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High-Profile Trials: Can Government Sell the “Right” to Broadcast the Proceedings?

David W. Burcham*

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I. INTRODUCTION

Faced with rapidly mounting costs caused by the criminal prosecution of O.J. Simpson, the Los Angeles County Board of Supervisors proposed in February 1995 that broadcast media be charged for access to the live electronic feed from the courtroom.¹ Legislation introduced in the state legislature the same month would have authorized city and county governments to award the right to televise “‘high profile’ cases” to the highest bidder.² While neither proposed legislation was enacted, the increased willingness of state

¹ Initially, the supervisors considered authorizing the county itself to install and operate the equipment necessary for televising trials, and then selling access to the video feed. A special task force determined that this would be too expensive. Report of the County of Los Angeles Task Force on Broadcasting of Court Proceedings at 3. Subsequently, a non-unanimous board requested that the state pass legislation which would allow judges to require any media agency which wishes to broadcast a trial to reimburse the county for costs which increase as a result of the broadcast. *County Supervisors Ask Legislature to Charge Media for Simpson Trial*, ASSOCIATED PRESS, March 21, 1995.

² California Assembly Bill No. 1733, California 1995-96 Regular Session (amended May 16, 1995), sponsored by Assemblywoman Paula Boland (R-Grenada Hills), would have allowed a city or county to contract with the highest bidder for the “right to provide a pool camera for the purpose of distributing televised images of the proceedings of a municipal or superior court.” As introduced, the bill’s provisions would have applied to any trial whose projected cost was more than \$500,000, but the bill was later amended to include any “high profile” trial, although it did not define this term. *Id.* The bill died in the Assembly Judiciary Committee on a 10-3 vote following substantial lobbying efforts by the media. Tom Dresslar, *Bill to Force TV to Pay for Covering Trials Is Killed*, L.A. DAILY J., May 25, 1995, at 3; *Bill on TV Rights for Trials Rejected*, FRESNO BEE, May 25, 1995, (Metro), at B4.

and local governments to allow television cameras in the courtroom,³ the high costs associated with the prosecution of high-profile criminal cases,⁴ and the public's apparent infatuation with such cases,⁵ suggest that the issue will resurface in California or elsewhere.

These "fees-for-feed" proposals to charge the media for the right to broadcast high-profile trials embrace the idea that the government, as owner of the physical facilities required to conduct a trial, as well as the employer of the judge and other court personnel, should be able to share in the revenue generated by the broadcast of the trial.⁶ Such

³ Currently every state but Indiana, Mississippi and South Dakota permits broadcasting, although some only on an experimental basis. Christo Lassiter, *Put the Lens Cap Back on Cameras in the Courtroom: A Fair Trial is at Stake*, 67 N.Y. ST. B. A. J. 6 (1995). The federal courts do not. FED. R. CRIM. P. 53.

⁴ As of September 31, 1995, Los Angeles County had spent almost \$9 million on the Simpson trial according to the Los Angeles County auditor-comptroller. *Developments in the O.J. Simpson Trial*, ASSOCIATED PRESS, July 24, 1995; *Southland: Briefly Simpson Trial Cost County \$9 Million*, L.A. DAILY NEWS, October 27, 1995, at N4. Other "high profile" trials conducted in Los Angeles County have cost the taxpayers considerable sums: Charles Manson (\$768,838), Robert Kennedy assassin Sirhan Sirhan (\$592,806), the "Night Stalker" (\$1,811,260), the "Hillside Strangler" (\$1,536,830) and the McMartin Preschool molestation trial (\$15 million). Henry Weinstein and Andrea Ford, *2nd State Scientist Backs DNA Results*, L.A. TIMES, May 24, 1995, at B1.

⁵ Media and public frenzy surrounding high profile trials seem to be the rule rather than the exception. The trial of Bruno Hauptman, who was convicted of kidnapping and murdering the Lindbergh baby, was subject to such disruption and sensationalism that it prompted the House of Delegates of the ABA to enact Canon 35 which prohibited broadcasting or taking photographs in the courtroom. See 62 A.B.A. REP. 240; see also Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 22 (1979). Recent highly publicized trials include the rape trials of heavyweight boxer Mike Tyson and William Kennedy Smith, the trial of those accused of the World Trade Center bombing in New York, the trial of Hollywood madam, Heidi Fleiss, and the trial and retrial of the Menendez brothers.

⁶ Because a trial is a newsworthy, factual event and is not an "original work[] of authorship" a trial itself is not copyrightable. See 17 U.S.C.A. § 102 (1995). Local government may, however, argue that as owner of the means of "production" of a trial (*i.e.*, it employs the judge and other court personnel and owns the courthouse), it possesses a common law property interest in controlling broadcasts from a courtroom. For example, in *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24

revenue should not merely enrich the private broadcast companies, but should redound to the benefit of those ultimately paying the cost of the prosecution—the taxpaying public.⁷ The government is, the premise runs, truly analogous to a producer in the private entertainment business.

The “government-as-producer” rationale becomes problematic when analyzed against the backdrop of First Amendment principles. Yet no satisfactory mode of analyzing the problem under the First Amendment has been articulated by the courts. This article proposes such a model.

Part II of this article briefly summarizes existing doctrine regarding public and press access to courtrooms. The Court has recognized that the Speech and Press Clauses of the First Amendment include a right of physical access to certain court proceedings. The right of access is a qualified one, and can be overcome by an overriding governmental purpose and a showing that closure is necessary to achieve that purpose. The right of access does not apply, however, to electronic access for the purpose of broadcasting or

F. Supp. 490 (W.D. Pa. 1938), the court enjoined a radio station from broadcasting play-by-play descriptions of a baseball game, where exclusive rights had been granted to another station. Because of the expense incurred in producing the event, the owner had a legitimate right to capitalize on the news value by selling an exclusive license to broadcast. The owner “by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use thereof for a reasonable time following the games.” *Id.* at 492.

⁷ A member of the Los Angeles Judicial Procedures Commission suggested that in the event of a retrial in the Simpson case, that “[i]nsofar as television coverage is concerned, [the government should] allow for bidding by networks, as is done in the Olympics and other sporting events, and grant to the successful network the rights to any live telecast.” B.J. Palermo, *25 Prosecutors on Simpson Case*, L.A. DAILY J., April 7, 1995, at 9. According to one Los Angeles County Supervisor, “[t]he amount of profit will be half a billion dollars from the O.J. trial. . . . That’s bigger than the gross national product of Grenada. . . . It’s a soap opera. It has now exceeded ‘All My Children.’ It’s the longest-running live daytime news show. And it’s being financed by taxpayers.” Henry Chu et al., *Political Briefing: Council Members Decline to Add Fuel to the Williams Flap Fire*, L.A. TIMES, May 26, 1995, at B5.

recording a court proceeding. Nonetheless, most states have enacted statutes and rules that permit the broadcast of court proceedings within certain guidelines.

Part III argues that if a state grants electronic access to court proceedings, and then burdens that access in some way, such as by imposing a fee on the media for the "right" to broadcast the proceedings, the burden must be subjected to First Amendment analysis. The primary argument to the contrary—that because government is not constitutionally compelled to grant any form of electronic access, it may therefore impose lesser burdens such as charging a fee—misconceives the protection offered by the First Amendment and ignores recent Supreme Court precedent.

Part IV explores the possible application of two lines of cases involving discrimination against the press, but concludes that the discrimination models established by these decisions do not provide a satisfactory means to analyze a fees-for-feed policy.

Part V argues that the Court's forum doctrine provides a useful analytical tool to crystallize the First Amendment values implicated by a fees-for-feed policy. Given the Court's assertions that the First Amendment does not protect electronic access to courtrooms, the governmental property necessary to provide electronic access, as opposed to physical, is best understood as a nonpublic forum. When government opts to allow electronic access, however, it thereby creates a public forum, and restrictions on electronic access should be analyzed accordingly.

Finally, Part IV assesses the governmental interest that underlies a fees-for-feed policy. Existing case law supports the proposition that when government acts in a propriety capacity, the raising of revenue constitutes a significant governmental interest. This interest is not sufficiently important, however, when government seeks to capitalize on public demand to observe government perform a core function, such as adjudicating criminal cases in the judicial system.

II. PRESS ACCESS TO COURT PROCEEDINGS

The Supreme Court's jurisprudence has established a two-caste system regarding press access and newsgathering inside a courtroom. While all members of the media enjoy a qualified First Amendment right of access to court proceedings, once inside the courtroom, the right does not necessarily protect the manner of newsgathering. The media has no constitutional right to record the events by camera or magnetic tape, or to televise the proceedings.

A. *The Right of Access to Court Proceedings*

The genesis, evolution, and contours of the right of access to court proceedings shared by the public and press have been extensively treated in the literature and will not be chronicled here.⁸ Below is a

⁸ See, e.g., SUSANNA BARBER, NEWS CAMERAS IN THE COURTROOM: A FREE PRESS - FAIR TRIAL DEBATE (1987); CHARLOTTE A. CARTER, MEDIA IN THE COURTS (1981); WARREN FREEDMAN, PRESS AND MEDIA ACCESS TO THE CRIMINAL COURTROOM (1988); *This Year's Access Developments*, 399 PLI/Pat 7 (1994); Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens A New Round*, 29 U. RICH. L. REV. 237 (1995); Carolyn Stewart Dyer & Nancy R. Hauserman, *Electronic Coverage of the Courts: Exceptions to Exposure*, 75 GEO. L.J. 1633 (1987); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992); Randall Kelso & Sonia M. Pawluc, *Focus on Cameras in the Courtroom: The Florida Experience, The California Experiment, and the Pending Decision in Chandler v. Florida*, 12 PAC. L.J. 1 (1980); Brian T. FitzGerald, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381 (1990); Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 22 (1979); Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546 (1985); Robert S. Stephen, *Prejudicial Publicity Surrounding A Criminal Trial: What A Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus"*, 26 SUFFOLK U. L. REV. 1063 (1992); Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128 (1994); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993); Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475 (1985); Carolyn E. Riemer, Note, *Television Coverage of Trials: Constitutional Protection Against Absolute Denial of Access in the Absence of a Compelling Interest*, 30 VILL. L. REV. 1267 (1985).

brief summary of only the scope and nature of the right.

1. The Right Derives From the First Amendment

The constitutional building blocks supporting a right of access to certain court proceedings were laid in *Richmond Newspapers, Inc. v. Virginia*.⁹ In that case, a majority of the Court recognized that the First Amendment guarantees the press and public a right to attend a criminal trial, with certain qualifications.¹⁰ The Court had held previously that the Sixth Amendment right to a public trial was a right personal to the accused; it assured neither public nor press access to trial proceedings.¹¹ The *Richmond* Court emphasized the long historical tradition in England of open criminal trials, asserting that this tradition was "no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial."¹² The Court also acknowledged that while the right appeared nowhere within the text of the First Amendment, the Amendment's explicit guarantees nevertheless served a structural function in that they "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government" thus making it "difficult to single out any aspect of government of higher concern to the people than the manner in which criminal trials are conducted"¹³

The Court later explained the type of court proceedings that would trigger the First Amendment right of access in *Press-Enterprise Co.*

⁹ 448 U.S. 555 (1980).

¹⁰ *Id.* at 580 (plurality); *Id.* at 585 (Brennan, J., and Marshall, J., concurring); *Id.* at 599 (Stewart, J., concurring); *Id.* at 604 (Blackmun, J., concurring).

¹¹ *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979).

¹² *Richmond*, 448 U.S. at 569 (plurality opinion).

¹³ *Id.* at 575; *see also id.* at 587 ("[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government.") (Brennan, J., concurring); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-05 (1982) (reaffirming the right of access to criminal trials and noting that "the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our . . . government.").

v. *Superior Court*.¹⁴ Proceedings should be evaluated under a 2-factor standard: (1) "whether the place and process have historically been open to the press and general public",¹⁵ and (2) "whether public access plays a significant positive role in the functioning of the particular process in question."¹⁶ The right of access has thus been held to apply to criminal trials,¹⁷ jury selection,¹⁸ and pretrial hearings.¹⁹ The Supreme Court has yet to hold that the right applies to civil proceedings,²⁰ but lower courts have so held.²¹

¹⁴ 478 U.S. 1 (1986) (Press-Enterprise II).

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ *Richmond*, 448 U.S. 555.

¹⁸ *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (Press-Enterprise I).

¹⁹ *Press-Enterprise II*, 478 U.S. 1.

²⁰ Several justices have, however, expressed their belief that the right should apply in such cases. *See, e.g.*, Chief Justice Burger, joined by Justices White and Stevens in *Richmond*, 448 U.S. at 580 n.17 ("Whether the public has a right to attend trials in civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."); Justice Stewart in *Richmond*, 448 U.S. at 599 ("[T]he First and Fourteenth Amendments clearly give the press and public a right of access to trials themselves, civil as well as criminal.").

²¹ *See, e.g.*, *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (recognizing a First Amendment right of access to summary judgment proceedings in a defamation suit); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1339 (D.C. Cir. 1985) (finding that post-judgment release of records in civil suit satisfies First Amendment right of access); *Westmoreland v. Columbia Broadcasting Sys., Inc.*, 752 F.2d 16, 23 (2nd Cir. 1984) ("[T]he First Amendment does secure to the public and to the press a right of access to civil proceedings. . . ."), *cert. denied*, 472 U.S. 1017 (1985); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3d Cir. 1984) ("A presumption of openness inheres in civil trials as in criminal trials."); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (recognizing a public right of access to proceedings on motion to terminate derivative claims in a civil suit); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1179 (6th Cir. 1983) (concluding that the Supreme Court's analysis in *Richmond* applies to both criminal and civil proceedings and finding that the First Amendment right of access attaches to all documents filed in a civil proceedings), *cert. denied*, 465 U.S. 1100 (1984).

2. The Right is Qualified

Once the right attaches to a proceeding, it is not absolute. It can be overcome if sufficient reason exists to exclude the public and the press. The burden on the party seeking to deny access, however, is a heavy one. The party must establish an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."²² Because of the nature of the "narrowly tailored" prong, trial courts must apply this standard on a case-by-case basis. Hence, the Court has held unconstitutional a state statute requiring that trial judges exclude the press and public from trials involving certain sex offenses committed on minors when the minor testifies.²³ The statute was not narrowly tailored because the interest in protecting minors could be served equally well by requiring trial courts to evaluate the need for trial closure on a case-by-case basis.²⁴

B. *The Electronic Media and the Right of Access*

The Court has not extended the First Amendment right of access to the electronic media. In *Estes v. Texas*,²⁵ the Court expressly rejected claims that the newsmedia had a First Amendment right to broadcast from the courtroom and that to deny the right discriminated against the electronic media in favor of the print media.²⁶ The *Estes* Court reversed a state conviction that had been obtained after a highly publicized, televised trial, holding that the impact of the television cameras in the courtroom on the jurors, witnesses, judge and defendant denied the defendant due process.²⁷ Given the several

²² *Press-Enterprise I*, 464 U.S. at 510.

²³ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

²⁴ *Id.* at 609.

²⁵ 381 U.S. 532 (1965).

²⁶ *Id.* at 539-40.

²⁷ *Id.* at 544-50.

opinions in *Estes*,²⁸ there existed some question whether requirements of due process prohibited the televising of any criminal trial, or whether such issues should be adjudicated on a case-by-case basis. The Court resolved this question in *Chandler v. Florida*,²⁹ holding that *Estes* did not announce a constitutional rule that the televising of criminal trials was inherently a denial of due process.³⁰ Absent a showing of constitutionally cognizable prejudice to a defendant, the Court would neither endorse nor invalidate Florida's "experiment" in televising certain criminal trials.³¹

Following *Chandler*, most states decided to allow some form of electronic access to courtrooms, although the procedures adopted by the states governing access varied widely.³² As would be expected,

²⁸ Justice Clark delivered an opinion for the Court, but Justice Harlan, representing the fifth vote, joined the opinion "subject to the reservations and to the extent indicated in his concurring opinion." *Id.* at 534.

²⁹ 449 U.S. 560 (1981).

³⁰ *Id.* at 574.

³¹ *Id.* at 582.

³² For example, of the 47 states that allow broadcasting, only 35 allow criminal trials to be broadcast. Summary of State Rules Compiled by the National Center for State Courts, August 1, 1994. Some states vest total discretion for trial coverage with the judge, with no appellate review. *See, e.g.*, Mich. Admin. Order 1989 ("A trial judge's decision to terminate, suspend, limit or exclude film or electronic media coverage is not appealable by right or by leave."). Some states provide a presumption in favor of coverage. *See, e.g.*, Conn. R. Super. Ct. Gen. § 7C ("The broadcasting, televising, recording or photographing of court proceedings by news media will be allowed, subject to the limitations hereinafter set forth, in civil and criminal trials in the superior court."). While most states grant the judge the power to limit coverage of individual witnesses or portions of the trial, in some states it is mandated when requested by a participant. *See, e.g.*, N.Y. Ct. Rules § 131.4(b)(3) ("Counsel to each party in a criminal trial proceeding shall advise each nonparty witness that he or she has the right to request that his or her image be visually obscured during said witness' testimony"); Ark. R. Civ. P. Order 6 ("An objection timely made by a party or an attorney shall preclude broadcasting, recording, or photographing of that witness."). Even when coverage is granted, the media is generally prohibited from broadcasting in camera proceedings, jurors and confidential communications between an attorney and client. *See, e.g.*, 17A A.R.S. Sup. Ct. Rules, Rule 122; Rules Governing the Administration of All Courts, Rule 50 (Alaska); North Carolina Superior and District Courts Rule 15. Coverage is

however, a common strand uniting the divergent approaches is a threshold concern for the overall fairness to the parties, as well as the perceived impact that courtroom cameras might have on the various participants in the proceedings. Hence, statutes and court rules conferring discretion on the trial judge to permit electronic access require that such access does not "distract" the participants, nor "impair" the dignity of the proceedings, nor "interfere with the rights of the parties to a fair trial."³³ At minimum, then, a trial judge evaluating whether or not to permit electronic access will consider interests similar, if not identical, to those she must consider under a First Amendment analysis if a party requests that a proceeding be closed.

typically proscribed for the following proceedings: trials involving trade secrets, trials of sexual offense charges, trials of domestic matters (*e.g.*, adoption, guardianship, divorce), trials of juveniles, and proceedings from which the public is otherwise excluded. *See, e.g.*, Colo. Code of Jud. Conduct, Canon 3A(7); Practice Book 1978, § 7C (Connecticut); N.Y. Ct. Rules, § 131.8.

³³ *See, e.g.*, Arkansas Admin. Order 6(b); Conn. Rules of Court 7(c); Cal. Rules of Court, Rule 980. Some state rules attempt to channel the trial judge's discretion in a more refined way. In New York, for example, the rules direct the trial judge to consider, among other factors "(1) the type of case involved; (2) whether the coverage would cause harm to any participant; (3) whether the coverage would interfere with the fair administration of justice, the advancement of a fair trial, or the rights of the parties; (4) whether any order directing the exclusion of witnesses from the courtroom prior to their testimony could be rendered substantially ineffective by allowing audio-visual coverage that could be viewed by such witnesses to the detriment of any party; (5) whether the coverage would interfere with any law enforcement activity; (6) whether the proceedings would involve lewd or scandalous matters; (7) the objections of any of the parties, prospective witnesses, victims, or other participants in the proceeding of which coverage is sought; (8) the physical structure of the courtroom and the likelihood that any equipment required to conduct coverage of proceedings can be installed and operated without disturbance to those proceedings or any other proceedings in the courthouse; and (9) the extent to which the coverage would be barred by law in the judicial proceeding of which coverage is sought." N.Y. Ct. Rules 131.4(c).

III. BURDENING ELECTRONIC ACCESS SHOULD TRIGGER FIRST AMENDMENT SCRUTINY

As shown above, while the press and public enjoy a qualified constitutional right of access to court proceedings,³⁴ government has no constitutional obligation to grant electronic access to such proceedings.³⁵ While the government is thereby relatively free to impose the ultimate burden—total denial—on electronic access, it may choose to act in a different manner. Government may decide to grant access and then burden the access in various ways. These types of burdens may run the gamut from seemingly innocuous requirements concerning the number and location of cameras in the courtroom, to an absolute prohibition against showing the faces of the jurors, to more substantial burdens that threaten the ability of the electronic media to perform its core reporting function at the trial proceedings. Burdens imposed by government as a condition of electronic access or after access has been granted should be subjected to First Amendment analysis.

The primary argument marshalled in favor of the constitutionality of permitting government to charge broadcasters for access to the electronic feed from trials³⁶ can be stated in classic syllogistic fashion. First, the Supreme Court has not recognized a right to broadcast such proceedings. Accordingly, courts have sustained the denials of requests to broadcast trials on the grounds that such denials

³⁴ See *supra* Part II.A.

³⁵ See *supra* Part II.B.

³⁶ The government could structure the burden on electronic access in one of two ways. First, government could grant the broadcast media the right, in exchange for a fee, to install the necessary equipment inside and outside the courtroom to generate a live feed from the courtroom. Second, government could purchase and install the necessary equipment itself and then sell access to the feed it creates to the broadcast media. No constitutionally relevant distinction exists between these two types of transactions. Under both, the government is leveraging its ownership and control over its property in an effort to extract fees from the broadcast media. Accordingly, as used in this article, the terms “charging fees for the right to broadcast court proceedings” and “charging fees for access to electronic feed” are deemed interchangeable, and both are encompassed by the term “fees-for-feed policy.”

simply do not implicate any constitutional rights.³⁷ Second, the imposition of fees for the right to broadcast a trial is necessarily less burdensome on the electronic media than complete denial of access to the feed from the courtroom. It follows, *a fortiori*, that because the power of courts to deny total access to the electronic feed is not limited by the Constitution, the power to impose lesser burdens on the media, such as conditioning access to the feed on the payment of a fee, is similarly unrestrained.³⁸

The fundamental flaw in the above argument lies in its failure to distinguish between two quite different kinds of governmental action. The major premise of the argument focuses on the virtually unrestrained power of government, under the Constitution, to deny the media the right to broadcast or record court proceedings. But if the government does not exercise this power and instead grants the media electronic access to trial proceedings, subsequent efforts by government to restrain and control the access involve state action of

³⁷ See, e.g., *Westmoreland v. Columbia Broadcasting Sys., Inc.*, 752 F.2d 16, 21 (2d Cir. 1984) ("CNN's status as a member of the press does not entitle it to claim a First Amendment right to televise federal trials."); *Combined Communications Corp. v. Finesilver*, 672 F.2d 818, 821 (10th Cir. 1982) (upholding refusal to permit televising of court-supervised settlement negotiations because the "First Amendment does not guarantee the media a constitutional right to televise inside a courthouse.").

³⁸ The Los Angeles County Counsel advanced this argument to support his opinion that the Constitution does not prohibit the county from charging the media for the right to broadcast a trial. The County Counsel argued:

The constitutional right of the press to attend criminal trials and report upon the proceedings does not include the right to electronically record and broadcast the proceedings. . . .

Accordingly, it is our opinion that there is no constitutional prohibition against charging fees or royalties as a condition of permitting the live broadcasting or recording of trial proceedings.

Letter from Los Angeles County Counsel to Los Angeles Board of Supervisors, at 7-8 (February 27, 1995). The County Counsel's written opinion on this point, which in its entirety consisted of 3 sentences, did not analyze the constitutional validity of the argument's minor premise. Implicit in the County Counsel's opinion is that the power to deny complete access to the electronic feed from a courtroom necessarily includes the power to impose lesser burdens without running afoul of the Constitution.

another character. At this juncture, the electronic media stands in a position constitutionally similar to that of the print media: its representatives are lawfully present at a newsworthy event performing core press functions presumably protected by the First Amendment. The argument that power to deny access necessarily includes the power to burden the access, once granted, erroneously lumps these two powers together and treats them as one. The resulting proposition—that government's power to deny electronic access immunizes imposition of "lesser" restraints—would lead to results flatly inconsistent with core First Amendment principles.

Suppose, for example, that a judge were to allow trial proceedings to be broadcast, but only on the condition that all prosecution witness testimony would be excluded from the broadcasts.³⁹ Or, suppose that a judge prohibited the broadcast of certain testimony because he found certain statements to be politically distasteful. Such viewpoint-based restrictions on press activity should, under conventional First Amendment doctrine, trigger the most exacting scrutiny.⁴⁰ Yet, the

³⁹ Cf. *KFMB-TV Channel 8 v. Municipal Court*, 221 Cal. App. 3d 1362 (1990). There, the trial judge allowed television coverage pursuant to Rule 980, of the California Rules of Court, but directed that "the actual verbatim statements cannot be displayed on a public facility such as a radio or TV without a further order from this court." *Id.* at 1364-65 n.2. The media challenged this restriction as an unconstitutional prior restraint and sought a writ of mandate. The Court of Appeal declined to reach the constitutional issue, instead reversing the trial court's order on the basis that it exceeded Rule 980's scope. While the rule allows the trial court to "refuse, limit or terminate film or electronic media coverage, . . . [i]t does not authorize a judge to become the editor of a . . . news broadcast." *Id.* at 1367.

⁴⁰ See, e.g., *Rosenberger v. Rector and Visitors*, 115 S.Ct. 2510, 2516 (1995) ("These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation."); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)

[A]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created, . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

argument would run, because a court possesses the unrestrained power to deny the media the right to broadcast the proceedings entirely, "lesser" burdens should also be permitted.⁴¹ The Supreme Court has rejected a similar argument under analogous facts.

In *City of Lakewood v. Plain Dealer Publishing Co.*,⁴² the Court considered a municipal ordinance granting the mayor authority to grant or deny permits to place newsracks on city property. The Court held the ordinance facially invalid inasmuch as it vested unbridled discretion in the mayor.⁴³ The dissent argued that a facial challenge to the ordinance was inappropriate, suggesting that "where an activity that could be forbidden altogether (without running afoul of the First Amendment) is subjected to a local license requirement, the mere presence of administrative discretion in the licensing scheme will not render it invalid *per se*."⁴⁴ Because newsracks could be banned completely from city property without violating the First Amendment, the dissent reasoned, the Court should not apply the usual strict rules announced in its licensing/prior restraint cases but should permit an as-applied challenge only.⁴⁵ The majority soundly rejected this suggested approach, asserting that it ignored "the radically different constitutional harms inherent in the 'greater' and 'lesser' restrictions."⁴⁶ A law that completely banned newsracks from city

⁴¹ Proponents of "fees-for-feed" would assert, of course, that exacting payment for electronic access to a high-profile trial is not viewpoint-based and therefore in no way resembles the above "extreme" hypothetical example. But the purpose of the example is not to suggest an appropriate standard of review for all burdens that may be imposed on electronic access, but rather merely to expose the weakness of the argument that the power to deny access *ipso facto* includes the power to impose lesser burdens.

⁴² 486 U.S. 750 (1988).

⁴³ *Id.* at 772.

⁴⁴ *Id.* at 787 (White, J., dissenting).

⁴⁵ *Id.*

⁴⁶ *Id.* at 762-63; see also *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985). *Legi-Tech* was a private company in the business of marketing computerized legislative information concerning the New York and California legislatures. It sought to subscribe to the Legislative Retrieval Service (LRS) operated by the state of New York. LRS contained the full text of bills pending in the New York legislature, as well as other legislative information, and the state offered the service

property would “presumably” be content neutral and hence subject to the Court’s “time, place and manner test.”⁴⁷ Much of the analysis under this test would focus on the availability of alternative channels of communication that a newspaper could use to transmit its message.⁴⁸ On the other hand, when a city allows newsracks to be placed on its property, but establishes a permit scheme that vests excessive administrative discretion in city officials, it “raises the specter of content and viewpoint censorship.”⁴⁹ This unacceptable risk of governmental censorship exists irrespective of whether the expressive activity could, in the first instance, be banned altogether without violating the First Amendment.⁵⁰ Accordingly, it should be

to the public, for a subscription fee. New York officials denied Legi-Tech’s request to subscribe to LRS, relying on a statute that prohibited providing LRS to “entities which offer for sale the services of an electronic information retrieval system which contains data relating to the proceedings of the legislature.” *Id.* at 731. The state argued, in support of the validity of the statute, that its discrimination against Legi-Tech fell outside the protection of the First Amendment because the state was not constitutionally required to provide LRS in the first place. The court expressly rejected this argument, stating “[w]e do not agree that the discriminatory denial of access to an organ of the press can never affect First Amendment rights where access generally is not constitutionally mandated.” *Id.* at 734.

⁴⁷ *City of Lakewood*, 486 U.S. at 763.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ The principle that government may, through certain conduct, “assume” constitutionally-imposed obligations is familiar in the equal protection area. For example, the right of citizens to vote in elections for state officials is not a fundamental right under the Constitution. Accordingly, a state could, without running afoul of constitutional limitations, abolish such elections and opt for state officials to be selected in some other manner. But while under no constitutional compulsion to do so, if a state decides to extend the franchise to its citizens, “lines may not be drawn which are inconsistent with the Equal Protection Clause” *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). Pursuant to this principle, the Court has invalidated state poll taxes and state districting schemes that inequitably distribute the effect of citizens’ votes. *See id.* at 663; *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

Under the Equal Protection Clause, then, the Court has viewed the fact that the state could impose the ultimate burden on voting for state officials—total denial of the “right”—as constitutionally irrelevant when analyzing lesser burdens on voting.

constitutionally insufficient to justify a fees-for-feed policy merely on the basis that the press and public possess no constitutional right in the first instance to access the electronic feed from a courtroom. Once government decides to grant access to the feed, a type of "constitutional transformation" occurs and a set of First Amendment issues and concerns arise that differ from those underlying the precept that government is not constitutionally obligated to grant electronic access.

IV. DISCRIMINATION MODELS

Concluding that governmentally-imposed burdens on the broadcast media's access to the electronic feed from courtrooms should trigger First Amendment analysis of some kind does not decide, of course, what kind of scrutiny such burdens should receive. On its face, a fees-for-feed policy raises questions of discrimination between organs of the press and between the press and other entities. Two lines of cases, relevant here, have incorporated equal protection principles into First Amendment analysis.⁵¹ One line of decisions addresses claims that government has discriminated between members of the press in granting access to certain information or agencies; the other deals with taxation of the press. None of these cases, however, adequately isolates and examines the nature of the governmental conduct

The restrictions on state action provided by the Equal Protection Clause have been deemed triggered notwithstanding the fact that a state's election scheme is the product of voluntary state choice, not federal constitutional compulsion. Similarly, while under existing First Amendment doctrine a state may completely deny electronic access to trial proceedings, if it chooses to grant any form of access, the protection of the First Amendment should be triggered.

⁵¹ A third line of cases borrowing equal protection doctrine—content-based restrictions on expressive activity, *see, e.g.*, *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.")—is inapplicable here because a fees-for-feed policy would presumably be content neutral.

underlying a fees-for-feed policy, nor the concomitant burdens imposed on core First Amendment values by such conduct.

A. *Discriminatory Access*

A number of cases have adjudicated claims by the press that government has afforded discriminatory access to information. This type of claim has proven the easiest for the courts to decide, and has yielded a relatively straightforward principle of law: government may not single out a particular organ of the press for discriminatory treatment. The decisions in *American Broadcasting Co., Inc. v. Cuomo*,⁵² *Quad-City Community News Service, Inc. v. Jebens*,⁵³ and *Times-Picayune Publishing Corp. v. Lee*⁵⁴ illustrate this principle.

The dispute underlying *Cuomo* arose out of the 1976 primary runoff election for mayor of New York City between Mario Cuomo and Edward Koch. Due to a labor strike at ABC, both candidates asked that ABC's television crews, staffed by management personnel, be excluded from the various premises of the candidates. At least part of the reason for ABC's exclusion was the candidates' belief that television crews from NBC and CBS would refuse to afford coverage from the candidates' premises if ABC's management-staffed crews were allowed to be present.⁵⁵ When challenged in court by ABC on First Amendment grounds, the candidates defended their actions by arguing that their respective campaign premises were private and admission to the premises was by invitation only. The court rejected this argument: "We think that once the press is invited . . . there is a dedication of those premises to public communication use [and] the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable."⁵⁶

Quad-City involved an underground newspaper that sought access to certain records maintained by a city police department. Some of

⁵² 570 F.2d 1080 (2d Cir. 1977).

⁵³ 334 F. Supp. 8 (S.D. Iowa 1971).

⁵⁴ 15 MEDIA L. REP. (BNA) 1713 (E.D. La. 1988).

⁵⁵ 570 F.2d at 1082.

⁵⁶ *Id.* at 1083.

the records were deemed "confidential" under state law, but the police department had granted access to the records to various members of the media, but not to the plaintiff underground newspaper. The court subjected the city's differential treatment of the media to strict scrutiny under equal protection principles, because such discrimination reflected a "classification which serves to penalize or restrain the exercise of a First Amendment right" ⁵⁷ The court dismissed the notion that because the records were confidential under state law and thus access to them lay within the discretion of city officials, the plaintiff's constitutional claims should be rejected: "[Plaintiff] is entitled to the same right of access as other citizens. . . . [and w]hether this access is denominated a 'right' or a 'privilege' in the first instance is of no consequence." ⁵⁸

In *Lee*, a county sheriff in Louisiana became dissatisfied with the coverage given to him and his department by a daily newspaper. The sheriff directed his staff to exclude representatives of the newspaper from all press conferences and ordered that any questions from the newspaper regarding the sheriff department's activities be submitted to the department in writing. The sheriff's policy applied to no other member of the media. The court declared the discriminatory treatment of the newspaper unconstitutional, declaring that the First Amendment guarantees "a right of access to information made available to the public or made available generally to the press." ⁵⁹

These cases, and others, ⁶⁰ rest on the rationale that governmental

⁵⁷ 334 F. Supp. at 15.

⁵⁸ *Id.* at 16.

⁵⁹ 15 MEDIA L. REP. (BNA) at 1719.

⁶⁰ *See, e.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (holding that government may not selectively exclude media from access to information otherwise made available to other members of the media as such discrimination could allow "government to influence the type of substantive media coverage that public events will receive."); *Stevens v. New York Racing Ass'n, Inc.*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987) ("[T]he [F]irst [A]mendment prohibits government from restricting a journalist's access to areas otherwise open to the press based upon the content of the journalist's publications."); *Borreca v. Fasi*, 369 F. Supp. 906, 910 (D. Haw. 1974) (excluding reporter from mayor's news conference because of dislike for reporter's articles "is no different in kind from requiring a newspaper to

discrimination among members of the press poses a high risk of content-based censorship. When government singles out a particular reporter or organ of the press for disparate treatment, its action may well reflect governmental hostility toward the manner in which the person or entity has performed reporting functions. As the court reasoned in *Cuomo*, if the governmental actors in that case—political candidates—were permitted to discriminate among various media entities, “the danger would be that those of the media who are in opposition or who the candidate thinks are not treating him fairly would be excluded.”⁶¹

Yet the discriminatory access cases do not supply an analytically satisfactory set of precepts to decide whether government may constitutionally burden the electronic media’s right to broadcast a trial. First, with respect to the electronic media’s treatment *vis a vis* the print media, no credible claim of discrimination can be sustained. Members of the electronic media who wish to attend a trial and engage in “conventional” newsgathering activities enjoy the same constitutional right of access as other media representatives. The government could correctly argue that this right remains unburdened by a fees-for-feed policy. Moreover, application of the teachings of the discriminatory access cases to support an argument that a fees-for-feed policy would saddle the broadcast media with a burden not shared by other media would require one to assume that the two modes of access—“conventional” and electronic—are constitutionally similar. But, under existing doctrine, these two modes of access are most certainly constitutionally dissimilar, and an argument that merely assumes otherwise to support a discrimination claim, without more, ignores constitutional fact and substitutes a conclusion rather than a

submit its proposed news stories for editing as a condition precedent to the right of that newspaper to have a reporter cover the news.”); *Consumers Union, Inc. v. Periodical Correspondents’ Ass’n*, 365 F. Supp. 18, 26 (D.D.C. 1973) (“Access to news, if unreasonably or arbitrarily denied [to a particular member of the media] . . . constitutes a direct limitation upon the content of news . . .”).

⁶¹ 570 F.2d at 1083.

point of departure under First Amendment analysis.⁶²

Second, an argument that fees-for-feed discriminates among the electronic media also lacks force. To be sure, such a policy invariably imposes a greater burden on those media representatives who are least able to pay than on those who are financially strong. Yet, this kind of access burden is content neutral and therefore, at least superficially, does not pose the kind of risk that drives the non-discrimination principle discussed above. Barring a showing that government may be using a fees-for-feed policy as a means to engage in content-based discrimination among the electronic media or that the policy creates a risk of content-based suppression of expressive activity, the strength of a First Amendment challenge to the policy—under the discriminatory access doctrine—dissipates substantially.

B. *Taxation of the Press*

The Court's tax jurisprudence⁶³ is doctrinally allied with the above-discussed discriminatory access cases, but is considerably more developed. Under this body of law, a fees-for-feed policy may be analyzed as presenting three separate types of differential press taxation:⁶⁴ the press is treated differently than non-press entities

⁶² See *Estes v. Texas*, 381 U.S. 532, 540 (1965) ("Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press.").

⁶³ See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

⁶⁴ It is true that such a policy does not resemble a conventional taxing scheme similar to those addressed by the Court in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers'*. Rather, the policy more closely approximates a "user fee" system whereby government charges a fee for the use of its property and provision of services. Any distinction, however, between taxes and user fees in the context of the Court's taxation of the press jurisprudence carries no constitutional relevance. Indeed, if a primary principle driving the decisions in this area is fear of governmental discrimination against the press, a user fee provides a tool as powerful as a tax by

("type 1" discrimination); only a "few" members of the electronic media are subject to the policy while others are not ("type 2" discrimination); and the electronic media is treated differently than the rest of the media ("type 3" discrimination). The strongest First Amendment case against a fees-for-feed policy would arise under the "type 1" discrimination model.⁶⁵ While such a challenge may well succeed, depending upon the facts of the particular case, the constitutional infirmity inherent in "type 1" discrimination is, at least theoretically, easily remedied. Once thus remedied, a fees-for-feed policy continues to invite First Amendment scrutiny, scrutiny not based on discriminatory treatment. With respect to "type 2" and "type 3" discrimination, the Court's most recent press taxation case, *Leathers v. Medlock*,⁶⁶ raises serious doubt as to whether a First Amendment challenge based on either of these theories of discriminatory treatment would succeed.

1. "Type 1" Discrimination

In a series of decisions, the Court has established that, under certain circumstances, a state tax that falls disproportionately on members of the press violates the First Amendment. In *Grosjean v. American Press Co.*,⁶⁷ the Court invalidated a state law that imposed a 2% gross receipts tax on publications with weekly circulations greater than 20,000. Only 13 daily newspapers were subject to the tax; 4 other daily newspapers and 120 weekly newspapers were not

which government can single out the press as a whole or particular organs of the press for harsh treatment.

⁶⁵ See, e.g., Erwin Chemerinsky, *Televising "The Trial." Simpson Proceedings Should Not Become "Pay Per View" Event*, L.A. DAILY NEWS, March 12, 1995, at V5 ("Even though there is not a First Amendment right to televise trials, a fee directed at the broadcast media would be indistinguishable from taxes on the press that have been consistently invalidated."); Tom Dresslar, *Bill to Force TV to Pay for Covering Trials is Killed*, L.A. DAILY J., May 25, 1995, at 3 (fees-for-feed policy is "without a doubt, unconstitutional" as court would view it as special tax on media as whole as well as on broadcasters) (quoting John Cary Sims).

⁶⁶ 499 U.S. 439 (1991).

⁶⁷ 297 U.S. 233 (1936).

taxed.⁶⁸ Relying on American colonial and English historical incidents of governmental taxation of the press for the purpose of censorship, and noting that the First Amendment was designed expressly to prohibit such abuse, the Court declared the tax unconstitutional.⁶⁹

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*,⁷⁰ the Court again addressed a state taxation scheme that created disproportionate tax burdens on certain newspapers. At issue was Minnesota's use tax on the cost of paper and ink necessary in the publication of newspapers. The tax was imposed on the sale of paper and ink, but exempted the first \$100,000 of such sales.⁷¹ The result, as was the case in *Grosjean*, was that the taxing scheme caused the largest publications to bear most of the tax burden.⁷² The Court invalidated the tax because it involved both "type 1" discrimination by singling out the press from other businesses for special tax treatment⁷³ and because it discriminated *within* media ("type 2" discrimination) by targeting only a small number of newspapers, "resembl[ing] more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises."⁷⁴

Based on these cases, a credible argument can be marshalled that a fees-for-feed policy violates the First Amendment. Because a fees-for-feed policy would, as a functional matter, apply only to the press,⁷⁵ a court may categorize the policy as presenting a "type 1" discrimination problem. The policy extracts a payment from the press

⁶⁸ *Id.* at 240-41.

⁶⁹ *Id.* at 250-51.

⁷⁰ 460 U.S. 575 (1983).

⁷¹ *Id.* at 578.

⁷² During the first year under the taxing scheme, only 11 publishers who produced 14 of the state's 338 paid circulation newspapers, were taxed. One newspaper was responsible for approximately two-thirds of the total revenue generated by the tax. *Id.*

⁷³ *Id.* at 585.

⁷⁴ *Id.* at 592.

⁷⁵ The legislation proposed in California was not facially limited to the press, but would have authorized the sale of electronic feed from a "high profile trial" to the highest bidder. See *supra* note 2.

to the government that no other entity must pay. In this respect, the policy parallels the use tax imposed by Minnesota that, on its face, taxed only the press. Such differential treatment of the press cannot withstand First Amendment scrutiny unless the government demonstrates an "interest of compelling importance that it cannot achieve without differential taxation."⁷⁶

Assuming a fees-for-feed policy were deemed a "type 1" discrimination case, the constitutional infirmity in the policy could, in theory, be easily remedied by merely broadening the user fee scheme to include non-press entities. For example, many local governments make available to the public, in exchange of a fee, a variety of governmentally owned properties such as sports stadiums and civic auditoriums for designated uses. In California particularly, many local governments vigorously compete to lease city and county-owned premises to movie studios for use in the filming of motion pictures.⁷⁷ One can imagine a comprehensive user fee scheme in which the sale of electronic feed from courtrooms would constitute merely one instance among many where government makes available its property, although not constitutionally compelled to do so, to members of the public in exchange for a fee. This type of comprehensive scheme would no longer involve the "type 1" discrimination addressed by the Court in *Minneapolis Star*. The Court there carefully explained that while any form of taxation of the press imposes some level of burden on First Amendment activity,⁷⁸ "[i]t is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional

⁷⁶ *Minneapolis Star*, 460 U.S. at 585.

⁷⁷ Some cities have deemed the revenue derived from filming fees so important that they have established special offices devoted exclusively to encouraging or facilitating filming in their cities. Some even have brochures, videos or full-time consultants. See, e.g., David Bloom, *Film Permit Group Takes Officers From Industry*, L.A. DAILY NEWS, May 24, 1995, at N4; Edmund Newton, *Stealing the Scene: With Its Beaches, Scenic Skyline, Queen Mary and Dome, Long Beach is Attracting More Movie Makers*, L.A. TIMES, January 19, 1995, at J8; Rick Orlov, *Council Votes to Merge Film Permit Operations With County*, L.A. DAILY NEWS, May 10, 1995, at N4.

⁷⁸ 460 U.S. at 583.

problems."⁷⁹ On this basis, the Court determined that the statutory scheme in *Arkansas Writers' Project, Inc. v. Ragland*,⁸⁰ that imposed a tax on receipts from sales of tangible personal property, but exempted newspapers and "religious, professional, trade and sports journals, [and/or] publications published and printed" within the state,⁸¹ presented no "type 1" discrimination: "On the facts of this case, the fundamental question is not whether the tax singles out the press as a whole, but whether it targets a small group within the press."⁸² Under "type 1" discrimination analysis, then, the Constitution does not prohibit government from imposing burdens on press activity, but only from imposing disproportionate burdens on such activity.

2. "Type 2" Discrimination

Assuming that government imposed fees non-discriminatorily on a wide variety of "users" of governmental property, and thus no "type 1" discrimination existed, a fees-for-feed policy might be attacked as "type 2" discrimination inasmuch as it "targets a small group within the press" for differential tax treatment. In *Arkansas Writers'*, the Court invalidated the challenged taxing scheme on the basis of "type 2" discrimination. Under the law, the petitioner's general interest magazine was subject to the tax, while most magazines were not.⁸³ The Court explained that this selective treatment of magazines condemned the taxing scheme, as it operated "in much the same way as did the \$100,000 exemption to the Minnesota use tax [at issue in *Minneapolis Star*]."⁸⁴ The Court emphasized in particular that the tax burdened only "a limited group of publishers."⁸⁵

Based on *Arkansas Writers'*, one could argue that a fees-for-feed

⁷⁹ *Id.* at 581 (citations omitted).

⁸⁰ 481 U.S. 221 (1987).

⁸¹ *Id.* at 224.

⁸² *Id.* at 229.

⁸³ *Id.* at 224-25, 229 n.4.

⁸⁴ *Id.* at 229 (footnote omitted).

⁸⁵ *Id.* at 229 n.4.

policy violates the First Amendment because it would subject only “a limited group” within the media to taxation. This argument, however, has been virtually, if not completely, foreclosed by the Court’s 1991 analysis and decision in *Leathers v. Medlock*.⁸⁶

The Court in *Leathers* addressed the structure of the Arkansas Gross Receipts tax, as amended in 1987, to tax the sale of cable television services. Arkansas also taxed the sale of other tangible personal property, but the scheme exempted newspaper and magazine sales from taxation.⁸⁷ A cable television operator and others (“cable petitioners”) challenged the tax on the ground that its differential treatment of cable television sales and sales of magazines and newspapers violated the First Amendment.⁸⁸ The Court rejected the challenge. The Court acknowledged, as an initial matter, that cable television was engaged in speech and, in much of its operation, was part of the press.⁸⁹ Reviewing the teachings of *Grosjean*, *Minneapolis Star*, and *Arkansas Writers’*, the Court noted that taxation of the press will trigger heightened scrutiny if it “single[s] out the press . . . targets a small group of speakers . . . [or] discriminates on the basis of the content of taxpayer speech.”⁹⁰ The Court held that the Arkansas taxing scheme possessed none of these infirmities. The tax applied generally to non-press entities and, therefore, involved no “type 1” discrimination. Moreover, unlike the scheme in *Arkansas Writers’*, the tax did not produce “type 2” discrimination because it did not target “only ‘a few’” members of the media but rather applied uniformly to approximately 100 cable systems.⁹¹ The Court explained the significance of this distinction:

The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. . . . There is no comparable danger from a tax on the services provided by a large number of cable

⁸⁶ 499 U.S. 439 (1991).

⁸⁷ *Id.* at 441-42.

⁸⁸ *Id.* at 442-43.

⁸⁹ *Id.* at 444.

⁹⁰ *Id.* at 447 (citations omitted).

⁹¹ *Id.*

operators offering a wide variety of programming throughout the State.⁹²

The Court's focus on the *size* of the media group disadvantaged by a taxing scheme carries significance when assessing the constitutionality of a fees-for-feed policy. The media group targeted by the policy would not consist of only "a few members of the media," but rather would comprise the entire broadcast media. This fact distinguishes a fees-for-feed policy from the taxing scheme in *Arkansas Writers'* that facially applied, at most, to only three magazines.⁹³ A fees-for-feed policy could easily be drafted to avoid this kind of infirmity. Moreover, unlike the tax addressed in *Arkansas Writers'*, not even all members of the targeted group would be burdened by the tax, but only those desiring to broadcast a court proceeding. Given this kind of structure, a court would be unlikely to find that a fees-for-feed policy would present the "danger of censorship" inherent in "type 2" discrimination.

3. "Type 3" Discrimination

The cable petitioners in *Leathers* also pressed the Court to recognize a third type of unconstitutional discrimination: differential taxation between separate segments of the media.⁹⁴ The petitioners argued that the intermedia discrimination occasioned by the taxation of cable television but not of the print media violated the First Amendment, "even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas" ⁹⁵ After surveying several cases⁹⁶ involving government's

⁹² *Id.* at 448-49 (citations omitted).

⁹³ 481 U.S. at 229 n.4.

⁹⁴ This argument was also advanced in *Arkansas Writers'*, but inasmuch as the Court disposed of the case on "type 2" discrimination—differential taxation among magazines—the Court found no need to address it: "[W]e need not decide whether a distinction between different types of periodicals [(newspapers and magazines)] presents an additional basis for invalidating the sales tax." *Id.* at 233.

⁹⁵ 499 U.S. at 449-50.

differential treatment of the press, the Court rejected this argument, holding that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."⁹⁷ Applying these standards, the Court easily determined that no evidence existed suggesting that Arkansas decided to tax cable television with an intent to censor expressive activities or that the "broad-based, content-neutral sales tax" would have the effect of stifling the free exchange of ideas.⁹⁸

The *Leathers* Court thus eschewed a bright-line, categorical approach to adjudicating differential press taxation cases. The Court did so by restricting the natural reach of the holdings in *Grosjean*, *Minneapolis Star* and *Arkansas Writers*'. The decision in each case, the *Leathers* Court explained, derived not solely from the fact that government had taxed the press differentially, but because in each case the tax was "directed at, or present[ed] the danger of suppressing, particular ideas."⁹⁹ This standard, then, calls for a more refined analysis of inter-media differential press taxation,¹⁰⁰ one focused on the intent of government in enacting the particular tax law and on the likely effect such law will produce. Under either inquiry, a fees-for-feed policy should be able to pass constitutional muster.

The apparent governmental motive in adopting a fees-for-feed policy would not be suppression of expressive activity but the generation of revenue. Like the Court's characterization of the sales tax in *Leathers*, such a policy would be "content neutral."¹⁰¹ Neither the Los Angeles County proposal nor the bill introduced in the legislature seemed to be infected in any way with a governmental intent to suppress expressive activity on the basis of content; both

⁹⁶ The Court traced the reasoning and holdings in *Regan v. Taxation with Representation*, 461 U.S. 540 (1983); *Cammarano v. United States*, 358 U.S. 498 (1959); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

⁹⁷ 499 U.S. at 453.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

focused exclusively on the revenue-raising potential inhering in a fees-for-feed policy.¹⁰² Indeed, it would seem highly unlikely that a state would seek to discriminate on the basis of content or viewpoint by using a fees-for-feed policy to burden electronic access.¹⁰³ Government would have an economic disincentive to restrict the number of broadcasters willing to pay the fee as the greater the number, the more revenue generation potential.¹⁰⁴

Second, imposing fees on the electronic media but not on the print media for access to court proceedings would not produce any

¹⁰² The proposed California legislation that would have authorized sale of access to electronic feed to the highest bidder, *see supra* note 2, was merely one in a series of measures proposed by Los Angeles to recover some of the funds being spent on the Simpson trial. Prior to this proposal, a bill was introduced in the California legislature to reimburse Los Angeles for some of the costs of the Simpson trial (S.B. 1103) and another to charge convicts for the costs of their trials (A.B. 1716). B.J. Palermo, *The Bottom Line: Revenue-Generating Possibilities Leap Into Budget-Watchers' Heads*, L.A. DAILY J., March 14, 1995, at 5. As one member of the Los Angeles Board of Supervisors explained, "[u]nderstand, we are not trying to hurt television stations. We are not trying to take away their profits, we just want a part of it." M.L. Stein, *Charging the Media to Cover the O.J. Trial?*, EDITOR & PUBLISHER, March 11, 1995, at 10.

¹⁰³ Of course, if the evidence showed that government was, in fact, administering a fees-for-feed policy with intent to discriminate on the basis of content or viewpoint, a court should examine the government's actions under heightened scrutiny. The same result should obtain if such intent infected a government's otherwise permissible decision to deny electronic access completely.

¹⁰⁴ This disincentive would exist irrespective of the manner in which government structured its fees-for-feed policy. Government might simply form its own press pool and make the electronic feed available to any entity willing to pay a set fee. Alternatively, government might structure the policy so as to sell the feed to the highest bidder, as the California legislative proposal provided. *See supra* note 2. Under either structure, the economic disincentive for government to restrict access to the feed would be substantially similar. Government would obviously want the largest possible group of willing buyers under the "press pool" structure. Under the highest bidder structure, the successful bidder would presumably set the level of its bid dependent on how many other broadcasters would, in turn, purchase the feed from it, and the price that these broadcasters would be willing to pay. Hence, as the number of broadcasters willing to purchase the feed from the successful bidder increased, government could expect the amount that the bidders would be willing to pay would also increase.

significant danger of suppressing particular ideas. Members of the electronic media would have the unburdened right to attend courtroom proceedings, engage in permissible newsgathering inside the courtroom along with all other attendees, and then broadcast their reports from outside the courtroom.

V. COURTROOMS AND FORUM ANALYSIS

The familiar three-category forum doctrine¹⁰⁵ recognizes that government may legitimately reserve portions of its property for certain specified uses that necessitate restrictions on First Amendment activity, and that the character of the property will determine the extent of restrictions permissible.¹⁰⁶ While the Court has never expressly analyzed restrictions on First Amendment activity inside courtrooms under the public forum rubric, the rationales underlying both the right of access cases and the public forum cases suggest such an approach would be analytically sound.

A. Courtrooms as Traditional Public Fora

Richmond and its progeny make clear that press and public access to courtrooms is activity protected by the First Amendment.¹⁰⁷ Hence, while courtrooms obviously are a species of government-owned and managed property, the Constitution strips government of the ability to exclude the public or press from this property, absent

¹⁰⁵ The Court has divided public property into 3 categories for purposes of First Amendment analysis: (1) traditional public fora such as "streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions;'" (2) designated public fora consisting of "public property which the state has opened for use by the public as a place for expressive activity;" and (3) non-public fora consisting of "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

¹⁰⁶ See *infra* Part V.D.

¹⁰⁷ See *supra* Part II.A.

special circumstances.¹⁰⁸ Viewed in this way, focusing on "access" as the protected activity rather than "expression," courtrooms have the characteristics of a traditional public forum, much like streets and parks that "have immemorially been held in trust for the use of the public and, time out of mind, been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹⁰⁹ Criminal trials "both here and in England had long been presumptively open."¹¹⁰ Indeed, in *Richmond*, Chief Justice Burger analogized courtrooms to traditional public fora, noting that like streets, sidewalks and parks, "a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place."¹¹¹

The Second Circuit declined an invitation to declare a courtroom a public forum in *Westmoreland v. Columbia Broadcasting System*.¹¹² In that case, Cable News Network (CNN) claimed a First Amendment right to televise a civil libel trial in federal court

¹⁰⁸ See, e.g., *United States v. Three Juveniles*, 61 F.3d 86, 92 (1st Cir. 1995) (finding that district court's closure of juvenile proceeding was "sufficiently compelling" and "narrowly tailored"), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 24, 1995)(No. 95-815).

¹⁰⁹ *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939).

¹¹⁰ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

¹¹¹ *Id.* at 578. For a criticism of this analogy, see Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311 (1982). Professor BeVier argues that Chief Justice Burger "failed to fashion any convincing link between unbroken tradition and constitutional command," and that he blurred "the important distinction between traditional, textually protected first amendment rights and the right to access" *Id.* at 329-30. Both criticisms derive from the means of constitutional interpretation whereby the Court declared that the right to access fell within First Amendment protection. Yet, putting aside the fact that the Court routinely interprets the broad phrasing of the Constitution against the backdrop of history and tradition, mere disagreement with the process which yielded the right to access offers little reason to question the validity of the analogy between courtrooms and traditional public fora now that the right of access is firmly embedded constitutional doctrine.

¹¹² 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

where both parties in the action had consented to such broadcast.¹¹³ In rejecting CNN's argument that the trial would serve as a public forum, the court focussed on the *litigants'* expression rights: "[w]hatever public forum interest may exist in litigation, that interest is clearly a speaker's interest, not an interest in access to the courtroom."¹¹⁴ The court then held simply that there exists no First Amendment right to televise trials.¹¹⁵ The court's terse dismissal of the public forum argument misconceived its central thrust. The "forum interest" in the courtroom does indeed extend beyond the expressive activities of the participants in the litigation; it includes the constitutionally guaranteed access rights of the press and public. As discussed above,¹¹⁶ in reasoning that the explicit provisions contained in the First Amendment included a right of access to courtrooms, Chief Justice Burger recognized that public forum interests are not confined to the expressive rights of speakers: "[p]eople assemble in public places not only to speak or to take action, but also to listen, observe, and learn"¹¹⁷ The Court reaffirmed this aspect of the nonspeakers' First Amendment right in *Globe*, noting that the right of access is premised upon "the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'"¹¹⁸ The right of access serves the structural purpose of ensuring that this discussion of governmental affairs is an "informed one."¹¹⁹

B. *Electronic Access as a Separate Forum*

No court has accepted the argument that courtrooms should be deemed traditional governmental fora for purposes of public and press

¹¹³ *Id.* at 17.

¹¹⁴ *Id.* at 21-22.

¹¹⁵ *Id.* at 23.

¹¹⁶ See *supra* Part II.A.

¹¹⁷ *Richmond*, 448 U.S. at 578 (plurality opinion).

¹¹⁸ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

¹¹⁹ *Id.* at 605.

access. If such a position were adopted, and were the Court writing on a clean slate, a ban on electronic access to a courtroom might readily be analyzed under the Court's time, place and manner standards¹²⁰ as a content-neutral restriction on a particular manner of access. While the "conventional" manner of press access considered by the Court in *Richmond* and its progeny¹²¹ could not be denied unless the denial were narrowly tailored to serve an overriding interest,¹²² electronic access is qualitatively different and may merit less protection by application of time, place and manner standards. Just as a single speaker, delivering his oration while standing on a downtown street corner during rush hour would be viewed differently under First Amendment analysis than would a protest organizer, delivering the same speech from the same spot with a sound system to a crowd of 5,000, so may a court legitimately consider significant governmental interests in restricting electronic access. Courts have noted that electronic access to court proceedings poses unique dangers to the effective functioning of jurors, witnesses and counsel.¹²³ Under a time, place and manner analysis, then, government could deny electronic access completely in those cases where the significant interest in maintaining the integrity of judicial proceedings required it, provided that the denial was content-neutral,

¹²⁰ In a public forum, the state may enforce time, place and manner restrictions on expressive activity that are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

¹²¹ See *supra* Part II.A.

¹²² *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*).

¹²³ See, e.g., *Chandler v. Florida*, 449 U.S. 560, 577 (1981) ("Inherent in electronic coverage of a trial is a risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected."); *Estes v. Texas*, 381 U.S. 532, 544-49 (1965) (televising trial may have adverse effect on the objectivity of jurors, lessen the quality of witness testimony and burden the trial judge).

narrowly tailored, and alternative forms of access remained.¹²⁴ In the normal case, an “alternative” channel of access would always exist, as members of the electronic media could exercise their right of “conventional” access.

Existing doctrine, however, forecloses application of time, place and manner standards to a denial of electronic access. When courts have adjudicated cases involving time, place and manner restrictions on First Amendment activity in a public forum, the activity so restricted has been presumptively protected.¹²⁵ Given the Court’s declarations that the public and press simply have no First Amendment right to access courtrooms electronically, a state rule banning all electronic access to courtrooms would not be subjected to time, place and manner analysis, but would be upheld as not implicating any First Amendment right.¹²⁶ Accordingly, existing doctrine implicitly treats courtroom electronic access not as one manner of exercising the First Amendment right to access court proceedings, but rather as a separate,

¹²⁴ See *supra* note 120. Hence, under this approach, the broadcast media would possess a presumptive right of electronic access to all court proceedings to which the press and public have a First Amendment right of access, and the burden would be on the government to justify any denial of electronic access in an individual case. As discussed *infra*, notes 125-128, this approach runs counter to established doctrine.

¹²⁵ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (“Here the bandshell was open, apparently, to all performers; and we decide the case as one in which the bandshell is a public forum for performances in which the government’s right to regulate expression is subject to the protections of the First Amendment.”); *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (holding solicitation, which government sought to restrict, protected under the First Amendment); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 44 (1983) (holding access to teachers’ on-campus mailboxes, which government sought to restrict, protected under the First Amendment).

¹²⁶ The Second Circuit followed this path in *Westmoreland v. Columbia Broadcasting Sys.*, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985). The court did not view electronic access as merely a means for the press and public to exercise their general First Amendment right of access to attend a trial. Such an approach—urged by Judge Winter in his concurring opinion, *see id.* at 24—would necessarily have triggered First Amendment analysis of the court’s denial of electronic access. Rather, the court treated the denial summarily, asserting simply that “the public interest in television access to the courtroom does not now lie within the First Amendment.” *Id.*

nonpublic forum.¹²⁷ That is, government is free to exclude the public and press from this forum—consisting either of courtroom space or electronic feed—and reserve this property for government's own, nonpublic uses.¹²⁸

C. *Electronic Access as a Designated Public Forum*

Accepting that the governmental property necessary to generate electronic feed is best understood as a nonpublic forum, when state or local government decides to permit electronic access to a courtroom, it creates a public forum. While the Court in *International Society for Krishna Consciousness, Inc. v. Lee*¹²⁹ established stringent requirements for the recognition of designated public fora, a governmental decision to allow the broadcast of court proceedings satisfies these requirements. In *Lee*, the Court held that the terminal areas of major international airports were not traditional or designated public fora, but remained nonpublic with the primary purpose of facilitating air travel, not expressive activities.¹³⁰ The Court reasoned that government does not create a public forum by "inaction," nor by permitting the public "freely to visit a place owned or operated by the Government."¹³¹ Rather, government creates a public forum "by intentionally opening a nontraditional

¹²⁷ The Court has recently recognized that forum doctrine principles can be properly applied to non-conventional governmental property. In *Rosenberger v. Rector and Visitors*, — U.S. —, 115 S. Ct. 2510 (1995), the Court addressed a public university's policy that prohibited payments from the Student Activities Fund (SAF) in support of student organizations engaged in religious activities. The SAF helped fund the activities of other student organizations that were related to the "educational purpose" of the university. *Id.* at 2512. In striking down the policy as viewpoint-based, the Court deemed the SAF to be a university-created forum, reasoning that it "is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Id.* at 2517.

¹²⁸ See, e.g., *Greer v. Spock*, 424 U.S. 828, 836 (1976) (holding that government "has power to preserve the property under its control for the use to which it is lawfully dedicated.") (quoting *Adderly v. Florida*, 385 U.S. 39, 48 (1996)).

¹²⁹ 505 U.S. 672 (1992).

¹³⁰ *Id.* at 680.

¹³¹ *Id.* at 679 (quoting *Greer*, 424 U.S. at 836).

forum for public discourse.’”¹³² Such governmental intent was lacking in *Lee*, the Court stated, pointing to the “frequent and continuing litigation evidencing the [government’s] objections” to certain forms of expressive activity.¹³³

A fees-for-feed policy, on the other hand, would satisfy the central *Lee* requirement of governmental intent. Such a policy would plainly evince an intent to open an otherwise nonpublic forum for use by entities engaged in core First Amendment activity. And, unlike the airport terminal areas at issue in *Lee*, the electronic access forum would serve only this one function—the facilitation of First Amendment activity.

D. *The Standard of Review*

Under existing doctrine, restrictions on expressive activity in a designated public forum are subjected to the same level of scrutiny applicable in a traditional public forum.¹³⁴ Content-based restrictions must be shown to be narrowly drawn and necessary to serve a compelling governmental interest, while so-called time, place and manner restrictions must be content neutral, narrowly tailored to serve a significant governmental interest and leave ample alternative channels of communication.¹³⁵ By contrast, government may impose any reasonable restriction on First Amendment activity in a nonpublic forum, provided the restriction is viewpoint neutral.¹³⁶

These standards prove analytically useful when examining most non-monetary burdens government might impose on electronic access. For example, in states permitting electronic access, regulations commonly vest the trial judge with discretion to decide whether such access should be permitted in a given case, and they direct the judge

¹³² *Id.* (quoting *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

¹³³ *Id.* at 679-680.

¹³⁴ *Id.* at 678; *see also* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

¹³⁵ *Perry*, 460 U.S. at 45.

¹³⁶ *See Lee*, 505 U.S. at 678-679.

to assess the effect access will have on the fairness and integrity of the proceedings.¹³⁷ Assuming that a state permitting electronic access under certain, specified conditions creates a designated public forum, a judge's denial of electronic access on the ground that the fairness of the proceedings would otherwise be jeopardized can probably be sustained under a time, place and manner analysis.¹³⁸ Similarly, many of the judge-imposed restrictions on electronic access, such as a prohibition on televising jurors' faces, also would survive time, place and manner analysis.

Doctrinal difficulty arises when one attempts to apply time, place and manner standards to a fees-for-feed policy. To be sure, levying a fee for access to the governmental property necessary to generate electronic feed is a type of "content neutral" restriction. In other contexts, however, when government has levied fees on the those exercising First Amendment rights in a traditional public forum, the Court has treated the fees harshly, applying strict scrutiny, notwithstanding the fact that the fees would seemingly appear content neutral. For example, in *Murdock v. Pennsylvania*,¹³⁹ the Court reversed a conviction for distributing religious literature and soliciting donations without first paying a fee to obtain a license, as required by city ordinance. In holding that government "may not impose a charge for the enjoyment of a right granted by the federal constitution,"¹⁴⁰

¹³⁷ See *supra* notes 32-33 and accompanying text.

¹³⁸ The important point, however, is that any such denial would indeed invite constitutional scrutiny, and governmental regulations purporting to vest the trial judge with complete and essentially unreviewable discretion would be presumptively invalid. Under time, place and manner analysis, the denial of electronic access in order to insure the fairness of the trial would satisfy the content-neutral requirement. The ban on electronic media would be complete, presumably irrespective of the type of coverage any particular member of the media might provide. Second, insuring fair judicial proceedings undoubtedly constitutes a significant governmental interest, but the trial judge would need to make certain that the denial of access not be more extensive than necessary to insure fair proceedings. Finally, in the usual case, members of the electronic media would be able to access the court proceedings conventionally.

¹³⁹ 319 U.S. 105 (1943).

¹⁴⁰ *Id.* at 113.

the Court reasoned that the ordinance was not saved by its content neutrality:

The fact that the ordinance is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.¹⁴¹

The ordinance at issue in *Murdock* burdened expressive activity in a traditional public forum. As shown below, lower courts have at least implicitly recognized a distinction between revenue-raising fees imposed on those engaging in First Amendment activity in a traditional public forum and fees imposed for use of either a designated public forum, such as utility poles¹⁴² and a civic auditorium,¹⁴³ or a nonpublic forum,¹⁴⁴ by permitting government to raise revenue by charging for the use of its property.¹⁴⁵

VI. GOVERNMENT'S INTEREST IN RAISING REVENUE

Whether a fees-for-feed policy is subjected to strict scrutiny, or to time, place, and manner intermediate scrutiny, or to a mere reasonableness test,¹⁴⁶ government must establish, at the threshold,

¹⁴¹ *Id.* at 115.

¹⁴² *See, e.g.,* Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954, 973 (N.D. Cal. 1987).

¹⁴³ *See, e.g.,* Cinevision Corp. v. City of Burbank, 745 F.2d 560, 569-77 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

¹⁴⁴ *See, e.g.,* Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth., 745 F.2d 767, 773 (2d Cir. 1984).

¹⁴⁵ In this limited sense, then, the standards used to assess restrictions on expressive activity in the two categories of public fora may not be identical.

¹⁴⁶ A court would assess the reasonableness of a fees-for-feed policy were it to conclude that electronic access constituted a nonpublic forum, *see, e.g.,* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79 (1992),

an interest sufficient to justify the burden on First Amendment activity. A fees-for-feed policy differs from other burdens states place on the broadcast of trial proceedings. Most of these other restrictions are designed to safeguard the integrity of the proceedings, thereby insuring that the participants are subjected to a fair process.¹⁴⁷ These kinds of interests have been held to be particularly important, and have been deemed sufficient to justify total denial of public and press access to certain trial proceedings.¹⁴⁸ A fees-for-feed policy, on the other hand, while content neutral, is designed for an entirely different governmental purpose—raising revenue. By adopting a fees-for-feed policy, government would arguably be acting in a “proprietary” rather than a governmental role.¹⁴⁹ In reviewing a

notwithstanding government’s decision to grant electronic access for broadcasting purposes.

¹⁴⁷ See *supra* notes 32-33 and accompanying text.

¹⁴⁸ See, e.g., *United States v. Three Juveniles*, 61 F.3d 86, 92 (1st Cir. 1995) (finding that district court’s closure of juvenile proceeding was “sufficiently compelling” and “narrowly tailored”), *petition for cert. filed*, 64 U.S.L.W. 3399 (U.S. Nov. 24, 1995) (No. 95-815); *Woods v. Kuhlmann*, 977 F.2d 74, 77 (2nd Cir. 1992) (upholding exclusion of defendant’s family during witness’ testimony to protect the safety of that witness); *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th Cir. 1992) (holding that trial court had the power to order limited exclusion of spectators during testimony of victim), *cert. denied*, 506 U.S. 958 (1992); *Fayerweather v. Moran*, 749 F. Supp. 43, 45-46 (D.R.I. 1990) (upholding a limited closure order during witness’ testimony to protect the welfare of a six year old victim of sexual assault).

¹⁴⁹ To be sure, in performing the judicial function itself, government acts in a traditional, not proprietary, role. Were one to deem a fees-for-feed policy the product of this traditional governmental function, the distinction the courts have developed between traditional and proprietary governmental roles would be inapplicable and the First Amendment analysis would proceed more predictably. Courts would not recognize a legitimate governmental interest, much less an important or compelling one, in government raising revenue by leveraging its performance of core governmental functions to impose fees upon those exercising constitutional rights. Government could not, for example, seek to justify selling a criminal defendant the right to receive a fair trial by claiming it was acting in a proprietary capacity. Nor should government be able to charge members of the press and public for the right to attend a criminal trial. In discharging the core judiciary function, which the Court has held includes the right of the public and

fees-for-feed policy, courts should, therefore, not treat government as regulating the broadcast of courtroom proceedings but rather as leveraging government's control over certain governmental property to generate revenue.

A. *Government as Proprietor*

The distinction between governmental regulatory and proprietary functions has at times been deemed significant in other areas of constitutional adjudication.¹⁵⁰ In the First Amendment area, cases involving government's rental of its property to publishers for the placement of newsracks and the lease of space on utility poles to cable television operators illustrate this significance. Courts have not agreed, however, on a uniform approach in adjudicating First Amendment claims directed at governmental "proprietary" action.

press to attend certain criminal proceedings, government simply may not claim proprietary status, even if its goal were to raise revenue. Accordingly, any governmental policy of the variety hypothesized above would assuredly be stricken for want of a legitimate governmental interest.

The enactment of a fees-for-feed policy, however, may arguably be distinguished from other traditional governmental functions. First, government simply has not traditionally been in the business of televising courtroom proceedings. Second, and more fundamentally, government has no constitutional obligation to generate (or permit the generation of) electronic feed from a courtroom. *See supra* Part II.B. Just as government, while under no constitutional compulsion to build a civic auditorium, may, having built such a facility, constitutionally charge rent to those who use it and thereby generate revenue, *see* *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 569-77 (1984), *cert. denied*, 471 U.S. 1054 (1985), so too, the government would argue, may it generate electronic feed and charge those who wish to use it. For these reasons, courts may find it appropriate to assess a fees-for-feed policy under the government-as-proprietor principles discussed *infra*.

¹⁵⁰ The most notable example arises in the Court's dormant Commerce Clause jurisprudence. While the Commerce Clause, of its own force, prohibits a state from discriminating against interstate commerce when it acts in a regulatory capacity, such prohibition vanishes when the state acts in a proprietary role, as a market participant: "[T]he commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their sovereign capacity." *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 336 (1st Ed. 1978)).

In *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*,¹⁵¹ the court upheld a scheme whereby a public benefit corporation ("the MTA") operating a railroad system charged newspaper distributors a fee for the right to place newsracks on its property, but only after concluding that the government was engaged in the performance of a proprietary function. The district court had enjoined the MTA from applying the scheme on the ground that it was an unconstitutional prior restraint because the fees were designed to raise revenue, not merely recoup the administrative costs created by the licensing of newsrack placements.¹⁵² The court of appeals reversed. Applying the 3-category forum doctrine, the court first reasoned that the MTA's property should be classified as a non-public forum.¹⁵³ Because the placement of newsracks in the public areas of MTA stations was not incompatible with the stations' normal activity, however, the court determined that these areas were "appropriate forums for the sale of newspapers through newsracks."¹⁵⁴ Viewed in this way, the court stated that the MTA could impose reasonable time, place and manner restrictions on the placement of newsracks.¹⁵⁵ In assessing the governmental interest asserted to justify the burden on Gannett's First Amendment rights, the court noted that normally government may not profit from the imposition of fees on the exercise of expressive activity.¹⁵⁶ This general rule did not apply to the MTA's conduct, the court reasoned, because it was not acting "in a traditional governmental capacity," but rather was engaged in "a proprietary" function.¹⁵⁷ The distinction was important because when "a government agency is engaged in a

¹⁵¹ 745 F.2d 767 (2d Cir. 1984).

¹⁵² *Id.* at 772.

¹⁵³ *Id.* at 773.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 774 (citing *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943); *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941); *Hull v. Petrillo*, 439 F.2d 1184, 1186 (2d Cir. 1971)).

¹⁵⁷ *Id.*

commercial enterprise, the raising of revenue is a significant interest."¹⁵⁸ The court then balanced the government's interest in raising revenue against the burden that the fees imposed on Gannett's First Amendment rights and concluded that the revenue interest "clearly outweigh[ed]" the burden inasmuch as Gannett would have to pay fees were it to place its newsracks on private property and it should not be entitled to a benefit merely because MTA's property was government-owned.¹⁵⁹

The significance of government as a proprietor has also been noted in cases addressing the constitutionality of fees imposed on cable television operators. In *Erie Telecommunications, Inc. v. City of Erie*¹⁶⁰ and *Group W Cable, Inc. v. City of Santa Cruz*,¹⁶¹ the courts relied upon *Gannett* in rejecting challenges to cities' imposition of fees—computed at 5 percent of the cable operators' gross revenue—for use of public rights-of-way.¹⁶² In *Erie*, the court recognized that government, as a general rule, may only "reallocate

¹⁵⁸ *Id.* at 775 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974)).

¹⁵⁹ *Id.* at 775; *see also* *Phoenix Newspapers, Inc. v. Tucson Airport Auth.*, 842 F. Supp. 381, 385 (1993) (holding rental fees charged for placement of newsracks in airport terminal areas constitutional because the First Amendment did not entitle plaintiffs "to utilize, free of charge, valuable commercial property, even when publicly owned.").

¹⁶⁰ 659 F. Supp. 580 (W.D. Pa. 1987).

¹⁶¹ 669 F. Supp. 954 (N.D. Cal. 1987).

¹⁶² *See also* *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 406 (S.D. Fla. 1991) (upholding 5% of gross revenue franchise fee, noting that "[g]overnments regularly charge fees for the use of their property, including the use of such property for speech."). *But see* *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559 (N.D. Cal. 1988). In *Century Federal*, the court held unconstitutional a franchise fee imposed on cable operators, applying discrimination models which focused on the disparate treatment accorded other users of the city's right of ways, such as the telephone company, which was not charged at all. *Id.* at 1575. Applying time, place and manner analysis, the court reasoned that this disparate treatment of First Amendment speakers rendered the franchise fee content-based. Alternatively, the court held that the disparate treatment amounted to type 1 discrimination under *Minneapolis Star*, as the city "singled out the press for a special burden" *Id.* at 1579.

the administrative and regulatory costs" occasioned by the exercise of expressive activity,¹⁶³ but reasoned that government is not so limited when imposing a fee "for transacting business," provided that the fee is not a "condition of the right to speak."¹⁶⁴ The gross receipts-based fee satisfied this requirement, according to the court, because "the City is empowered to charge franchise fees for the commercial use of the public rights-of-way."¹⁶⁵ Moreover, the court stated that the cable company's First Amendment rights were "eroded" because the medium of cable television enjoys less First Amendment protection than afforded newspapers.¹⁶⁶

The court in *Group W* employed a different mode of analysis but arrived at a substantially similar result. The *Group W* court viewed the property involved as a "limited public forum"¹⁶⁷ and the fees as "directed at the noncommunicative aspects of Group W's First Amendment activities" and therefore applied the 4-prong test articulated in *United States v. O'Brien*.¹⁶⁸ The court reasoned that the city had authority to charge franchise fees, and rejected Group W's argument that the public thoroughfares are a "traditional public forum, access to which may not be conditioned upon the payment of a revenue-raising fee."¹⁶⁹ Because cable television requires the permanent occupation of space on utility poles and other public property, it differs from other speakers, and cable operators may be

¹⁶³ 659 F. Supp. at 596 (citing *Cox v. New Hampshire*, 312 U.S. 569 (1941)).

¹⁶⁴ *Id.* at 596-97.

¹⁶⁵ *Id.* at 597.

¹⁶⁶ *Id.*

¹⁶⁷ 669 F. Supp. at 973.

¹⁶⁸ *Id.* The Court in *O'Brien* stated:

[A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 377 (1968).

¹⁶⁹ 669 F. Supp. at 973.

charged for their use of this property.¹⁷⁰ Moreover, the court reasoned that the city had a substantial interest in charging a reasonable fee for use of the property, and this interest was unrelated to the suppression of expression inasmuch as the city also charged a public utility company a 2% of gross revenue fee for laying pipe under public streets.¹⁷¹ Finally, the court noted that while the city was entitled to be paid the fair market value of the property used by the cable operator, the fee should not be "excessive."¹⁷² The court accordingly directed the parties to negotiate a fee that reflected the fair market value of the property.¹⁷³

These cases provide some measure of authority for the constitutionality of a fees-for-feed policy. Like the public properties at issue in each case, neither the space inside a courtroom on which cameras and audio equipment would be located nor the actual electronic feed itself fits within any reasonable conception of a "traditional public forum." Accordingly, the Constitution does not require government to grant access to this particular property, and the constitutional rule articulated in *Murdock*¹⁷⁴ prohibiting government from charging those exercising First Amendment rights would not apply. A fees-for-feed policy would result in the "rental" of this property to a commercial entity seeking to use the feed in broadcast programming to generate revenue. Hence, the government's interest in raising revenue would approach its zenith: a private commercial entity that seeks to use governmental property in its profit-making ventures—property to which government is not constitutionally compelled to provide access—may be required to pay government a reasonable fee for use of the property. This was the holding in *Gannett, Erie, and Group W*. As those cases teach, when government acts in a proprietary capacity, the raising of revenue becomes a

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 973-74.

¹⁷² *Id.* at 974.

¹⁷³ *Id.* at 975. The court also noted that the city was entitled to receive an administrative fee to defray the administrative costs of issuing the franchise to *Group W*.

¹⁷⁴ See *supra* notes 139-41 and accompanying text.

significant governmental interest. Characterizing the interest in this manner allowed the Court to conclude in *Gannett*, for example, that the government's interest "clearly outweigh[ed]" the burden imposed on First Amendment rights,¹⁷⁵ and would, in all likelihood, cause a fees-for-feed policy to survive time, place, and manner analysis.¹⁷⁶ That the private entity burdened by governmentally-imposed fees happens to be an organ of the press performing core press functions should not alter the analysis any more than it did in *Gannett*, *Erie* and *Group W*.

B. *Raising Revenue From Public Demand to Observe the Judicial Function*

The constitutional issue thus isolated and framed by application of forum analysis is whether government may condition access to a courtroom electronic access forum, designated for public use, on the payment of a fee. Even assuming the correctness of the above-discussed decisions, there are important differences between the governmental conduct involved in these cases and a fees-for-feed policy. These differences suggest that courts should not slavishly adhere to the holdings and rationales in the government-as-proprietor cases when adjudicating the constitutional validity of a fees-for-feed policy.

1. *The Source of Economic Value of "Conduit" Fora*

The source of forum economic value in the government-as-proprietor cases differs significantly from the source of economic value ascribed to courtroom electronic feed. In the proprietor cases,

¹⁷⁵ *Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth.*, 745 F.2d 767, 775 (2d Cir. 1984).

¹⁷⁶ A fee charged for access to electronic feed would be content neutral, government would possess a "significant" interest by virtue of the proprietor cases, the fee charged would naturally be tailored to achieve the significant interest in raising revenue, and conventional, non-electronic courtroom access would be available to members of the broadcast media.

the value of the governmental property stems from its convenience or necessity in providing a conduit for privately produced First Amendment activity. The property is situated in a manner such that First Amendment speakers desire access to the property to facilitate communication of their messages. A newspaper distributor finds train stations that serve many commuters daily as valuable to its commercial goal of selling newspapers; a cable television company's access to utility poles and other public right-of-ways is similarly commercially valuable. That the government owns the valuable property in question is thus truly fortuitous; the conduct of the government in managing the property would not vary significantly from any other owner. The value of the property to a potential "speaker" will be determined by the effectiveness of the property's conduit capabilities. But any value ascribed to the conduit property is merely derivative of the commercial value of the speech sought to be distributed; that is, consumer demand for the end product—newspapers, cable programming, or other speech engaged in for profit—will determine largely how much the speakers will be willing to pay government, or any other conduit controller, for access to the desirable channels through which the speech will be distributed. This end product value will be set without significant government involvement.

The value analysis differs significantly in the case of a fees-for-feed policy. Accepting that the value of the conduit, in this context either the courtroom space necessary for the placement of camera and audio equipment or the feed itself, derives from the value of the "end product"—the court proceedings—government assumes a much different role than in the typical proprietor case. Here, ultimate value is driven by consumer demand to observe government performing one of its essential core functions. Unlike private producers and distributors of speech, the end product, while still distributed through government-owned conduit, is now also exclusively the product of governmental action. Hence, in a fees-for-feed policy, government would not find itself merely situated in the chain of distribution of privately produced speech being sold for profit, but rather in the business of selling access to expression generated in the performance of core governmental functions.

2. *Forum Economic Value and Competing First Amendment Values*

The fundamental differences in the source of value in the fora at issue in the proprietor cases and the source of value in the courtroom electronic access forum are constitutionally important. To the extent that government's exercise of core functions generates citizen demand to observe "government-in-action," First Amendment values would be seriously compromised were government to leverage this demand into a revenue-raising enterprise.¹⁷⁷ Citizen interest in and comment

¹⁷⁷ Cf. *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985). In *Legi-Tech*, discussed *supra* note 46, the court addressed Legi-Tech's claim that a New York statute, which prohibited the state from accepting subscriptions to a state-run Legislative Retrieval Service (LRS) from entities, like Legi-Tech, who were competitors of LRS, violated the First Amendment. Applying forum analysis, the district court had declared the state's LRS to be a nonpublic forum, and had upheld the reasonableness of the denial of access to Legi-Tech, inasmuch as it was necessary "to protect the state's natural monopoly on computer supplied legislative information." *Legi-Tech, Inc. v. Keiper*, 601 F. Supp. 371, 380-81 (N.D.N.Y. 1984). The court of appeals, disagreeing with the district court's legal theories, remanded for further factfinding. The court applied a discrimination model, holding that once "the state creates an organ of the press, as here, it may not grant the state press special access to governmental proceedings or information and then deny to the private press the right to republish such information," 766 F.2d at 733, and that the state could not offer LRS to the general public but then discriminate against Legi-Tech by denying it access. *Id.* at 734. Finding the record inadequate to apply these precepts, the court held that further factfinding was necessary to determine whether Legi-Tech had access on "substantially the same terms as LRS" to the raw legislative data and, if so, whether the cost of converting the data to a computerized format was "neither avoidable nor de minimis." The court of appeals directed that if either question were answered in the negative, the statute prohibiting Legi-Tech from subscribing to LRS would violate the First Amendment.

Because the issues framed for decision by the court of appeals centered on the discriminatory treatment of Legi-Tech *vis a vis* other members of the public, the court had no occasion to address the more fundamental question presented by the facts, specifically, whether, discrimination aside, the state could leverage the public's demand for access to legislative materials into a profitmaking enterprise. Indeed, the district court had found that the state's interest in denying access to entities like Legi-Tech was purely profit-centered: competitors would threaten the state's "natural monopoly" in providing computerized legislative information. 601 F. Supp. at 381.

upon government's performance of its core functions are central tenets of an effective democratic process, and lie within the structural protection of the First Amendment. The Court recognized this structural role in *Globe*,¹⁷⁸ noting that the First Amendment's guarantee of public access to criminal trials "serves to insure that the individual citizen can effectively participate in and contribute to our republican system of self-government."¹⁷⁹ As Justice Brennan observed in *Richmond Newspapers*,¹⁸⁰ the First Amendment's structural role embodies the notion that in a democracy, debate on public issues should be "uninhibited, robust, and wide-open,"¹⁸¹ and that "valuable public debate—as well as other civic behavior—must be informed."¹⁸² Because of these concerns, government should not be recognized as having a legitimate interest in raising revenue by selling access to newsworthy events of its own creation. To decide otherwise would sanction government selling information to the press and public covering a wide range of topics important to the citizenry.¹⁸³

Moreover, the case against recognition of a legitimate governmental interest in raising revenue by selling electronic access is strengthened by the fact that the Constitution already compels some level of access to courtroom proceedings. Because, by definition, the

And, the court of appeals intimated that the state could properly charge Legi-Tech for the "true cost to LRS of its subscription, namely the revenue LRS will lose as a consequence of Legi-Tech's retransmission" of the data to others. 766 F.2d at 736. As argued *infra* notes 178-83 and accompanying text, the First Amendment should prohibit government from leveraging public demand for information about core governmental functions into revenue raising schemes.

¹⁷⁸ 457 U.S. 596, 604 (1982).

¹⁷⁹ *Id.*

¹⁸⁰ 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring).

¹⁸¹ *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹⁸² *Id.*

¹⁸³ The "parade of horrors" need not be long to illustrate the point. One can imagine, for example, the federal government deciding to raise money for the beleaguered treasury by selling, to the highest bidder, the exclusive right to interview the President on some subject of national or international importance. Or, the federal government might choose to sell the exclusive right to televise a presidential inauguration.

proprietor cases arise in designated public fora or nonpublic fora, the government possesses the power in those contexts to deny public access to the property altogether, either by closing a previously designated forum or choosing not to open a nonpublic forum. A criminal trial, however, and probably at least certain civil proceedings,¹⁸⁴ are presumptively open. The Court has emphasized the importance of the information such proceedings convey regarding government's performance of the judicial function and has declared that First Amendment principles are advanced by public access.

The structural role of the First Amendment discussed above seeks to insure better self-governance. When government designates courtroom electronic access for press/public use, it facilitates realization of the structural goals identified in *Richmond* and *Globe*. In this context, the First Amendment values served by the broadcast of court proceedings conflict with government's interest in raising revenue. Under a fees-for-feed policy, government seeks to advance this economic interest at the expense of the constitutional values. The tension should be eliminated in favor of the paramount First Amendment principles.

VII. CONCLUSION

The Court has not recognized a First Amendment right of electronic access to courtroom proceedings. Government is thereby free to enact a flat ban on such access. Yet if government opts to grant access conditionally, the conditions and other burdens that may be imposed on the broadcast media should be subjected to First Amendment scrutiny. Analyzing courtrooms in general and electronic access in particular under the forum doctrine rubric properly focuses the constitutional inquiry on the nature of the governmental property involved and the government's conduct in managing that property, the type of burdens government seeks to impose, the interests underlying those burdens, and the First Amendment values at stake.

A fees-for-feed policy cannot withstand this kind of inquiry. In

¹⁸⁴ See *supra* note 21 and accompanying text.

seeking to generate revenue by charging the broadcast media for electronic access to the courtroom, government seemingly acts in a proprietary capacity. In other contexts, courts have recognized that government has a significant interest in raising revenue when it assumes such a role, even when it imposes financial burdens on members of the press performing central press functions. Government should not be permitted to claim such an interest as justification for a fees-for-feed policy. The electronic access forum has economic value because it provides a conduit enabling the public to observe government perform a core function. The press, by facilitating these observations, assumes an exceedingly important structural role in insuring that the public is well-informed about government's performance of the judicial function. The First Amendment itself serves an identical structural function, and prohibits government from seeking to leverage public desire to observe public court proceedings into additional revenue.