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First Amendment Interest Balancing-Behind Bars?

Teresa L. Mussetto

of burdens imposed by particular legislation, setting aside concern for the public interest deemed to be at stake.[72] Since, as the Court in *Allied* recognized, it is not impairment of contractual obligation which is of constitutional concern but rather *substantial* impairment, the notion of a fairness standard is an inherent feature of contract clause analysis even under present case law. Should the Supreme Court follow this perspective in a situation similar to *Allied,* a like result might appear to be less of an aberration.

With the *Allied* decision following so soon after *United States Trust,* the contract clause has certainly been revived. A careful evaluation of the decisions indicate, however, that the clause has merely been resuscitated rather than revised. Aside from the development of the dual standard of review in *United States Trust* and the affirmation of enlargement of obligation as impairment announced in *Allied,* the Court has retained the traditional analysis of the 1930's. Whether the Court will attempt to unravel the effect of state legislation upon the "multitudinous private arrangements" of society[73] can be but speculation. There is a growing sense, however, that the Court may be increasingly willing to move beyond mere resuscitation, to revitalize and reinterpret contractual obligations in the modern setting.

JEAN F. REED

First Amendment Interest Balancing—Behind Bars?

This casenote examines the recent decision of Houchins v. KQED, Inc., *in which the Supreme Court of the United States narrowly construed the right of access afforded the news media in their coverage of penal facilities. The analysis focuses upon the first amendment methodology utilized by the Court in its decisionmaking process. The author concludes with a critical assessment of the Court's departure from accurate interest balancing techinque.*

Following the suicide of a prisoner in the Alameda County Jail at Santa Rita, California, KQED, a licensed operator of both a radio

72. It has been suggested that a "takings" approach would have better justified the holding of the Court in *United States Trust. See The Supreme Court, 1976 Term,* 91 HARV. L. REV. 1, 90-94 (1977) (fairness-centered takings standard as a measure of clear government-generated costs would be an effective response to the Court's concern for misuse of the police power).

73. Justice Frankfurter used this phrase in East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232 (1945).

and television station, sought access to the facility. The county sheriff refused to permit station news personnel to enter. Subsequently, the station filed suit seeking preliminary and permanent injunctions to prevent the county sheriff from " 'excluding KQED news personnel from the Greystone cells and Santa Rita facilities and generally preventing full and accurate news coverage of the condition prevailing therein.' "[1] Basing its claims on the first and fourteenth amendments, KQED contended that the limited access policies of the prison effectively precluded the gathering of news, a right essential to the protection of freedom of speech and of the press.[2] The sheriff thereafter provided public tours which afforded limited access to the jail. The United States District Court for the Northern District of California, however, granted a preliminary injunction preventing the exclusion of KQED news personnel and equipment " 'at reasonable time and hours' " for the purpose of interviewing inmates and obtaining full coverage of prison conditions.[3] On interlocutory appeal, the United States Court of Appeals for the Ninth Circuit sustained the district court's order, concluding that the public and the media have a first and fourteenth amendment right of access to prisons and jails.[4] On certiorari, the Supreme Court of the United States *held,* reversed: In the absence of legislation so providing, the media has no constitutionally mandated right of access to penal facilities beyond that of the general public. *Houchins v. KQED, Inc.,* 98 S.Ct. 2588 (1978).[5]

Over the years, the Supreme Court has developed a number of

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1. Houchins v. KQED, Inc., 98 S.Ct. 2588, 2591 (1978) (quoting KQED's complaint). The NAACP joined in this suit, alleging a

> 'special concern with conditions at Santa Rita because the prisoner population at the jail is disproportionately black, and the members of the NAACP depend on the news media for information about conditions in the jail so that they can meaningfully participate in the current public debate on jail conditions in Alameda County.'

Id. at 2600 n.5 (Stewart, J., concurring) (quoting the NAACP's complaint). Since special relief was neither sought nor granted, the claims of the NAACP were not considered separately in the opinion.

2. *Id.* at 2593.

3. *Id.* (quoting the district court's preliminary injunction order).

4. KQED, Inc. v. Houchins, 546 F.2d 284 (9th Cir. 1976).

5. Chief Justice Burger delivered the plurality opinion of the Court, in which he was joined by Justices White and Rehnquist. In a concurring opinion, Justice Stewart accepted the plurality's recognition of a constitutional right of equal access afforded the public and the press; he diverged from the plurality, however, in his characterization of the right of equal access as one necessarily based on practical distinctions between the public and the news media. Dissenting Justices Stevens, Brennan and Powell objected to the failure of the Court to grant relief commensurate with the special needs of the press. Justices Marshall and Blackmun did not participate in the decision. 98 S. Ct. at 2588.

This note will focus on the first amendment methodological aspects of the case, and therefore will only indirectly examine the specific first amendment issues raised.

doctrinal approaches for analyzing first amendment claims. Among these methodologies are the "bad tendency" test,[6] the "clear and present danger" standard,[7] the "absolute" test[8] and the implementation of "ad hoc" interest balancing.[9] The latter, introduced in *Schneider v. State*,[10] is traditionally employed in cases where the challenged restraint is not directly imposed, but rather is unavoidably ancillary to a regulation designed to further legitimate societal goals.[11] Thus,

> a governmental 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.[12]

The broad language of the first amendment, devoid as it is of interpretive guidelines, is vulnerable to such discretionary limita-

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6. This method, utilized in the earlier stages of first amendment interpretation, validated legislative regulation of expression that was thought to endanger the public peace and safety. *See* Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

7. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.); *see* Whitney v. California, 274 U.S. 357 (1927). The "clear and present danger" standard was abandoned in Dennis v. United States, 341 U.S. 494 (1951), in favor of a "balancing" test.

8. The absolutist determines whether speech is within the "magic circle" of first amendment protection by means of definitional categorization. Thus, while "no law" which "abridges" the "freedom of speech" is constitutionally permissible, invalidation of a regulation may depend upon the definition accorded each of these concepts in a particular case. *See, e.g.*, International Ass'n of Machinists v. Street, 367 U.S. 740, 780, 788-91 (1961) (Black, J., dissenting) (definition of "law"); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137-38, 147-69 (1961) (Black, J., dissenting) (definition of "abridge"); Dennis v. United States, 341 U.S. 494, 579-81 (1951) (Black, J., dissenting) (definition of "the freedom of speech").

9. Historically, the interest balancing technique has been employed in cases dealing with state infringement upon interstate commerce. *See, e.g*, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). More recently, it has appeared in the "new" equal protection cases. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

10. 308 U.S. 147, 161 (1939).

11. *See* Konigsberg v. State Bar, 366 U.S. 36 (1961) (Harlan, J.); Talley v. California, 362 U.S. 60 (1960) (Clark, J., dissenting); Barenblatt v. United States, 360 U.S. 109 (1959) (Harlan, J.); NAACP v. Alabama, 357 U.S. 449 (1958) (Harlan, J.); Dennis v. United States, 341 U.S. 494 (1951) (Frankfurter, J., concurring); American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (Vinson, C.J.).

12. United States v. O'Brien, 391 U.S. 367, 377 (1968).

tions.[13] As originally developed, however, the balancing method had some presumptive safeguards against undue restraint of speech. The first amendment was accorded a "preferred position,"[14] and any legislation appearing to infringe upon it was strictly scrutinized. Regulations involving "prior restraints," *i.e.*, where the government practiced prepublication censorship, bore "a heavy presumption against . . . constitutional validity,"[15] and restrictions that were vague[16] or overbroad[17] in scope were struck down as lacking requisite explicit standards. Furthermore, if the legitimate governmental interest asserted could be achieved by means of a "less restrictive alternative,"[18] or if existing alternative channels of expression were unsatisfactory substitutes,[19] the abridging legislation fell.

Despite auspiciously protective beginnings, the "ad hoc" inter-

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13. For the competing view that the first amendment is an absolute mandate, reflecting a prior balancing by the Framers, see Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961).

14. *See* Kovacs v. Cooper, 336 U.S. 77, 88 (1949); Saia v. New York City, 334 U.S. 558, 562 (1948); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Follett v. Town of McCormick, 321 U.S. 573, 575 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

15. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); *see* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-59 (1976); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (Pentagon Papers case); Organization for a Better Austin v. O'Keefe, 402 U.S. 415, 419 (1971). For elaboration of those "exceptional cases" where prior restraints are constitutionally permissible, see Near v. Minnesota, 283 U.S. 697, 716 (1931).

16. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451 (1939) (voiding statute making membership in a "gang" criminal), *cited in* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 718 (1978).

17. "A law is void on its face if it 'does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associational rights." L. TRIBE, *supra* note 16, at 710 (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940)); *see, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting); Street v. New York, 394 U.S. 576, 592 (1969).

18. *E.g.*, United States v. Robel, 389 U.S. 258, 268 (1967) (federal law preventing any Communist Party member from working in defense facilities); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (Arkansas statute requiring teachers in state-supported schools to file annual list of organizational affiliations); Schneider v. State, 308 U.S. 147, 164 (1939) (anti-handbill ordinances for purpose of minimizing litter, noise, traffic congestion and invasion of privacy). *See generally*, Wormuth & Meikin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 267-93 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

19. *See* Wooley v. Maynard, 430 U.S. 705 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976); Spence v. Washington, 418 U.S. 405, 411 & n.4 (1974); *cf.* United States v. Robel, 389 U.S. 258, 267 (1967) (rejecting argument that reasonably effective alternatives did not exist); Sherbert v. Verner, 374 U.S. 398, 407 (1963) (same). *See also* Procunier v. Martinez, 416 U.S. 396, 408-09 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972). Conversely, where equally effective alternatives are readily available, the restriction is not deemed significant. *See* Greer v. Spock, 424 U.S. 828, 839 (1976); Pell v. Procunier, 417 U.S. 817, 827, 830 (1974); Saxbe v. Wahington Post Co., 417 U.S. 843, 846-47 (1974); Lloyd Corp. v. Tanner, 407 U.S. 551, 566-67 & n.12 (1972).

est balancing approach was offset by development of the "judicial restraint" doctrine,[20] which acceded the function of balancing competing interests to the legislature. Thus, the judicial scales, which had previously favored the first amendment mandate against governmental infringement, began to tip heavily on the side of legislative regulations.[21]

It is precisely this shift which libertarian absolutists have so strongly criticized.[22] Clearly, the effectiveness of the balancing technique depends upon a careful case-by-case analysis of the relevant facts.[23] In contrast, the "categorization" technique classifies certain protected areas of speech and creates cognizable precedent which is later dispositive of any case fitting within the predetermined categories.[24] As applied, these two techniques are not mutually exclusive; indeed, the responsible determination of whether a case fits a previously defined mold for constitutional purposes requires careful examination of the particular facts.[25]

The recently decided prison access cases provide an illustration

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20. "It is not our function to examine the validity of . . . congressional judgment. . . . We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake." United States v. Robel, 389 U.S. 258, 267 (1967).

21. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring):

> Free-speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

See also Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963): "[T]he 'balancing' test has tended to reduce the first amendment, especially when a legislative judgment is weighed in the balance, to a limp and lifeless formality."

22. A libertarian absolutist is an ideologue who believes that the courts should have plenary powers of review to prevent Congress from abriding first amendment freedoms through "ad hoc" political balancing. *See, e.g.*, Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1447 (1962) [hereinafter cited as *First Amendment Balance*]. *See generally* Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963) [hereinafter cited as *Frantz Reply*]; Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461 (1953); Meiklejohn, *supra*, note 13.

23. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 126 (1959) (emphasis added): "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue *always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.*"

24. *See* L. TRIBE, *supra* note 16, at 584; *First Amendment Balance*, *supra* note 22 at 1435, 1442; *cf.* Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) (categorization technique "too inflexible for the non-Euclidean problems to be solved.")

25. *See* Note, *The Speech and Press Clause of the First Amendment as Ordinary Language*, 87 HARV. L. REV. 374, 381 (1973): "[T]he definers must . . . resort to balancing in applying their theoretical distinctions to actual cases."

of this proposition.[26] In *Pell v. Procunier,*[27] the Supreme Court considered the issue of whether a regulation[28] prohibiting interviews with specific individual prisoners infringed upon the first and fourteenth amendment rights of the plaintiff inmates and upon the first amendment rights of the plaintiff press. The restrictive regulation reflected legitimate penological concerns[29] and did not foreclose alternative opportunities for interaction between the press and prison inmates.[30] Finding no infringement, the Court was careful to analyze all factual aspects, as well as conflicting interests, asserted by the opposing parties. The language of the opinion is replete with balancing terminology. In setting forth the test to be followed, the Court stated:

> In the First Amendment context . . . a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.[31]

Refuting the asserted right of the plaintiff press to "interview any inmate who is willing to speak with them, in the absence of an individualized determination that the particular interview might create a clear and present danger to prison security or to some other substantial interest served by the corrections system,"[32] the Court relied upon *Branzburg v. Hayes*[33] and *Zemel v. Rusk,*[34] which estab-

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26. Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

27. 417 U.S. 817 (1974).

28. Section 415.071 of the California Department of Corrections Manual provided that "[p]ress and other media interviews with specific individual inmates will not be permitted." *Quoted in* 417 U.S. at 819.

29. 417 U.S. at 822-23. Among these concerns were deterrence from further crime, rehabilitation and internal prison security.

30. *Id.* at 824-25. The prisoners could communicate by mail, receive limited visits from family, friends, clergy, attorneys or former acquaintances, and talk with any press members who visited the jail.

31. *Id.* at 822.

32. *Id.* at 829. The very language of the claim, as phrased by the Court, acknowleged that it was asserted within an interest balancing context. As the Court stated earlier: "In a number of contexts, we have held 'that reasonable "time, place and manner" regulations [of communicative activity] may be necessary to further significant governmental interests, and are permitted.' " *Id.* at 826. *See also* note 48 *infra.*

33. 408 U.S. 665 (1972). In *Branzburg,* the Court determined that even a qualified journalist was not privileged to withhold source identity from a good faith grand jury inquiry.

34. 381 U.S. 1 (1965). In *Zemel,* the Court upheld the Secretary of State's refusal to validate American passports for travel to Cuba, trivializing plaintiff's contention that such

lished that "[t]he Constitution does not . . . require government to accord the press[35] special access to information not shared by members of the public generally."[36]

Immediately following the *Pell* decision was *Saxbe v. Washington Post Co.*[37] In *Saxbe,* the Court faced a situation similar to that in *Pell*: respondents, a major metropolitan newspaper and one of its reporters, initiated litigation to challenge the constitutionality of a federal regulation[38] prohibiting any personal interviews between newsmen and specific federal prison inmates. The *Pell* case afforded an apt model for decision by analogy. In *Saxbe,* categorization came to the fore; yet a reasonable analysis of the facts preceded the determination that such a method was appropriate. Thus, the statement that "[t]he policies of the Federal Bureau of Prisons regarding visitations to prison inmates do not differ significantly from the

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restraint infringed upon his first amendment right to be informed (a necessary adjunct to the exercise of freedom of speech). The Court stated that the "right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 17.

35. In *KQED,* the plaintiff press challenged the regulation as an infringement upon the protection afforded by the "press" clause, rather than the "speech" clause. For a discussion of whether a meaningful distinction exists between the two, see, *e.g.* Lange, *The Speech and Press Clauses,* 23 U.C.L.A. L. REV. 77 (1975); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?,* 26 HASTINGS L.J. 639 (1975); Stewart, *"Or of the Press,"* 25 HASTINGS L.J. 631 (1975). While Justice Stewart's concurring opinion in *KQED* focused upon the special role of the press in informing the electorate, the plurality opinion of the Court failed to differentiate clearly between the speech and press clauses in resolving the right to access issue. 98 S.Ct. at 2588.

36. *Pell,* 417 U.S. at 834. While recognizing the importance of an "informed public," the Supreme Court has repeatedly maintained that the first amendment does not affirmatively mandate either access to, or disclosure of, information within the government's control. This is particularly true in cases where it is alleged that national security is involved. *See, e.g.,* United States v. Nixon, 418 U.S. 683 (1974) (validating executive privilege); Alderman v. United States, 394 U.S. 165 (1969) (dictum discussing the right to withhold military secrets from diclosure); Zemel v. Rusk, 381 U.S. 1 (1965) (denying asserted right to travel to Cuba based on freedom of speech clause); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (rejecting first amendment argument that member of communist organization has right to travel outside the United States as means of acquiring knowledge necessary for self-government); Kent v. Dulles, 357 U.S. 116 (1958) (same as *Aptheker*); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("secrecy in respect to information gathered . . . may be highly necessary, and the premature disclosure of it productive of harmful results"). *But see* New York Times Co., v. United States, 403 U.S. 713 (1971) (upholding newspaper publication of the Pentagon Papers, in the face of asserted national security interests).

37. 417 U.S. 843 (1974). The *Pell* and *Saxbe* decisions were rendered on the same day.

38. Paragraph 4b(6) of Policy Statement 1220.1A of the Federal Bureau of Prisons, which provided:

> Press representatives will not be permitted to interview individual inmates. This rule will apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities.

Quoted in 417 U.S. at 844.

California policies considered in *Pell v. Procunier*"[39] was substantiated by a detailed assessment of the visitation policies at the pertinent prison facilities.[40] It was only after this examination that the Court concluded: "We find this case constitutionally indistinguishable from *Pell v. Procunier* . . . and thus fully controlled by the holding in that case."[41]

The *Pell* and *Saxbe* prison access decisions might be characterized as reflecting a responsible interest balancing,"[42] followed by a responsible categorization. As the most recent decision of this genre, however, *KQED* is disturbing in that neither of these traditional doctrinal methods is legitimately or openly employed.

In *KQED,* the Court derived its holding that the media has no constitutionally mandated right of access to penal facilities beyond that of the general public from the *Pell* and *Saxbe* decisions. The Court arrived at this determination first, by undermining KQED's use of case law;[43] second, by relying upon the *Pell* and *Saxbe* holdings; and third, by buttressing its stance with an artillery of arguments normally employed in interest balancing. The Court paraded separation of powers, lack of judicially manageable standards, compelling government interest and existence of viable alternatives in support of its decision.[44] Yet, it refused to apply the "proper test,"[45] as articulated by the United States Court of Appeals for the Ninth Circuit: "[A] governmental restriction on First Amendment rights can be upheld only if the restriction furthers an important or substantial governmental interest unrelated to suppressing speech and the restriction is the *least drastic means* of furthering that governmental interest."[46] Indeed, the Court openly rejected "ad hoc" interest balancing on the grounds that "the Constitution affords no

39. 417 U.S. at 846.

40. *Id.* at 846-50. The Court determined that "members of the press [were] accorded substantial access to the federal prisons in order to observe and report the conditions they [found] there. Indeed, journalists [were] given access to the prisons and to prison inmates that in significant respects exceed[ed] that afforded to members of the general public." *Id.* at 849. Press personnel were permitted to tour the prisons, to conduct brief interviews with any inmates they might encounter and to photograph the prison facilities. *Id.*

41. *Id.* at 850.

42. For a discussion advocating this technique, see Gunther, *supra* note 9.

43. 98 S.Ct. at 2594-95. KQED relied upon favorable language in Pell v. Procunier, 417 U.S. 817 (1974) (dicta); Mills v. Alabama, 384 U.S. 214 (1966); Grosjean v. American Press Co., 297 U.S. 233 (1936); and Branzburg v. Hayes, 408 U.S. 665 (1922), to support its proposition that the media should have a special right of prison access. Unfortunately, none of these cases directly supported that contention. Indeed, contrary language in these decisions negated assertion of the right of prison access, and the fact patterns were distinguishable. 98 S. Ct. at 2595.

44. 98 S. Ct. at 2596-97.

45. 546 F.2d 284, 286 (9th Cir. 1976).

46. *Id.* (emphasis added).

guidelines" and, "absent statutory standards, hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or 'expedient.' "[47]

One might ask, however, when, in all the years of judicial interest balancing, has the first amendment ever provided guidelines? Nevertheless, the Court has not been deterred from utilizing an interest balancing methodology in the past to invalidate legislation whose guidelines were overbroad or vague. Clearly, in those instances, "no guidelines" were perceived as preferable to constitutionally unacceptable ones.

This is particularly true where, as in *KQED*, implementation of the restrictive regulation is left to the discretion of an administrative officer.[48] By disclaiming its role as an interest balancer, the governmental Court has ceded its power to check governmental infringement upon first amendment liberties not to the legislature, but to an individual civil servant. Surely, this was not what Madison envisioned when he said:

> If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[49]

While it is apparent that interest balancing is being employed at some level in the *KQED* opinion, on its face, the decision seems to reflect a classification technique. This is especially evident in the precise formulation of the issue: "The right to *receive* ideas and information is not the issue in this case. . . . The issue is a *claim* [*sic*] *special privilege of access* which the court rejected in *Pell* and *Saxbe*, a right which is not essential to guarantee the freedom to communicate or publish."[50]

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47. 98 S.Ct. 2588, 2597 (1978).

48. *See Frantz Reply, supra* note 22.

> It is . . . obvious, I think, that mere regulations of the time, place, and manner of speech . . . do not, per se, affect the "freedom" of speech. They may do so, however, if they are applied in a discriminatory manner so as to burden one point of view more then another, *or if they are left open to discretionary application by officials who are empowered to use them as an instrument for regulating the content of public discourse*, or if they are carried to such an extent that adequate low-cost means of reaching the public with all points of view are no longer available.

Id. at 736 (emphasis added).

49. 1 ANNALS OF CONGRESS 457 (1789), *quoted in Frantz Reply, supra* note 22, at 738.

50. 98 S. Ct. at 2596 (emphasis added) (citations omitted). One might criticize this

As stated at the outset of the plurality opinion, "[t]he question presented is whether the news media have a constitutional right of access to a county jail, *over and above that of other persons.*"[51] The answer is simply that "[u]nder [the] holdings in *Pell v. Procunier* . . . and *Saxbe v. Washington Post*, . . . until the political branches decree otherwise, as they are free to do, the media has no right, special of [*sic*] access to the Alameda County Jail different from or greater than that afforded the public generally."[52]

The *KQED* holding appears to be an innocuous restatement of principles decided in *Pell* and *Saxbe*; its corollary that "neither the First Amendment nor Fourteenth Amendment mandates a right of access to governmental information or sources of information within the government's control"[53] is not a novel proposition. The *KQED* holding, however, is disturbing because, as pointed out by Justice Stevens in his dissenting opinion, the Court, through its formulation of the issue to be resolved, has summarily dismissed the "access to public jails" issue as a mere backdrop of the "public versus press right to access" distinction, which the holdings in *Saxbe* and *Pell* are seen to control. While *Saxbe* was legitimately categorized as "constitutionally indistinguishable" from *Pell*, the same may not fairly be said of *KQED*. The categorization and balancing language of this opinion is a mere subterfuge as the Court has failed to focus sufficiently on the underlying facts—a step indispensable to either method. Had it done so, the Court might have concluded that the "legal issue" to be decided was more accurately stated by Justice Rehnquist, who was acting Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

> If the "no greater access" doctrine of *Pell* and *Saxbe* applies to this case, the Court of Appeals and the District Court were wrong, and the injunction was an abuse of discretion. If, on the other hand, the holding in *Pell* is to be viewed as impliedly limited to the situation where there already existed substantial press and public access to the prison, then *Pell* and *Saxbe* are not necessarily dispositive, and review by this Court of the propriety of the injunction, in light of those cases would be appropriate, although not necessary.[54]

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framing of the issue, in light of Professor Fried's admonition: "One thing is perfectly clear, that under no circumstances should the Court formulate the conflict in a particular case, or identify the elements of the balance to be struck, in such a way that the statement itself prejudices the decision." Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 763 (1963).

51. 98 S. Ct. at 2591 (emphasis added).

52. *Id.* at 2597.

53. *Id.*; *see* note 36 *supra*.

54. 98 S. Ct. at 2602. (quoting Houchins v. KQED, Inc., 429 U.S. 1341, 1344 (Rehnquist, Circuit Justice, 1977)).

Unlike the *Pell* and *Saxbe* situtations, the relevant visitation policies in *KQED* were unduly restrictive and not clearly justified by legitimate penological goals.[55] While in the former cases, libertarian first amendment concerns[56] were sufficiently met by meaningful alternatives, viable alternative channels of communication were inadequate in the instant case.[57]

In keeping with methodological doctrine, the Court in *KQED*, as was done in *Saxbe*, could have conceivably determined that the distinction in prison visitation policies between the case at bar and the *Pell* and *Saxbe* cases was constitutionally insignificant; therefore, the latter cases were controlling. Alternatively, the Court could have found *KQED* distinguishable. But through "ad hoc" interest balancing, as was done in *Pell*, it could have ultimately arrived at the same conclusion. Instead, even though a form of interest balancing supplied the underpinnings of the *KQED* decision, through irresponsible categorization, the Court, *sub silentio*, validated stringent public prison access policies under the guise of stare decisis.[58]

Thomas Lord Erskine, speaking in defense of Thomas Paine's work, *The Rights of Man*, observed:

> Let us consider, my Lords, that arbitrary power has seldom or never been introduced into any country at once. It must be introduced by slow degrees, and as it were step by step, lest the people should see its approach. The barriers and fences of the people's liberty must be plucked up one by one, and some plausi-

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55. *Id.* at 2600, nn.3 & 4, 2601 & nn.7-11, 2603 & n.14, 2604-05 (Stevens, J., dissenting).

56. These concerns were noted by the Court. *Id.* at 2593-94, 2598, 2605 & n.20. The basic tenet was eloquently expressed by James Madison:

> A popular government, without popular information or a means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.

Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 WRITINGS OF JAMES MADISON 103 (G. Hurst ed. 1910), *quoted in* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 1. This ideal has alternatively been expressed by both "the free flow of information" and "the marketplace of ideas" metaphors. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Grosjean v. American Press Co., 297 U.S. 233 (1936); Abrams v. United States, 250 U.S. 616 (1919) (Holmes J., dissenting).

57. "I cannot agree with petitioners that the inmates' visitation and telephone privileges were reasonable alternative means of informing the public at large about conditions within Santa Rita." 98 S. Ct. at 2603 n.14 (Stevens, J., dissenting). *See* note 55 and accompanying text *supra*. For the view that such communicative channels as existed in *KQED*, *id.* at 2596, are inadequate to effectively inform the public, see Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 2-3 (1957).

58. *See* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 5-9 (1964) (criticizing "legitimation" as being contrary to "principled constitutional adjudication").

> ble pretenses must be found for removing or hoodwinking, one after another, those sentries who are posted by the constitution of a free country for warning the people of their danger.[59]

In *KQED,* the Court is a constitutional sentry fallen asleep. It has failed to protect meaningful access to publically supported penological facilities and, presumably, to "all other public facilities such as hospitals and mental institutions."[60]

TERESA L. MUSSETTO

The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights

In this note, the author examines the continuing debate over the role of the judiciary in reviewing state legislative acts and indicates the continued reluctance of the Supreme Court of the United States to expand the content of rights protected under the privileges and immunities clause of article IV and the fourteenth amendment. The author concludes that the present refusal of the Court to impose its own value judgments over those of the state legislature is consistent with the purpose and past interpretation of the privileges and immunities clause, absent a conflict with other rights of the Constitution.

A Montana resident, who was licensed by the state as a hunting guide, and four nonresident hunters sued the Fish and Game Commission of Montana in federal district court[1] seeking declaratory and injunctive relief from a discriminatory licensing scheme. Under this scheme, nonresidents were charged between seven and one-half to twenty-five times more than residents for elk hunting privileges.[2] A three-judge district court, in a two to one decision, held that the licensing scheme as applied to nonresidents did not violate the Constitution on the grounds that the asserted right was not one that was

59. E. WALFORD, SPEECHES OF THOMAS LORD ERSKINE 336 (1870), *quoted in First Amendment Balance, supra* note 22, at 1424.

60. 98 S. Ct. at 2597.

1. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D. Mont. 1976).

2. MONT. REV. CODES ANN. §§ 26-202.1(4), (12), 26-230 (Supp. 1977) provide that a Montana resident can purchase a license solely for elk for $9, while a nonresident must purchase a license which entitles him to take one elk, one deer, one black bear, and game birds, and to fish with hook and line for a fee of $225. Under these statutes, a resident can enjoy all of the privileges granted to the nonresident under the combination license for only $30.