Indirect access--where the media provide news coverage for people or events which the media consider newsworthy.
3. Combination of direct and indirect--where there is an agreement made by a broadcaster with local citizen groups in which the broadcaster provides for increased direct and indirect access to subjects, opinions and speakers of the local groups. This also includes the hiring of personnel from the groups, people who in turn might be more likely to provide further access for their organizations.

There is another category of access which is found when individuals take direct action in some communications form, circumventing the established media in order to create greater dissemination for their ideas than can be provided merely by direct conversation. In this category would be such methods as bumper stickers, posters, graffiti,

telephone campaigns, sky writing, pamphleteering and the use of bulletin boards.

This chapter will mainly consider direct access to the mass media and will concern itself primarily with the electronic media--broadcasting and cable television. However, other forms of access will be mentioned because all forms are tied together in various ways, particularly in the legal sense.

5.2 NEWSPAPER AND BROADCAST ACCESS: THE LEGAL HISTORY

5.2.1 HISTORY OF ACCESS THROUGH 1967

When the framers of the Constitution and the First Amendment considered the matter of free speech and a free press, they basically had in mind protection against prior restraint rather than freedom of expression as is generally the prime concern today. They believed in the common law at the time which was that the printers should be held criminally liable for what they produced, including being prosecuted for libel for statements against the government (Georgetown Law Journal 1973, 5-10). But, over the years this changed to a concept of freedom of expression. This

has developed in the courts to such an extent that generally a newspaper now may be convicted for libel only if there is malicious intent, meaning that the material is published with reckless disregard for the truth (New York Times Co. v. Sullivan, 376 US 254 (1964)). Hence, the press today is considerably freer to print without penalty than it was when the Constitution and the First Amendment were developed, although recent libel cases have been decided against the press, narrowing its freedom of expression (Daily Texan 1982b; Higdon 1980; Columbia Journalism Review 1983a).

The press itself also was very different in the late 1700s from that which we find today. There were many more newspapers per city and per capita than there are now. Advertising was a negligible factor. Public debates were carried on in newspapers via letters to the editor and by a multiplicity of partison papers. It was not very expensive to start a newspaper then, unlike today, and therefore it was not too difficult for someone with something to say to find a printed outlet (Commission on Freedom of the Press 1947, 14; Georgetown Law Journal, 1973, 5-10).

Modern technological and economic factors have made a revolutionary change in the press.[1] The news media have not only become truly mass in nature, but also big business. Because of government restrictions on the number of TV and

radio outlets, not everyone who wants to be a broadcaster may become one. Because of the considerable capital requirements to start a newspaper and the great risk involved in trying to compete with established papers in monopolistic situations which are found in most American cities, it is extremely difficult to successfully start a daily newspaper (US Congress 1967b). Cable TV provides many channels for diversity, but requires great initial expense as well.

Almost all commentators on the nature of the press today view with concern, not only the concentration of ownership of the mass news media, but also the limited sources of basic information: the government, two main press services, three major TV networks, and monopoly newspaper positions in most cities. This is not a recent development. The Hutchins Commission on Freedom of the Press in 1947 (104) indicated that concentration of ownership was the "greatest danger" to freedom of the press and communications.

Whereas the newspaper editors and publishers can generally print whatever they wish, modified only by laws such as obscenity and libel, the broadcast industry operates under restrictions of federal law and the Federal Communications Commission. Because there are not sufficient

frequencies available on the broadcast band for all persons who wish to own stations, the Communications Act of 1934 places responsibility in the FCC to determine who will receive licenses. The main, basic requirement of a licensee is to operate in "the public interest, convenience and necessity." The vagueness of these terms has been the center of many court battles, and the application of it has led to changing interpretations over the years. Just as the Supreme Court has greatly changed its thinking in other areas of law--such as what constitutes interstate commerce and the relation of manufacturing to commerce [2] --so also has the court changed its interpretation as to what the relationship should be between broadcasters and the consuming public.

For many years the broadcaster was considered basically a custodian or fiduciary for his frequency. The only access requirement was the equal time provision for political candidates which was part of the Communications Act of 1934. However, in 1947 the Hutchins Commission (organized and partially funded by publisher and Ruling Cartel member Henry Luce) took a view which called for modifications of this broadcaster power. Although it took great pains to say that there was no right of access to the media for every citizen, it did say that a framework should be devised so that each

"idea shall have its chance". It called for the broadcasters to be common carriers of public discussion, but not to be available for free access. Despite the disclaimer of not being open for access, the commission made several statements throughout its report which urged access for minorities, the right of reply or retraction, and in general for the media to be "free to all who have something to say to the public" (Commission on Freedom of the Press 1947, 8, 23, 101, 103, 129).

From then until 1979 there was a slow but steady journey in the courts and the FCC toward greater access. It mainly has been lurking in the shadows cast by the Fairness Doctrine. The latter was created by the FCC's change in policy toward editorials. Prior to 1949 the Commission had prohibited broadcasters from being advocates (Mayflower Broadcasting Co., 8 FCC 333 (1940)). However, this was changed from a prohibition to an encouragement. The FCC stated in 1949 that there should be editorialization with "reasonable limits" and "subject to the general requirements of fairness" (Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 FCC 1246 (1949)). The Commission said that there is a right of the public to be informed rather than just a narrow right of an individual licensee to air his or her own views. This was in keeping

with the Supreme Court decision in the 1944 Associated Press case that people have a First Amendment right to receive information from the widest possible diverse and antagonistic sources. The FCC required that stations not merely refrain from denying time to speakers with opposing viewpoints, but to actively seek them out. Although the broadcaster also has the obligation to provide fair and balanced information, the Fairness Doctrine mainly comes into play when the station facilities are used for discussion of a controversial issue of public importance.

The Fairness Doctrine goes even further. And, once again, the subject of access is interwoven with the doctrine. When a person comes under attack on a station's facilities, the person must be notified of the fact and be given a chance to reply .

When the Fairness Doctrine and personal attack provisions were contested in 1967 in the famous Red Lion case, a unanimous Supreme court not only attested to the constitutionality fo the FCC rule, but went further in expounding overall rights of citizens and relationships of consumers to broadcasters.

Red Lion is such a landmark case and Justice White was so wide-ranging in his opinion that many people are able to read many things into it depending on which point of view

they wish to support. Some broadcasters and lawyers viewed it as an abridgement of constitutional rights of the broadcasters and as a big foot in the door for governmental regulation of programming (Robinson, G.O., 1967; Schenkkan 1974; Blake 1969). It was viewed by the Supreme Court as a confirmation of the primary role of the broadcaster as fiduciary and controller of his airwaves, even though he must be socially responsive and objectively fair in his presentation of controversy (Columbia Broadcasting System, Inc. v. Democratic National Committee 412 US 94 (1973)).

Proponents of access saw Red Lion as a significant step forward for their cause (Nord, 1970; Barron 1969c). The Court (390) said that "it is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experience which is crucial here". Even more directly, Justice White (401) said that Congress would not abridge the freedom of speech or press if it passed legislation giving "time sharing" or "other devices which dissipate the power of those who sit astride the channels of communication with the general public." The Court (400) stated that there should be sensitivity to "the legitimate claims of those unable without government assistance to gain access to those frequencies for expression of their views."

In June 1967, before the Red Lion case was decided, there appeared in the Harvard Law Review an article by Jerome Barron law professor at George Washington University. The article, which was entitled "Access to the press--a New First Amendment Right," started a discussion and debate on the subject of access which has continued to the present among journalists, judges, broadcasters and lawyers. Because Barron was the most outspoken proponent of access at that time, we will review more fully his point of view and then present the arguments of his opponents.[3]

Barron said that the free market place for ideas via the mass communications media does not exist. It is only a romantic tradition just like the idea of a free market existing in economics. Because of the antipathy of the people who control the mass media to ideas other than the bland, innocuous ones which enhance the medium for advertising, governmental intervention is necessary if novel and unpopular or unorthodox ideas are to be assured a forum. The law now only protects people who have control over the mass media. Barron quotes various Supreme Court justices who state that full and free discussion of ideas in the mass media is fundamental in our Constitution and to our form of government. Because this is not practiced by the mass media, we have access by riot and demonstration and the

phenomenon of the underground press.

Barron found hope in Justice Black's statement in the Associated Press case that freedom of the press from the government is "no sanction for repression of that freedom by private interests" (Barron 1967, 1654). Even with the slight access found in the U.S.--the right to reply to personal attack which occurs over the air, and equal time for politicians--this does no good for groups and ideas which are ignored. Barron sees hope in various court cases in which the judges or justices stated that there is a need to protect the rights of the public, particularly where there is a communications monopoly or where the media will not perform in the public interest because it would be bad for business. In such cases the government could intervene on behalf of the public. (Barron (1967,1659) noted that the right to reply is commonly used in Europe and South America.)

Barron called for an expanded interpretation of the First Amendment to provide for an affirmation of the rights of the public in the communications process, not just for the owners of the mass media. There should be an interpretation that there is a First Amendment right of the people to speak, to have an audience, and to be heard. The second interpretation expansion needed by the courts (or a

law passed by Congress) is that the mass media are quasi-public in nature. Not only are they in monopoly or oligopoly situations in most parts of the country, but also the functioning of the government and the basic information the public needs in order to carry out its duties as citizens in a democracy require the greatest degree of information from the media. Furthermore, the news media benefit from favorable legislation and from administration by government agencies. Hence, the media should not be considered as purely private enterprises but as agencies which should be more responsive to the people and to government intervention on behalf of the people. This can best be accomplished by providing access to the media by citizens.

The critics of Barron focused on two basic questions: how would access be implemented and operated, and how would this be done without considerable government control. Ben Bagdikian (1969, 11) press critic and journalist, said that access would be bad because it would bypass the traditional professional expertise of the editor, it would be chaotic to implement, and it would result only in confusion to the audience. Furthermore, the Fairness Doctrine in broadcasting was sufficient to provide the information the citizens need. Clifton Daniel (1970) of the New York Times

said that the need for access is exaggerated and that the media can take steps to cure any ills or imbalances which occur. He also indicated that implementing access would be an impracticality. Almost all critics of access claimed that it would lead to too much governmental intervention. Justice William O. Douglas was particularly severe in his judgement on this point (Schenkkan 1974, 76, 78, 79). CBS' Walter Cronkite thought that access not only is a foolish and dangerous proposal, but that broadcasting should be de-regulated altogether and complete freedom should be given to the press (Georgetown Law Journal 1973, 131-135). Cronkite's boss agreed, saying that the press "is doing a sufficient and responsible job now" (Barron 1973, 311, 312). The editor of Editor and Publisher (1967) claimed that there is no need for access because minority views are in fact being expressed. Two journalism professors at the University of Missouri stated that the main problem with access was that government intervention would be required to determine who would speak for which groups. The problem would be just too complex because of the extremely pluralistic nature and great size of this country (Gillmor and Barron 1969, 148-150).

But Barron has not been alone in his pro-access orientation. He has many supporters, the most prominent of

whom is Nicholas Johnson (1970; Johnson and Westen 1971), a former FCC commissioner who was instrumental in initiating the first access requirements. Johnson also is a critic of the Fairness Doctrine.

The subject of access to the mass media is part of a general struggle by citizens for access to other media of communications, particularly the "public forum." One of the results has been to produce court cases of significance, not only from the point of view of their possible application to the press, but also from the aspect of noting the varying yardsticks used by the courts for different media.

There have been several cases in which people have attempted to use public facilities as a forum for dissemination of information. The federal court of appeals ruled in Wolin v. Port of New York Authority, 392 F. 2nd 83 (2nd Cir., 1968) that a group had the right to distribute leaflets and talk with people in a bus terminal. This judge cited a previous case which was decided by the Supreme Court in which it was stated that a pamphleteer had the right to enter the streets of a company-owned town because, when an owner opens up his property for use by the general public, his rights become circumscribed by the rights of those who

use it (Marsh v. State of Alabama, 326 US 501 (1946)).

In a case in California (Barron 1973, 100), the State Supreme Court ruled that railroad station officials could not prevent people from using the station for political communication just as they could not prevent people from using parks and streets. (The only proviso in this case and the bus terminal case was that there could be no interference with the flow of traffic.) However, in 1966 the Court held in a 5-4 decision that jailhouse grounds could not be used for political protest (Adderly v. Florida 385 US 39 (1966)).

In the significant Logan Valley case, which reached the Supreme Court, pickets were given approval to enter a privately owned shopping center because that was where the audience was. Justice Marshall said that there are some circumstances where privately owned property may be treated as public property for First Amendment purposes (Amalgamated Food Employees v. Logan Valley Plaza, Inc. 391 US 308 (1968)).

In 1967 the Supreme Court ruled in the Kissinger case that the New York Transit Authority could not refuse a subway ad merely because it was controversial and because the Authority officials did not agree with it. They could not refuse the ad, particularly since they had accepted

other posters of a strictly non-commerical nature.

A somewhat similar case to Logan Valley involving handbill distribution occurred in Portland, Oregon (Lloyd Corp. v. Tanner 92 S. Ct. 2219 (1972)). In 1968 the trial judge ruled (consistent with Logan Valley), and the appeals court agreed, that there was a right of access. However, by the time the case reached the Supreme Court in 1972, the Nixon appointees had changed the flavor of the Court. In a 5-4 decision it ruled in favor of the owners of the shopping center, saying that there had to be a definite relationship between the object of the protest and the site of the protest.

Proponents of the right of access to the mass media would argue that these court decisions upholding the right of the public to have communications access to public and private property which is open to the public should be extended to the mass media. They contend that the broadcasting industry is publicly sanctioned and supervised, and it is operated under the banner of public interest, convenience and necessity. The newspapers are public in nature because of their receipt of governmental legislative favors and because of their intimate relationship with the information needs of the citizens in a democracy. Additionally, the press opens its pages and air time to the

public, and it provides the public with information and entertainment to everyone who wishes to see and hear. Cable TV (CTV) operates with a governmental franchise and uses public streets and rights of way to string its cable. They all open their facilities up for commercial speech by advertisers. Hence, they all are public in the same sense as in Logan Valley (Georgetown Law Journal 1973, 83).

Opponents of access would counter this by saying that the above cases are irrelevant because the press is specifically exempt by its special constitutional status. The First Amendment clearly states that the government shall enact no law abridging the right of freedom of the press. Additionally, there is the Fifth Amendment prohibiting the government from taking private property for public use without just compensation.

Advocates of access have had a rough time in the courts in their attempts to gain access to newspapers. In cases where people have sought guaranteed access to the letters-to-editor column, the courts have ruled in favor of the newspaper (Pierce 1972, 60; Barron 1973, 45, 46).[4]

The main argument surrounding the newspaper cases is the question of whether the publication is of a state or private nature. In the cases where the newspaper is clearly privately owned, access has been denied (Chicago Joint

Board; Resident Participation of Denver). However, where there has been a determination that the paper is of a public nature, the decisions have generally gone against the press[5]. These cases have been with newspapers in a state university (Lee v. Board of Regents), in a public high school (Zucker v. Pamitz; Tinker v. Des Moines Independent School District), and in a bar journal of a state university (Radical Lawyers Caucus v. Pool. The only exception is found in a case where the judge ruled that access was not mandatory if the editor exercised fairness and reasonably good judgement (Avins v. Rutgers).

The preoccupation of the courts in these cases with the matter of the public or private nature of the media to which access is being sought is based on the Fourteenth Amendment which says that states must give equal protection to citizens, but does not mention that private individuals must also give such protection. Because a corporation is considered as a private person, there is the need to prove that the privately owned facilities were performing public functions and that the school and bar publications were agencies of the state. The attempt to jump the gap from private to public nature of privately owned newspapers has not been successful in court so far.

5.2.2 HISTORY OF ACCESS FROM 1968 THROUGH 1972

The years from 1968 through 1972 saw a great increase, not just in the discussion of the subject of access (particularly in the legal profession), but also in the activity of citizens groups trying to obtain special favors, including access, from the broadcasters whose licenses were coming up for renewal. The subject of access was discussed in most law journals and other legal publications during this time as well as in some popular publications. The merits and demerits of access were argued as public unrest became acute; the potential of cable television was being discussed; the FCC was grappling with the subject of access and its first cousin, the Fairness Doctrine; and significant court cases were decided or were winding their way up toward the Supreme Court. Jerome Barron continued to publish defenses of the idea, and Commissioner Nicholas Johnson made his opinions publicly known, frequently through dissents to FCC decisions. Their opponents were quick to answer. Meanwhile, the medium with the greatest potential for access, CTV, was developing quickly and creating a great stir in the broadcasting industry and in the legal profession.

The Red Lion case opened the gates for individuals and

groups to appeal to individual stations, to the FCC and to the courts to provide services which they thought the Fairness Doctrine and the court's decision authorized. This led to two types of struggles: the federal level of the courts and the FCC, and at the local level with individual broadcasters.

The seminal case was Banzhav v. FCC (405 F.2nd 1083 (D.C. Cir. (1968)) in which the D.C. Circuit Court of Appeals ruled that cigarette advertising in television required counter advertising--free. The three reasons given were, first, that the broadcasters' public interest requirements necessitated reply time against a public health hazard. Second, the issue was controversial, a criterion of the Fairness Doctrine. Third, the First Amendment contained a requirement for communicating ideas and equalizing opportunity of access to the media.

Although the FCC and the court insisted that this was a special case and was not to used as a precedent, subsequent cases have in fact relied on Banzhaf as a precedent. In two situations, one decided by the FCC (In Re Wilderness Society) and one by the court of appeals (Friends of the Earth v. FCC), environmental groups were allowed access to answer advertising because the commercials had raised controversial issues.

Anti-war groups, however, did not fare so well. In two cases the FCC and the court of appeals declared that because there as considerable news coverage of the Viet Nam War, the Fairness Doctrine requirements had been met. There was no right of access for those groups to explain the alternatives to military service (David Green v. FCC; G.I. Association, Stephen P. Rizzo v. FCC; Barron 1973, 182; Hanks and Lazar 1972).

There was further pressure on the FCC and the TV networks from groups and individual members of Congress to counteract the easy access which President Nixon was able to obtain to announce and explain his policies (Barron 1973, 160-172; Pierce 1972, 47-55). Under such pressure the FCC negotiated with the networks to provide some time for the groups, emphasizing that it was a matter under the Fairness Doctrine, not the right to access. All this was complicated by requests for time to answer some of the people who had been given time to answer the President. In the case of one group--the Congressional Black Caucus--the FCC refused the request for access, saying that if Congress needed a law requiring access, it could pass one (39th Annual Report/Fiscal Year 1973, 41).

Two cases were of more significance than others because they struck at the heart of the access problems and were

eventually decided by the Supreme Court. The Business Executives' Move for Vietnam Peace (BEM) challenged a broadcaster's refusal to sell time to a spokesman to oppose President Nixon's address on 3 June 1970. The FCC supported the broadcaster; the BEM appealed the decision. The court of appeals heard not only the BEM case, but also a similar appeal of the Democratic National Committee (DNC) which also wanted to buy time for presentation of political and social commentary, but was refused by the TV networks and the FCC. The DNC had asked the FCC to create a general right of access. In a 2-1 decision the D.C. Circuit Court decided in favor of the DNC and against the FCC. Judge Wright said there was a First Amendment right of limited access to the mass communications media.

The decision was appealed to the Supreme Court, but the case would not be decided for two more years. In the interim, articles on access were published in great number, and the FCC announced it planned a comprehensive inquiry into the Fairness Doctrine and access (Notice of Inquiry, 30 FCC 2nd 26 (1971)).

Meanwhile citizens were applying pressure for access and other concessions from local broadcasters. In 1967 there was a court decision which radically changed the relationship between citizens and broadcasters. A citizen

group in Jackson, Mississippi, had petitioned the FCC to grant a hearing permitting a challenge for renewal of the license of a local TV station (WLBT) because of the station's continuously segregationist viewpoint and the exclusion of opposing opinions. The FCC ruled that the petitioners were merely members of the public; hence, they had no standing with the Commission because they had no economic interest in the operation of the station. In disagreeing with the FCC the D.C. Court of Appeals said that individuals and groups of citizens had such sufficient interest in the performance of the broadcasting stations that they were entitled to challenge license renewals (Office of Communication of the United Church of Christ v. FCC, 359 F.2nd 994 (D.C. Cir. 1966).

Consequently, during the next few years citizen groups and individuals all over the country exacted consessions from their local broadcasters, many of whom were fearful of challenges to their licenses (Jaffe 1972, 791)[6]. The agreements covered many subjects including access in direct and indirect ways (Johnson 1970, 194-203; Barron 1973, 194-198; Daily Texan 1974a). Frequently there were concessions to minorities about hiring practices and giving on-camera jobs to representatives of the minority groups. Additionally, there frequently were demands that the station

present more programs which reflected minority groups and interests. The positions of minority groups vis-a-vis the broadcasters were strengthened by placing their members on advisory boards for the stations and by assisting the stations with their FCC requirement of making a study to ascertain the problems and needs of the community (Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 FCC 2nd 650 (1971)).

There were some agreements which provided for direct access (Johnson and Westen 1971, 623, 624). A Sandersville, Georgia, station provided access to "significant" community groups (Schwartz and Wood 1972, 1-19). Public station WGBH in Boston started to give thirty minutes, five times a week to groups and individuals (Jaffe 1972, 790). In Pittsburgh and a few cities in the San Francisco Bay area some agreements were reached for providing access for periodic 50-second spot announcements, resulting in an average of seven messages per week (Hanks and Longini 1974). Some stations provided a slight degree of access by reading listeners' letters over the air (Jaffe 1972, 790). Newspersons on public TV station KERA in Dallas read the phoned-in comments of their viewers in response to stories just presented in the newscasts.

The broadcast industry generally attacked this

activity. Robert Jencks, president of CBS broadcast group in 1973, criticized the citizen groups, saying that they only represented themselves, not the entire community which the broadcaster must serve. He claimed that the American population is too pluralistic to allow such programming fractionalization, thus undermining the mass audience appeal of broadcasting, which is the basis of commercial television (Barron 1973, 236, 237).

Although the FCC made some procedural decisions facilitating the work of the citizen groups by extending the time for filing the license renewal and by requiring the broadcaster to announce when his license is up for renewal, the Commission has generally not been hospitable to citizen groups, particularly in providing evidentiary hearings. It has been claimed that the FCC does not have the personnel to have such hearings for each petition to deny which is filed by the citizen groups (Barron 1973, 246, 248).

5.2.3 HISTORY OF ACCESS FROM 1973 TO 1976

The years 1973 and 1974 were ones of setback for the supporters of access. The Supreme Court ruled to reverse the court of appeals and to support the FCC in the Business Executives Move/Democratic National Committee case

(BEM/DNC). The high court also determined in the Tornillo case that the Florida law of right of reply in newspapers was unconstitutional, thereby dashing the hopes for a foot in the door for access to the newspaper medium (Miami Herald v. Tornillo 418 US 241 (1974)). The FCC announced the results of its review of the Fairness Doctrine and access, a report which clearly was in support of the former against the latter. And, finally, the FCC began to take a firmer stand against citizen groups and their agreements with local broadcasters, particularly those agreements which permitted access (Broadcasting 1975b, 30; Broadcasting 1975c, 24; Variety 1975, 43).

In the BEM/DNC case the decision was not so clear cut as the 7-2 vote would indicate, because five of the seven majority justices wrote opinions. Chief Justice Burger reasoned that, since the 1934 Communications Act (paragraph 153 (h)) states that broadcasters are not common carriers, and since it always says that the FCC cannot censor or interfere with free speech, there was no right of a government-imposed system of access, a system which would abridge broadcasters' First Amendment rights and lead to day-to-day government control of broadcasting. Burger stated some of the standard arguments against access, arguments which were in agreement with the FCC position:

access would dilute the rights and effectiveness of control and responsibility of editors; political spot advertising is not a suitable medium for intelligent treatment of complex issues; because the activity of the broadcaster is not "state action," his production is completely as a private enterprise; an access system based on the purchase of air time "might allow the wealthy to monopolize or at least mold public discussion;"[7] the Fairness Doctrine insures balance, retains traditional editorial responsibility, maintains public accountability when licenses are renewed, and screens out irresponsible speakers; since the audience is a captive one, it must be protected from the risk of harmful propaganda.

The two dissenting justices made the following arguments: the banning of access makes a mockery of the oft stated goal of free and uninhibited discussion; merely relying on the Fairness Doctrine is inadequate because the broadcasters lack the desire for the expression on their stations of unorthodox and varying views; the First Amendment rights of potential speakers to have a forum and to be heard are violated; the editorial judgement of the broadcastor is not involved with political advertising because, since the broadcastors already turn over their air time to some members of the public (the advertisers)

political advertising is merely providing air time for other citizens; the broadcasters are private censors; it is a violation of the First Amendment for the broadaster not to give time to some people when other citizens with opposing views receive time; there is no compelling reason why there should be governmental control if a system of access were established.

One of the key issues was to determine if broadcasting constituted state action. It id did, then the non-broadcasting cases in which courts had granted public access might apply to broadcasting. Chief Justic Burger ruled that broadcasting was not a public function, saying that the FCC is merely an "overseer" and that broadcasters are "free agents" (BEM/DNC, 116, 117). The broadcasters have primary responsibility, with the Commission having only review authority.

The court did not completely extinguish the hopes of people who favored access. At the end of his opinion Chief Justice Burger, noting that the FCC was taking another look at the Fairness Doctrine and access, said that Congress or the FCC that is both practicable and desirable" (BEM/DNC 1971, 170-204).

The reaction in the legal profession to the case, as reflected in law journals and reviews, was generally one of

disapproval. But most writers thought that the subject was still an open matter because of the diverse court opinions and the fact that the court indicated that some sort of access could be developed by Congress or the FCC.[8] (Interestingly, most legal commentators seemed to favor some form of access; however, most journalism writers were highly critical of the scheme.)

Most commentators thought that the court ignored too much evidence of government control of broadcasting, and that there is no doubt that broadcasting is state action. They believe that there is certainly more state action than in the many non-broadcasting cases where there is no government action at all except that the area is open to the public. The second factor the court ignored was the many non-broadcast cases (with private as well as public defendents) in which the courts ruled that where advertising once exists, a prohibition of controversial advertising is a First Amendment violation. Another precedent ignored in the decision was that non-commercial speech is more protected by the First Amendment than commercial speech. There are also many cases which could be precedents for governmental affirmative action for access for paid political advertising. The court skirted the matter of equal rights protection of the Constitution because the broadcaster may

be discriminatory in accepting some spot announcements (mainly commercial) and rejecting editorial spots. The court of appeals decision which was overturned noted three such cases.

Generally, the commentators were of the opinion that the decision confused the situation more than clarified it. Canby (1974) particularly was concerned about the status of public broadcasting in light of the court's decision. Since PBS and the Corporation for Public Broadcasting are heavily and directly involved with the government, is access mandatory for non-commercial, state supported broadcasting? If so, the only question remaining is a determination that the public stations are appropriate forums for access.[9]

Cornish (1974) said that there is a First Amendment internal conflict between the rights of the broadcasters and the public. In the Associated Press case the Court said that freedom of the press from government interference was no sanction for repression of rights by private interests. The Court in Red Lion indicated that the rights of the broadcasters are secondary to those of the public, and it attempted to provide more public debate and exposure to ideas. This attempt has "been stymied" by the BEM/DNC case.

The legal commentators who disapprove of access were

more or less pleased with the Court's action. The decision clarified the First Amendment relationships in broadcasting, they said. The Amendment is a limit on government, not an imposition of affirmative action to ensure freedom of speech (Loper 1974).

The next big blow to the advocates of access was the Supreme Court case of Miami Herald v. Tornillo. The decision must have been particularly disappointing to Jerome Barron, because he argued the case before the court. In no uncertain terms the unanimous court struck down the Florida law of right to reply in the press, a right which was extended only to political candidates whose personal character or official record was assailed in the press.

As in the BEM/DNC case Justice Douglas was the only member of the court who flatly stated that the First Amendment prohibits any interference of the press by the government. This includes the Fairness Doctrine as well as access. Parallel to the broadcasting case Chief Justic Burger said that the Florida law was an invasion of the First Amendment rights of the editor/publisher, whose judgement and responsibility are supreme. Also, as in BEM/DNC, a determination was made as to whether the newspaper industry constituted state action. Despite the

assistance of the government to the newspaper industry--certain exemptions from antitrust, tax breaks, special mail rates and limited protection from libel--these are devised only to enhance the press' function of providing information to the public. To the cases Barron presented--where the courts had approved public access to private facilities which were open to the public--the Court replied that in these cases the property involved still was private property despite the fact that the "public is generally invited to use it for designated purposes" (Lloyd v. Tanner, 2229) Justice Powell clarified these cases further and interpreted them very narrowly where the public aspect was concerned. Burger said that deciding what was to be in print and on the air is the editor's job. That editors "can and do abuse their power is beyond doubt, but that is not reason to deny the discretion Congress provided." The newspapers were given a free hand. As Justice Blackman said, "We have opted for a free press, not free debate" (Broadcasting 1974f, 56). Replying to the claim that such an interpretation could have a chilling effect on public debate, Justice Renquist remarked, "The Miami Herald can chill anyone if it wants to" (Broadcasting 1974f, 56).

Although the subject of the difference in handling of the broadcast industry compared with newspapers was brought

up, the court clearly decided to maintain the double standard. For the newspaper industry there will be no Fairness Doctrine, equal time or right of reply to attacks. As the Chief Justice wrote in a previous case about the difference between the two media, "A newspaper can be operated at the whim of the owners; a broadcast station cannot" (Office of Communication of the Church of Christ v. FCC 359 F 2nd 944 (D.C. Cir. (1966)). However, Justice White seemed to have some misgivings about this vote to support the newspaper. After noting the result of the Tornillo case and the Supreme Court's decisions in the major libel cases, he remarked that the people are "left at the mercy of the press" (Tornillo, 323).

It is no surprise that, in 1974, when the FCC finally published the findings of its two-year review of the Fairness Doctrine and the subject of access, the conclusions were similar to its statements in the previously mentioned cases which had been appealed to the Supreme Court (39 Code of Federal Regulations, 25372-26382 (1974)). The Commission strongly reaffirmed the Doctrine and just as strongly criticized the concept of access. The report generously quoted the favorable court decisions.

There were some key provisions of the report which

merit mentioning. Since each station has the full responsibility of the Fairness Doctrine, it must "encourage" presentation of opposing viewpoints. Time is to be given free to a group if it cannot pay for it. Editorial advertising is subject to the Fairness Doctrine, but institutional advertising is not. The Commission criticized the D.C. Court of Appeals for spreading the Banzhaf cancer to the Friends of the Earth case. In the future the FCC would apply the Fairness Doctrine to commercials only for those which obviously and meaningfully discuss a public issue.

The Commission specifially rejected the Federal Trade Commission's recommendation to provide access for spot announcements to rebut commercials which explicitly or implicity are controversial, which make claims which are in scientific dispute, or which are silent on the negative aspects of a product. The FCC said that the FTC should use its own powers to police advertising.

Getting to the heart of the access issue, the FCC acknowledged that the Supreme Court said in the BEM/DNC case that the Congress and the Commission "can experiment with new ideas," including access. However, the Commission said it could not conceive of any "scheme of government-dictated access which we consider both practicable or desirable."

The best system is the Fairness Doctrine, which leaves journalistic discretion in the hands of the broadcaster. However, stations may provide access as they see fit in order to meet their Fairness Doctrine responsibilities. The public does have a right of access--the right to hear ideas which are given access via spokespersons selected by the broadcasters, who are the "trustees of the public."

The whole situation seemed to have place the pro-access Court of Appeals in Washington, D.C., into an anti-access vice of the FCC and the Supreme Court.[10] Now that the FCC knew it had the backing of the Supreme Court, it seemed likely that the Commission would take a stronger and more decisive role in its administration of the Fairness Doctrine and particularly access.

And this is what appeared to happen. In mid-1975 the FCC proposed that broadcasters be insulated from citizen groups and their agreements with these groups (Variety 1975, 43). The Commission said it would reject these agreements when they "curtail a licensee's fundamental responsibility and discretion" (Broadcasting 1975c, 24). More specifically, in a proposed rulemaking, the FCC said that citizen agreements cannot curtail broadcaster responsibility to the

larger community. It is not good for a station to set a fixed amount of time for, or a specific program directed to, a particular segment of the community. Nor is it advisable for a station to broadcast a particular number of citizen-initiated or issue-oriented messages at stated periods of time. The broadcaster does not need to feel he has to make these types of agreements. The activity of the citizen groups has resulted in too many petitions to deny, bringing a large backload of cases for the Commission. However, the Commission encourages "dialogues with citizen groups" (Broadcasting 1975b, 30).

Meanwhile the Congress was buzzing with proposals and statements which concerned the press and access to it. Various members of Congress were pressing for more access of their own to counteract the easy access of the President (Broadcasting 1974a, 23). Senator McClellan proposed a Fairness Doctrine for newspapers, because the concentration of ownership of the news media had resulted in an absence of dissemination of diverse views. Other congressmen were agitating for free access to the media for politicians during elections (Broadcasting 1974b, 28). The networks countered with a proposal for greater TV access to Congress for live coverage (Broadcasting 1974c, 48). A House group of sixteen congressmen claimed that, as part of the Fairness

Doctrine responsibilities, broadcasters should run spots to counter the oil company institutional commercials (Broadcasting 1974d, 60-63). A bill was introduced to give equal time to an opposing spokesperson every time the President went on the air and discussed a controversial subject (Broadcasting 1974e, 7).

Individual opinions varied greatly among congressmen, academics and influential members of the executive branch, ranging from eliminating all restrictions on broadcasters to making them equal with the newspaper industry (Oettinger 1974; Moss 1975); eliminating the Fairness Doctrine and instituting access (Johnson and Westen 1971; Broadcasting 1971, 11); keeping the Fairness Doctrine and also creating access (Barron 1973); and keeping the Doctrine and eliminating access--the FCC position.

Meanwhile the Fairness Doctrine itself seemed to be in trouble if it were tested again in the existing Supreme Court. As Schenkkan (1974) pointed out, the composition of the Court had changed from that which provided the unanimous Red Lion decision. Only four members of that court were left. One Justice definitely was against the Fairness Doctrine; another had almost arrived at the same conclusion; two others were more included toward access and viewed the Fairness Doctreine as a poor solution; two others were

question marks, but could be leaning away from the Doctrine; and three continued to roar the virtues of Red Lion.

All the above circumstances plus the facts of continued citizen group action and the statement of the Supreme Court in BEM/DNC that it would not look unfavorably if Congress or the FCC came up with a reasonable, limited access scheme, seemed to indicate that the subject was still alive, although it suffered serious setbacks in 1973 and 1974. However, only the matter of access to the broadcast industry seemed to be alive. Tornillo appeared to have ended the attempt to obtain access to the print media.

5.3 CABLE TELEVISION: ACCESS HISTORY FROM 1976 TO THE PRESENT

5.3.1 INTRODUCTION

By the end of 1975 cable television (CTV) was seen both by friends and foes of access to the press as the proper place for public access. With its large, multichannel capacity, CTV can have the ability to provide for all standard TV broadcasting channels, local programming and many other services of one-and two-way communications which could revolutionize much of the mass and private informational and

communication process (Bagdikian 1971).

A rather surprising phenomenon is the approbation given to CTV access by some of the foes of broadcast access. After a thorough and balanced review of press access, and following his criticisms of it, Lange (1973, 91) concludes that cable access is good. "For all those who want the ability to speak with a fair chance to be heard by anyone who may be interested, cable television can truly prove to be the 'television of abundance'" Even the Chief Justice Burger, who led the Court's fight against access, expressed his approval for the FCC regulations of CTV (BEM/DNC, 93 S.Ct., 2100). And yet, many of the same, basic questions and issues which aroused so much controversy and objection regarding the subject of access to the mass media also apply to CTV.

The end of 1975 found the status of public access clarified by the courts: for newspapers--none; for broadcasting--only for candidates for federal office and victims of attack; for cable--a green light. The courts showed four different standards which are used for the various media categories of CTV, broadcasting, newspapers, and general non-mass media communication. An argument used to defeat access in one medium was used to promote it in another medium. Precedents in one form of communication

were not transferred to another. The definition of state or public action, ownership or interest widely varied from medium to medium. One court of appeals and some state supreme courts frequently seemed to be more pro-access than the Supreme Court.

The U.S. executive branch had its divisions. The FCC was consistently against broadcasting access, but the FTC was for it. (On a closely related subject the Justice Department was very concerned about the concentration of ownership of the media, but the FCC showed much less interest (Schenkkan 1974, 750).[11])

Congress, although having occasional cries for access, was mainly either for congressional access to counteract the easy availability of the media to the president or for obtaining more access to the media for its members during elections.

Meanwhile, in the 1970s the pressure for access was growing at the local level where citizen groups were making more and more demands on broadcasters and exacting many concessions, including provisions for access. The FCC was trying to discourage these groups and was encouraging the broadcasters to resist them.

During this time of agitation and confusion most people seemed to approve of the idea of access on CTV. It was to be

the major arena for conflict regarding access during the next period of access history.

5.3.2 CABLE TV ACCESS: LEGAL HISTORY

The period 1976 to the present is a rather curious one, in that access went in different directions. With access to broadcasting no longer an issue, the Fairness Doctrine came under strong attack, so strong that it seemed to be almost a dead letter as the proponents of deregulation held sway. Indeed, the FCC itself is now recommending the abolition of the Doctrine (Access 1984). As the backers of access turned more to cable TV, they suffered a major defeat at the hands of the Supreme Court which ruled against the FCC's requirements for access (Midwest Video v. FCC, 440 US 689 (1979)). They also had to fight off continuous attempts in Congress to either outlaw access or to severely cripple it (Access 1982i). Meanwhile, radio became deregulated by the FCC, with backing by the courts (Access 1983a).

Despite these problems, access began proliferating and booming all over the country as more and more cable systems began to offer access channels to their communities and the people started to produce programs (Harrison 1981). The cable industry itself was showing two faces: one lobbied in

Congress against access; but the other offered magnificant access provisions and facilities when trying to get franchises awarded to them or when attempting to have their franchises renewed by communities (Cablevision 1982d). However, occasionally, after receiving the lucrative awards, they dragged their feet or refused to fulfill some of the agreements, particularly if the provisions were not spelled out in detail in writing, or they tried to diminish the extent of access after they got the franchise and operated it for a while (Access 1983b; Letter to author from James Bond; Access 1984; Feinstein 1984).

In addition, a new medium was on the horizon which had the potential for providing additional, diverse voices in broadcasting--low power TV. Direct broadcast satellites, although further down the read as a practical reality for mass use, nonetheless was another method of potential competition for cable and broadcasting and a further possibility for public access in the future.

But, regardless of the setbacks for access, one thing is clear: the access movement is starting to accelerate and it may be very difficult for the Ruling Cartel and local power structures to contain it.

In the latest court cases regarding access the Supreme Court ceased emphasizing the relevance of "public fora" cases which were discussed previously. As we have seen, in the public forum situation citizens have a right of access for public speech and discussion to state-controlled places such as a street or park, in public libraries and schools, in the streets of a company-owned town, and even on private property if the owner opens his space for public entrance and use. If CTV could be interpreted as constituting "state action," it would be subject to regulations which place some limits on the operators' First and Fifth Amendment rights. Because the Supreme Court ruled that neither the print nor broadcast media constitute state action, they cannot qualify for being a public forum.

The Court made this determination despite the fact that there are limits on the freedom of broadcasters in the provisions of the Fairness Doctrine, equal time for candidates, and in the right of response to personal attacks. However, a district court ruled in 1980 that a university's public TV station was required to show the documentary Death of a Princess, a controversial program which the University of Houston station would not clear for broadcast in a city with powerful oil interests and financial connections with the oil producing Arab countries

(Harrison 1981, 648). However, the whole question of state action regarding PBS stations has not had a constitutional challenge yet.

The relationship of CTV to the public forum interpretations arose in the most important court case of this period--Midwest Video Corporation v. FCC (440 US 689 (1979)), commonly called Midwest Video II to distinguish it from a previous case of a similar name in 1976. We will discuss it in detail because of its great importance to the subject of public access. But first, it would be useful to review the previous unsuccessful challenges to the FCC's regulatory authority over CTV in order to understand the Supreme Court's radical departure from its previous decisions that Midwest Video II represents.

The first case was US v. Southwestern Cable Co (352 US 157 (1968)). This suit arose in response to the FCC's initial steps in limited regulation of cable television, then referred to as CATV--Community Antenna Television. When the subject of cable TV was first raised, the FCC refused to step in, because cable was not considered as being the broadcasting area where the FCC had its mandate. The Commission preferred for Congress to make a statement or to pass a law showing its desires on the subject. When Congress did not, and with pressure mounting from the

broadcasters to clip the wings of CTV before it became a true competitor, the FCC entered the vacuum, setting minimum standards requiring the franchisees to carry the local broadcasting stations on their channels (Stern 1981, 189, 194).

In 1968 Southwestern Cable company challenged this limited action by the Commission, claiming that not only did the FCC not have jurisdiction over cable, but that the regulations requiring the operators to carry the local broadcast signals constituted making operators a limited common carrier, something which was not allowed by the Communications Act of 1934. The Supreme Court ruled for the Commission, saying that the FCC rules were "reasonably ancillary" to its regulation of broadcasting.

Accordingly, in 1969 the Commission issued regulations (Schwartz 1982, 1014) for the cable industry, among which were requirements for the systems with more than 3,500 subscribers to have local origination facilities. In 1971 Midwest Video Company challenged these rules. The Eighth Circuit Court of Appeals agreed with the operators, but the Supreme Court reversed and ruled in favor of the FCC, saying that the Commission could "regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over

broadcasting" (US v. Midwest Video Corporation, 406 US 649 (1972), commonly known as Midwest Video I).

Consequently, the FCC issued more regulations (Schwartz 1982, 1015), this time increasing the number of local origination channels to one each for public, education, government and leased use. This would be applicable for systems in the top one-hundred cable markets. (However, the Commission's support was weakening. The Midwest Video I decision was 5-4, with Chief Justice Burger supporting the FCC, but with great doubts.) In 1976 the FCC modified these requirements, making them applicable for systems with over 3,500 subscribers and demanding a 24-channel capacity by June 1986, with the old systems being grandfathered until the franchises elapsed (59 FCC 2nd 294 (1976)).

The access requirements were made more flexible, in that if the channels were not active, the operator could use them (Harrison 1981; Schwartz 1982). Additionally, the franchisee could combine the channels into general access instead of having them dedicated for the above specified four uses. It was further required that the operator must provide equipment for access users at reasonable cost and that there would be no charge for the first five minutes of time, with subsequent time being at a "reasonable cost." The channels must be made available on a first-come,

first-served, non-discriminatory basis and the operator was not to have editorial control over the channels, although he could prescribe rules to prevent obscenity, indecency and lotteries. (The Washington, D.C., Court of Appeals stayed the provisions on indecency and obscenity upon challenge by the American Civil Liberties Union (American Civil Liberties Union v. FCC, No. 76-1695 (DCCA, 1977); Schwartz 1982, 1015).)

Midwest Video again challenged the FCC's authority and actions. Not surprsingly, the Eighth Circuit Court of Appeals once more agreed with the operator, in a wide-ranging opinion which has been highly criticized in law journals and reviews (Midwest Video v. FCC 571 F. 2nd (Eighth Cir., 1978)). The court ignored the previous Supreme Court decisions by saying that cable was outside the FCC's jurisdiction because CTV was not broadcasting. It also stated that the Commission's rules had placed an illegal common carrier requirement by forcing operators to have access channels but with no content control and by being forced to carry programs on a first-come, first-served, non-discriminatory basis. This deprived the operators of their First Amendment rights and gave the government control of content and access. The franchisees' Fifth Amendment rights were also violated because the government was taking

away the operators' property (channels) for public use without just compensation. The appellate court reached the conclusion that cable TV and newspapers were the same; therefore, the Tornillo case was applicable, making access unconstitutional. Finally, the court claimed that there was no state action involved; hence, the government could not intrude.

The FCC appealed. But despite the two previous favorable rulings by the Supreme Court, the Commission's chances were not so rosy as it might have seemed, The Midwest Video I decision was by a 5-4 vote, with doubts harbored by some of the majority. Also, two subsequent cases had whittled away at the Commission's authority and its regulations over CTV (Stern 1981; Nemelman 1982). On top of this, the winds of deregulation were blowing in the executive and legislative branches (Simon 1982b).

The Commission claimed that its access requirements helped to create diversity of opinions and voices to be heard, and they had increased the outlets for public expression as was upheld in Midwest Video I. Furthermore, the access provisions had replaced the Court-approved local origination requirements which were more of an economic burden on the operators than the access regulations. Additionally, the FCC ruled in 1978 that the operators did

not have to provide live access programming if tape facilities existed.

In 1979 the Supreme Court upheld the Eighth Circuit in the Midwest Video II decision in which it agreed that the FCC overstepped its congressional mandate. The 5-3 decision was written, ironically, by the same Justice Byron White who, in writing the Red Lion decision, championed the cause of the listener and viewer. The court claimed that broadcasting and CTV were the same, thus making its broadcast decisions applicable. White placed great emphasis on the Court's action with CBS in the BEM/DNC in which it upheld the network's right to reject the request for time to be made available for political discussion by the purchase of time, either in spot announcements or in full programs. In the BEM/DNC case the court stressed the need to preserve the journalistic editorial control of content by the network. This is exactly what the FCC deprived the cable operators from exercising, White claimed.

Another significant factor was the matter of common carrier status, the court saying that the access requirements made the operators common carriers in contravention of paragraph 3(h) of the Communications Act. Justice White rejected bruskly the statement by Chief Justice Burger in the CBS case that CTV, with its diversity,

would be the appropriate medium for public access and that it could be that a limited form of it could be worked out by the FCC or Congress.

White relied heavily on his perception of congressional intent during the formation of the Communications Act in 1934 which indicated that the public was not to be given direct access to the airwaves. Finally, the Court concluded that the FCC regulations were a prohibitive economic burden on the operator. The Court reached no constitutional considerations nor discussed the problems of monopoly.

The Midwest Video II decision has been greatly criticized by legal scholars writing in law reviews and journals (Harrison 1981; Schwartz 1982; Nemelman 1982; Stern 1981; Kreiss 1981; Christensen 1980; Miller and Beals 1981). They said that the court reversed itself from the two previous cable cases; it made strained or spurious interpretations of previous cases to justify itself; and it ignored provisions of previous decisions which would have been favorable to the FCC.

The critics had a field day concerning the following facets of the decision:

1. Common carrier. The Court had approved limited common carrier provisions in the two previous cases in which the operators were required to carry certain specific

broadcast signals and could not control content. The public access channels would merely be additional channels of the same type. The Court mentioned two previous cases involving the definition of common carrier status and the range of acceptability of allowing businesses to be used as such. But the Court ignored or misread the provisions of the cases which clearly would permit the cable industry to fall within the scope of limited common carrier. There are limited common carrier requirements of broadcasting which the Court has approved: the equal time for candidates and the provisions for answering personal attacks. The broadcaster has no content control here. But even more basic is the matter of the wording of the 1934 Act itself. As the writers and even Justice Stevens in his dissent point out, section 3(h) is only definitional in nature; hence, it is only administrative in function, not a prohibition.

2. Economic burden. The Court had previously approved the FCC's local origination provisions which were considerably more expensive to the operators than the access requirements. The operators, themselves, acknowledged this. Furthermore, the Commission had gone to great lengths to lessen the financial impact

on the operators and to provide them with great flexibility in the management of the channels, even permitting them to carry commercial material on access channels if the latter were not fully used.

3. Cable is like broadcasting. CTV has great capacity compared with only a single channel for broadcasting; therefore, there is room for access channels without harming the operator. Because CTV derives its revenue mainly from subscription fees, not advertising, the additional time for access does not result in either loss of revenue or viewership. The Court's objection in BEM/DNC that time cannot be made available for all viewpoints is not applicable to cable because of the latter's multichannel capacity. Finally, the Court ignored its own previous decisions where it stated that CTV was, indeed, different from broadcasting. Justice Stevens also mentioned this. The critics' conclusions were that the cable operators are not broadcasters, but merely mainly retransmitters of broadcast material, thereby exempting them from the common carrier prohibitions of the 1934 ACT which only mentions broadcasters.

4. FCC overstepped its authority. The Court itself had approved local origination requirements which were

more burdensome to the operator than the access provisions. The Court also had approved mandatory channel use for local broadcast signals. The access channels would be more of the same. Finally, the Court ignored the previous HBO decision which stated that the FCC should be given latitude in the regulation of new technology (Home Box Office, Inc. v. FCC, 567 F. 2nd 9 (1977)).

5. State action. In the BEM/DNC case Burger stated that broadcasting was not state action despite all the activities of the FCC which indicate otherwise. CTV also was found not to be state action despite the fact that the state awards the franchise to the operator, and the latter uses public streets and rights of way to install his cable system. Because the state may either set up a monopoly situation or have competitive systems, it determines who will be "heard," i.e., the operator. It also determines the length of the franchise. The Court deemed irrelevant the cases where it had ruled that when the owners of a business opens his property for use by the general public, his rights become circumscribed by those who use it. It could be argued not only that the broadcaster makes his air time available for commercial speech, but that

> he opens his property to the public by transmitting his messages on the open, publicly-owned airwaves. The same could be said for the cable operators. Indeed, he places his cable into the homes of the consumers (and only after their approval), constituting an intrusion rather than just an opening up of facilities to the public.

5.3.3 CABLE TV ACCESS: POLITICAL HISTORY IN CONGRESS AND THE STATES

The court system was not the only place in which access was being attacked. In Congress there have been almost continuous assaults by a few people, abetted by the lobby for the cable industry--the National Cable Television Association (NCTA) (Brown, L., 1982; Access 1981z). Some of them came during the unsuccessful attempt to re-write the Communications Act of 1934. Others were in the form of bills introduced by members of Congress or as riders to other bills.

The pressure has been heavy, and different angles have been tried. One was to prevent the local communities from requiring access channels of their franchisees; another was

to cripple access by requiring that only a small percentage of channels be set aside for the public; and a third was to permit governmental and educational access, but to provide for public access only as the people wish to purchase time on a local origination channel (Access 1981e).

The lobbying has been so intense and the deception so great that Ralph Nader labelled the situation as an attempt at a "coup," with "the most outrageous procedural irregularities Congress has ever seen," because some of these bills have been passed in committee without the usual, required hearings (Access 1981i; Access 1982d).

Meanwhile, the FCC Chairman, a Reagan appointee, has been energetically lobbying for complete deregulation of both broadcasting as well as cable television. This includes eliminating public access, the Fairness Doctrine, equal time for candidates, and the right of reply to a personal attack (Simon 1982b).

So far, citizen groups and lobbies for local governments have been monitoring these efforts and have been successful in warding off the attacks on access (Access 1981t). However, Congress has yet to act on the Goldwater bill which, as originally written, would have severely limited the availability of public access channels, effectively crippling a full, free development of access.

(An amendment to the bill by a pro-access senator inserted adequate access provisions.) The bill also would provide for automatic franchise renewal if the operator had not defaulted on the franchise agreement (Access 1982d; Broadcasting 1982h).

Meanwhile, a vice president and lawyer for the NCTA is confident that all public access will soon be held illegal by the courts even if no action is taken by Congress (Access 1981j; Stoney 1981). He points to the Midwest Video II case as well as the antitrust case brought against the city of Boulder, Colorado (Community Communications Co. v. City of Boulder, 102 S. Ct. 835 (1982)). This involved a franchisee which had not wired the whole city. The city government, wanting to study its options before permitting the operator to wire the rest of town, ordered the company to desist. The Supreme Court ruled that the city was not exempt from antitrust laws and therefore could not set up a monopoly unless specifically authorized by the state. (Again, this Court action was severely criticized, particularly because the city had, in fact, been so authorized by the state government (Driker and Sharer 1982).)

The ramifications of this case could be great for the future of local control of cable franchise selection and for the levying of requirements on the operators (Sherfman and

Rose 1982). With the addition of another suit (Access 1982a) in which the Court let stand an appellate court decision backing the FCC in its dropping of previous rules requiring the operators to carry certain distant signals and in eliminating syndicated exclusivity rules, the Supreme Court has almost deregulated CTV by its actions alone. (The FCC requirements to carry local stations and the franchise fee restrictions remain in effect (View 1982c).) This assumes of course that subsequent cases are decided in a way which is consistant with the past decisions--a rather problematical assumption. Basically, there is a vacuum and great uncertainty regarding the legal status and regulation of cable TV (Mueller, M., 1982 Access 1981e).

The state governments have not been quick to step into this void. As of 1981 only thirteen states had cable-regulating agencies, and of these only three (Connecticut, Minnesota and Rhode Island) have access requirements (Schwartz 1982; Harrison 1981). California has a voluntary access provision, but it contains incentives for the operators to provide such channels. Rhode Island is the only state to levy equipment requirements.

These states have tried in various ways to develop guidelines for setting up operating and content rules. Some of these either have been subsequently changed or have not

been implemented, particularly those regulations regarding obscenity or indecency. Each state has also grappled with the problem of trying to insulate the operators from program content liability such as defamation and obscenity, but without making them common carriers.

Law journal authors and pro-access writers point out the advisability to have some federal requirements, however minimal, to prevent certain abuses, particularly in the awarding of franchises (Buckley, T., 1973; Bell 1983, Wittek 1973; Access 1975a; Schwartz 1982; Harrison 1981; Stier 1982; New York Times 1971). Some abuses which have occurred are as follows:

1. City council members can be bought off by the franchisee.
2. The operator can place key members of the local city government or power structure on his board of directors and can permit them to have small stock positions in the companies.
3. The city, not being interested in access, does not require it.
4. The city, not being knowledgeable, can be talked into a minimal or no access effort on the part of the franchisee.
5. The city might make a contract, not an ordinance,

thereby making it impossible to change requirements if later it becomes desirable to do so.

6. The city might not get promises in writing from the franchisee.
7. The local unregulated rates for local origination access could be placed too high by the operator so that there would be no demand for such a channel.
8. Charges for access time and access equipment can be required which stifle development of access or result in only certain, more affluent members of the citizenry being able to use the system.

There also can be adverse local requirements which can be unfair and harmful to the operator. For instance, the city might levy a franchise fee which is inappropriately high in order to subsidize other activities of city government. Although the FCC regulations addressing this are still valid, they are rarely enforced.

Even if cities are conscientious in requiring a good access package, their ability to do so in the future might become very difficult. One writer expressed the concern that, with concentration of ownership increasing so rapidly, it might soon be that the cities' powers will be dwarfed by those of a handful or less of oligopolistic giants which own not only most of the programming services, but also most of

the franchises and the most viewers (Schwartz 1982, 1029). The cities could be left in a take-it-or-leave-it situation if the giants cooperated with each other in a cartel style of operation. Indeed, there are indications that this is in fact starting to happen (Dobbs 1983).

It also is possible that a coalition of cable operators, their lobbying organization and their affiliated business organizations, particularly bankers, can overwhelm the power of local access activists and their supporters in the state legislatures. This already has happened in California (Schwartz 1982; Harrison 1981)).

5.3.4 THE POTENTIAL OF ACCESS TO CABLE TV

5.3.4.1 General Trend in the 1980s

The courts and Congress are facing a possible access fait accompli by the people, leaving themselves in a position of eliciting a great public outcry if any governmental institution were to effectively cripple public access to cable. The reason is that cable is proliferating and access is blooming (Sima 1981; Jacobs 1981; Jacobs 1982; Taylor 1982). The more than 4,000 cable systems in 1982 reached 26 million homes, with 250,000 new subscribers being

added each month (Greenky 1982). The Nielsen company estimated in 1982 that 30% of TV households were on the cable; but at the end of 1983 it was up to 40% (Multichannel News 1983). (In 1977, 30% audience penetration was not predicted until 1985.) Furthermore, network prime time viewing is down 12% to 15%, and the premium channel Home Box Office (HBO) frequently carries the top-rated show (Berkman 1982). (Ironically, the share of audience of HBO has been dropping as other, non-network cable channels are being watched by more and more people (Multichannel News 1984a).) The latest figures indicate a continuous erosion of network hegemony, with the nets' viewing down to 81% from 88% during the previous year (TV Guide 1982). The audience share also is steadily dropping, down to 59.1% in March 1984 from 60.7% a year earlier (Multichannel News 1984b). One analyst estimates that this figure will drop to 75% in the early 1990s, but another person predicts that it will be only 59% by 1990 (Berkman 1982).

No one knows exactly how many access channels are available and, of those, how many are being used and, if so, to what extent. (Even the cable operators do not know the extent of access on their franchises (Personal conversation with Austin, Texas, Cablevision personnel).) There is great variation of the estimates. The latest FCC information is

from 1977 which stated that of the 8,668 cities with franchises, 885 had access channels of some kind (Harrison 1981). There was no information as to the use of these channels. That estimate is much higher than those from other sources. TV Digest reported in 1978 that of 3,997 systems 205 had access. A survey for the years 1979 and 1980 showed that, of the 4,075 systems which responded, 1,167 had access channels. The TV Factbook data from 1979 through 1983 indicated the access growth as follows:

1. October 1979: 4,180 systems providing 283 public access channels.
2. June 1981: 485 channels.
3. 1982: 1,560 cable systems carrying 752 public access channels (with 730 and 535 channels set aside for educational and governmental access, respectively).

The National Federation of Local Cable Programmers (NFLCP) Video Register for 1983 lists "more than 700" facilities where operators provide access channels.[12]

The proliferation of access continues. To win the franchise bidding wars or where a renegotiation takes place upon the expiration of a franchise, one of the prime enticements which the operators present to the communities (and which the communities demand) is an attractive public

access package (Cablevision 1982; Feinstein 1984, Access 1982f).

Community groups supporting access are forming all over the country (Sima 1981). Other groups are also actively promoting their particular special interests on the access channels (Access 1981k; Access 1981q; Zimmerman 1984). Networks have been started and there have been attempts to establish more of them, ranging from individuals promoting their own programs to organizations being started to set up networks.[13] Some use simple bicycling methods, while others are trying to employ satellites (Greenky 1982). It is an impressive fact that right now it is possible for any citizen to reach a mass, nationwide audience via public access television. It is no wonder that the courts, Congress and local governments are trying to co-opt, cripple or eliminate access.[14]

5.3.4.2 A PUBLIC ACCESS SUCCESS: ALTERNATIVE VIEWS

A good example of the kind of programming the local and national power structures would not want to see proliferated is the weekly public affairs program in Austin, Texas, called Alternative Views which has successfully provided an alternative to the regular media for over five years. There

have been over 200 one-hour programs cablecast on the access channel on subjects and sources which are ignored or distorted on the Establishment media. Of the Sonoma State University's "Project Censored" lists of the most censored and inadequately covered stories, which it has compiled each year since 1976, Alternative Views has reported on all of them.

The programs are in a flexible format to provide the most effective presentation of the subject or subjects. Most shows contain fifteen to twenty minutes of news gathered from a broad range of sources including left wing and right wing publications, the business press, special interest group newsletters and specialized journals. This material is contrasted with the treatment of subjects in the traditional media. The central focus of the program may be on a single subject or on a multiplicity of them.

The types of subjects presented vary. Some programs contain interviews or presentations by well-known people such as anti-nuclear activist Helen Caldicott; former U.S. Attorney General Ramsey Clark; peace activist Daniel Ellsberg; Hollywood film director Edward Dmytryk; civil rights lawyer William Kunstler; American Indian activist Russell Means; former CIA official John Stockwell; Nobel Prize winning Biologist George Wald; black power advocate

Stokely Carmichael; and Dr. Benjamin Spock.

Other guests are not famous but have vital information to relate, such as former political prisoners from Chile, Iran and Argentina who were arrested and tortured; a man who was a mile from the hypocenter of the Nagasaki explosion; a man who, while an exchange student in Iran, was hired by NBC to be liaison between the network and the students holding the hostages in the American embassy; people who talked with survivors of massacres in Guatemala; a reporter who spent three weeks with the guerrillas in El Salvador; a Chicano who relates his brutal experiences in a Texas prison; the former Minister of Mining in the Allende government in Chile; and the man who made the definitive, award-winning film on the CIA.

Many documentaries are presented, some of which have made their American TV debut on Alternative Views because the Establishment media either will not air them or will not present them in uncensored form. Occasionally documentaries are about local issues. Some material is breathtakingly--even brutally--real. Some of the footage is almost too disturbing, but none is censored. An example is the videotape of the horrible consequences to the civilian population of the war in Lebanon, particularly the scenes of the massacres by the Phalangists in the two Palestinian

camps.

Another unique aspect of Alternative Views is that it provides a public forum for individuals and groups which otherwise do not have direct access to a media audience. Over 100 local organizations or local representatives of national groups have been provided an opportunity to speak out. Many third party candidates have been provided a platform to present their views.

The program (repeated weekly) reaches an estimated weekly audience of from 10,000 to 20,000, based on a combination of factors: a study commissioned by the cable company in 1979 and a survey in 1983 indicating that 7% of the audience is watching access; the system has 163,000 home units with cable; the greatly increased programming on the access channel the past 18 months has attracted more viewers; and the continuous and increasing response to Alternative Views itself.

The response to the program has been almost uniformly positive. From the feedback the program's participants receive from viewers, such as from phone calls, letters, people stopping them on the streets, etc., the program is watched by people of all ages, all races and all income and educational levels. Interestingly, viewers who disagree with the material presented nonetheless watch the program

because they get information and perspectives they cannot receive elsewhere. An exception is William F. Buckley (1983a and 1983b), who saw an Alternative Views show in Austin and wrote a column on it, stating that the program was an example of the "moral rot" in the U.S..

When Alternative Views was started, the ACTV staff had fears of censorship from the cable company because it previously had prevented the showing of anti-nuclear material and had stated in writing that it would allow only "suitable" programs about local subjects which were not "disturbing" to the viewers. Yet, although each tape had to be reviewed by the company prior to being cablecast, there were no problems. Later, after the access programming quantity had become so large as to require an inordinate amount of time for company personnel to look at each program, the company permitted ACTV to perform the preview function.

However, this changed when some high company officials from corporate headquarters saw a program to which they objected. Ironically, it was an Alternative Views show about public access and how the citizens could become involved in making programming and in the franchising process. The tape was kept by the company and the preview of tapes by company personnel was resumed. The company

became very hard-nosed about programs, not permitting any show to be repeated if there was as much as one complaint about it when it was first cablecast. One Alternative Views program about the CIA was the victim of this criterion.

Next, no material which fell under the Fair Use Doctrine of the copyright law could be used. Thus, an Alternative Views program could not be cablecast which showed clips of what the TV networks had said about the situation about the Russian troops in Cuba in comparison with what was being said by alternative sources, particularly our guest John Stockwell, the former high CIA official. It was a study of how the networks, the government and the CIA handle an event (or in this case a non-event), pointing out the complexities of the situation and the inaccuracies in the handling of it by the networks. Another program was censored by ther company, using the same criterion. This show was an interview with Nobel Prize winning scientist George Wald in which some commercials by chemical companies were played and Wald commented on the truthfulness of the commercials and on the consequences of chemicals in the environment.

The excuse which company personnel gave for such heavy-handed treatment was that, with the franchise coming up for renegotiation, it did not want trouble coming from

viewers who were upset by such "unimportant things as access programming." But the company changed its approach as negotiations neared. Not wanting to appear to be a censor in the eyes of the city government, which would make the decision on the franchise, the company again relinquished control over previewing of programs. There have been no censorship problems since that time.

Alternative Views has gained considerable attention, considering that it is "only" a public access program. Articles about it have appeared in all local newspapers (Collum 1978, Hylton 1983) except for the main one--the monopoly paper Austin-American Statesman--which is hostile to public access (Marriotti 1982). The Progressive magazine (Davis, R., 1982) had a story about Alternative Views, Access newspaper had three small articles on it, and USA Today (Brown, Ben, 1983) included the program in a story about access in the U.S.. Recently, representatives from TV Guide and Community Television Review expressed interest in presenting information about Alternative Views in their publications.

The programs have been seen over other access systems, in New York, Kansas, Montana, Illinois, Pennsylvania, Wisconsin and Michigan. They have been shown to three conventions of the National Federation of Local Cable

Programmers (NFLCP), a national labor convention and one is presently being bicycled around the country on the cable company's local origination channels. Certain programs have been sold to three colleges. People from Germany, Sweden and Holland have expressed interest in showing Alternative Views in their countries and tapes have in fact been sent to some people in Germany. An internationally known Syrian filmmaker expressed a desire to distribute the programs in the Arab world. Most promising is that the new Channel Four in England has indicated it wants to buy some shows and is planning to send a crew to Austin to do a documentary about access and Alternative Views. Alternative Views recently started being shown in San Antonio, Dallas, Pittsburgh and Champaign-Urbana, Illinois. Additionally, there are plans to begin sending tapes to Atlanta, Georgia, St. Louis, Kansas City, Fayetteville, Arkansas, and Fort Worth, Texas. These are the first steps in the effort to establish a nationwide network.

Funding is a problem in keeping the program alive. The purchase of tapes is the main expenditure. Some assistance was received for many months from the University of Texas in the form of free tapes in exchange for the completed programs being placed in a university library for use by faculty and students. However, with a change of university

policy, tapes became unavailable and it was necessary to cannibalize tapes and record over programs in order to continue operation.

The program has received very modest contributions from individuals and small foundations and small amounts of money from local fund raisers. A network could easily be set up to cablecast Altenative Views around the country to an audience of millions if sufficient funds were available; but there have been only negative responses from the larger foundations to which applications have been made.

The main expense in making the program is time. The producer, who also is editor and on-camera newsperson and interviewer, spends between 40 and 60 hours a week on the each program, depending on the complexity of it. The show is usually taped in a small studio at the University of Texas campus, using only a single camera. Occasionally programs are taped with three cameras and a switcher at the cable company studios which are shared with Austin Community Television (ACTV). When necessary, equipment is checked out (for free) from ACTV to use in shooting events. The program is edited on ACTV equipment--again, without charge.

The significant lessons to be learned from the experience of Alternative Views are as follows:

1. It is easy to make a news program using alternative

sources.

2. People hunger for information of this type and appreciate people who present it to them.

3. The audience can be attracted without slick productions which are made with the highest quality video equipment.

4. The attention span of the audience, even younger people, is not short. The viewers will remain attentive to a complex subject for an hour if the material is presented in an interesting way by articulate people, even if, visually, it is only "talking heads."

5. The feedback from people regarding Alternative Views indicates that the information presented has had two very significant effects: it changes people's minds about world events and it diminishes a sense of isolation which people seem to have when they hold progressive, non-Establishment views but never, or rarely, see them on TV or read them in the print media.

6. Perhaps most importantly, public access TV is a mass medium which is available NOW for progressive people to reach millions of U.S. citizens with their messages. Through networking, particularly by sending tapes to many cities, mass dissemination of information and opinions can be effected at minimal cost. For instance, famous Atheist

Madalyn Murray O'Hair sends her program to approximately 30 cities nationwide.

The public access operation and community participation in Austin, Texas, seem to be, if not the best in the country, at least is among the leaders. But Austin is a progressive city with a very politically active citizenry. Whether the success of a program like Alternative Views could be achieved in other cities, one can only speculate. Such programming certainly could elicit negative reactions in other parts of Texas which are very conservative and where fundamentalist religion permeates the culture, and hostility would be aroused in a city such as Miami, Florida, where there is a concentration of right wing emigres from overthrown, repressive regimes such as Batista's Cuba and Somoza's Nicaragua.

But, with the accent on reality, the program is automatically provocative, disturbing, and sometimes even upsetting. Yet, as Texas Congressman from San Antonio Henry Gonzalez said, after being interviewed, "Harry Truman used to say that people accused him of 'givin' em' hell' when he was only telling the truth. That is what you are doing on Alternative Views."

Perhaps these are the basic reasons for the program's success. The fact that there have been so many requests to

show Alternative Views in other parts of the country indicates that there is considerable, widespread interest in this type of programming.

5.4 PUBLIC ACCESS: A POWER AND RULING CLASS ANALYSIS

The previous review of the court cases regarding access shows the lengths to which the Supreme Court and some of the lower courts will go in applying the law selectively and in distorting it when they wish to justify an opinion or to accomplish a particular goal. Some writers in law publications impugn the intelligence of the justices and judges, while others accuse the courts of "insufficient analysis" or "misanalysis."

But the matter becomes clear if viewed from the perspective of power relationships and the maintenance of ruling class hegemony. Then we can see a consistency throughout the legislative and judicial history of the mass media, particularly since the commencement of radio broadcasting.

In the very early days of radio American Telephone and Telegraph had the best, most powerful stations (Townsend

1981).[15] Although company personnel controlled content and exercized censorship, they first experimented with access to their airwaves (for a fee) on a first-come, first-served basis--like using a phone booth, AT&T said. Time was made available free for charitable, political and religious groups. When the plan did not elicit much response, the company turned to advertising and networking to make it economically viable (Barnouw 1975, 43, 44). Later, when AT&T withdrew from broadcasting and sold its facilities in 1926, the common carrier nature of broadcasting came to an end and direct access to the airwaves by other than the owners and their representatives ceased. This was affirmed in 1925 by the National Radio Conference when the public interest was equated to the "right to receive," with the right to transmit being placed only with those who owned and operated a transmitter.

But the champions of access (at least for their own groups) fought this interpretation. For a while, there were promising expectations. The original draft of the 1927 Radio Act had a common carrier section in it with the provision that any radio station could be "used for hire or for political candidates or for discussing public questions" (Nemelman 1982, 169).

There was a great outcry from the broadcasters and

Congressmen. They said that "radical" thinkers and "Bolshevists" would be given access to the airways to "fill the air with their efforts to poison the minds of those without formed opinions" (Nemelman 1982, 170). Broadcasters feared that too much profitable air time would be preempted by public discussions of significant issues. As a result, the equal time provisions with no censorship for candidates for federal office became law, and the common carrier requirements were dropped.

But the struggle continued. Many bills to establish public access were introduced in Congress in the 1920s and 1930s. One passed the House in 1933, but President Hoover refused to sign it. Even the American Bar Association criticized the 1927 Radio Act because it did not contain a requirement for the stations to be operated as "public utilities."

When the 1934 Communications Act was being debated, the struggle heated up. Non-profit, labor and educational groups lobbied hard, requesting 25% of available radio channels, because they had been frozen out from the airways. The proposals were all denied, and the equal time feature of the 1927 Act was carried over into the new act. The groups continued to push for access up to World War II, never with any success.

But the law was not the only way of trying to prevent dissident views from reaching a mass audience via radio. When the populist priest Father Coughlin developed an ad hoc network of his own to criticize the big banks, big business and big government (later maligning the Jews and praising Fascists), the National Association of Broadcasters--with urging from the federal government--adopted a rule against the sale of time for discussion of controversial issues, including labor news. The Chairman of the FCC publicly endorsed this action. After originally having a nationwide audience of millions, the Coughlin network collapsed.

In an early radio case the Washington, D.C., Circuit Court approved the lifting of a license in 1932, warning of the danger of people using the ether to "inspire political distrust and civic discord" (Emory 1971, 49). Although the language of the courts has become more subtle over the years, there still exists the same paternalistic, authoritarian attitude and the continuously careful eye to maintain the existing power system intact. In the Red Lion case, which is pointed to as the high-water mark for protecting "an uninhibited marketplace of ideas in which truth will ultimately prevail" (Associated Press v. US, 326 US 1 (1945)), the key sentence in Justice White's decision is "It is the right of the public to receive suitable

(emphasis mine) access to social, political, esthetic, moral and other ideas and experiences which is crucial here" (Red Lion Broadcasting Co., Inc. v. FCC, 395 US 367 (1969), 390). Once again we see only the right to receive, not to speak. Furthermore, that information must be "suitable." Suitable as determined by whom? By the CTV operator, newspaper publisher and the broadcaster through their editorial judgements.

This fear of the people expressing and hearing ideas which the ruling class deems destructive to its position of hegemony finds further expression in the other cases discussed in this chapter. Chief Justice Burger stated in BEM/DNC (1973, 124, 125) that Congress wanted to give the broadcaster "broad journalistic discretion." He said that if access were allowed, the idea of public interest would be subject to "private whim" and that broadcasters would have to accept editorials and political advertising regarding "trivial" or "insignificant" matters from someone whose only qualification is either "abundant funds" or a "point of view." Nemelman (1982) observed that this is the same opinion as was expressed in the Congress in 1927 regarding the desire to exlude deviant views from the airways, but saying it in a more subtle, acceptable, modern manner.

In the Midwest Video II case the appellate court stated

the position most clearly when it said that whatever would be communicated over an access channel would be of "no informational value" and only furthered the interest of the particular access user. There was no public benefit in providing time to anyone who "wanted to be seen on TV" (Harrison 1981, 600).

In writing the Supreme Court's opinion in the case, Justice White bruskly brushed aside Chief Justice Burger's statement in the earlier BEM/DNC case that some form of limited access might be devised, particularly in cable TV (Nemelman 1982, 185). White lauded Red Lion (which he wrote) because it gave the licensee the power to "exercise his best judgement" to determine the subjects, shades of opinion to be presented and the spokesmen" (Midwest Video v. FCC, 440 US 689 (1979), 705). And he was pleased to say that the cable operators "now share with broadcasters a significant amount of editorial discretion regarding what their programming will include" (Midwest Video II, 707).

In the Red Lion, BEM/DNC, Tornillo and Midwest Video II cases we see the same attitudes expressed. Content control of the mass media must remain in the hands of the trusted ruling class institutions. The cable case said that the operators may have local origination channels as mandated by the FCC (and approved by Midwest Video I), the local

broadcasters will have mandatory carriage of their signals on cable TV (as approved by Southwestern Cable), but the public cannot have its own channel to communicate directly to the populace.

Chief Justice Burger stated the crux of the issue succiently in BEM/DNC (130) when he said that "the question here is . . . who shall determine what issues are to be discussed, by whom and when." Thus, these cases (and the congressional activity which preceded them) support the maintenance of a system whereby the affluent, the capitalists and the powerful have access to the media, but the non-powerful, the non-traditional, and the non-affluent do not.

5.5 CONCLUSION

The threat which public access potentially presents is great when seen through the eyes of members of the Ruling Cartel, particularly from the point of view of the Trilateralists. Their opinion is that the three main sources of societal destablization and undermining of Cartel control are the uncooperative, disruptive press, the "value

oriented" professors, and a populace which is actively involved in politics and is demanding a fair share of the fruits of the system (Crozier, Huntington and Watanuki 1975). Public access on cable television at the level of thousands of cities has the potential to bring all three of these destabilizing sources to focus in one medium, causing people to become more politically active, permitting them to communicate freely and directly with fellow citizens, and providing a forum for, not must "value oriented" professors, but for all people and all values. With the possibilities existing for nationwide networking of cable programs--even international networking--the danger to the ruling class control could conceivably be great.

Such a threat, when recognized by the Cartel, cannot go unchallenged. If the rulers do not continue to attack access overtly, or if the overt attacks fail, they probably will do so covertly with agencies such as the FBI, CIA, IRS, INS and BATF as well as various police agencies at all levels of government.

It probably will be an attack from various levels of authority and using many political and economic weapons. Considering the repressive governmental response to the alternative press and on dissidence in general in the 1960s and early 1970s (Columbia Journalism Review 1983b; Baybak

1979a; Mackenzie 1981; Wolfe 1973), it may now respond in kind or with even greater energy, because access producers will be reaching, not just considerably larger audiences, but mass audiences composed of people of all economic and social strata. And what is ironic is that it will be occurring over channels which are capitalist owned and government sanctioned.

But this is only a potential at this time. Access must be allowed to develop and people must use it on a massive scale and in a progressive way before it can start to become a significant alternative and serious challenge to the Establishment media.