ACCESS TO PUBLIC AND PRIVATE PROPERTY UNDER FREEDOM OF EXPRESSION

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I. INTRODUCTION

Communication requires a forum. Individuals speak to passers-by on street corners; they broadcast from radio stations; they place signs on front lawns; they hand out pamphlets in parks and shopping malls; they publish and distribute newspapers.

Freedom of expression must involve more than the absence of external interference with an individual's liberty to communicate, with property rights serving as the fixed background against which the freedom may be exercised.[1] If freedom of expression is to be more than an abstraction, it must encompass the circumstances of communication and ensure that those wishing to communicate are allowed access to the resources necessary for effective communication.

I believe that freedom of expression affects property rights in at least two ways. Freedom of expression requires, first, the protection of the individual's exclusive control over the narrow realm of property which is important and intimate to his/her opportunity to communicate.[2] Second, the freedom requires that large and significant accumulations of state and private property be opened up to the public so that a more equitable distribution of opportunities to communicate can be achieved.

In this paper, I will examine the second requirement: the granting of public access to state and private property. I will argue that Canadian courts should follow the American lead and interpret freedom of expression as requiring, in certain circumstances, access to both state and private property. However, I will suggest that Canadian courts should avoid the complex and confusing doctrine which the American courts have constructed around the requirement of access.

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[1] In *The Scope of Freedom of Expression* (1985) 23 OSGOODE HALL L.J. 331, I argue that the importance of freedom of expression lies in the value of social interaction. Through communication with others an individual experiences certain forms of good and develops in his/her human capacities.

[2] *See* R. Moon, *Freedom of Expression and Property Rights* (1987-88) 52 SASK. L. REV. (forthcoming).

The complexity of the American doctrine reflects the difficulties which courts face in articulating a right of access. A right of access raises difficult questions concerning the state action doctrine, the conception of freedom as a negative right and the capacity of the courts to deal with issues of distributive justice.

Underlying the access right is a concern for a fairer, more equitable, distribution of communicative opportunities, or communicative power, within the community. In recognizing a right of access, the courts have accepted that property rights (the right to exclude/the right to access) are an appropriate matter for review under freedom of expression. For a variety of ideological and institutional reasons, though, the courts have been reluctant to engage in an open-ended review and redistribution of property rights. Instead the courts have sought to isolate a category of property from the larger distribution of property rights in the community. In particular, they have focussed on state-owned property and on privately-owned property which is used to perform public functions. Consideration of an access claim, then, has involved the threshold issue of what is to be included in the category of property that is subject to claims of access (subject to review) and the substantive issue of whether, in a particular circumstance, access should be granted to a state or private property.

The American courts have held that, in the case of state-owned property, access is required when the property is a "public forum". A state-owned property is a "public forum", if by tradition, or by the state's consent, the public is generally permitted entry onto that property in order to communicate. Although the state is permitted to impose time and manner restrictions on communication in a public forum, it cannot restrict the content of communication except for the most compelling reasons.

If a state property is not a "public forum" the state may exclude or restrict communication provided the restriction is reasonable and "viewpoint neutral". The state cannot allow access to some individuals while denying it to others on the basis of the point of view they express; however, a general exclusion of communication is permissible.

This division of state-owned properties into public forums and non-public forums reflects a recognition by the American courts that access to state-owned property cannot be unlimited. Many of the functions performed by the state on its property would be seriously impeded if the state were not able to restrict public access in some way. The use of the public forum/non-public forum categories allows the courts to limit the depth of the right of access to state property without having to engage in a direct balancing of competing interests.[3]

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[3] The American Bill of Rights does not include a limitations provision, and so the American courts have defined certain categories of communication which are not protected by the right to free speech (or which receive only limited protection) as a way of placing limits on the freedom.

However, the public forum doctrine has not been particularly effective as a technique for defining the limits of access. The public forum/non-public forum dichotomy has shown many signs of breakdown. While the courts purport to attach the categorical labels, public forum and non-public forum, as a formal threshold matter, it appears that, beneath it all, the determination that a particular state-owned property is a public forum involves a judgment that public access for communication is reasonably consistent with the state use of the property. Access is required if it can be reasonably accommodated by the state. The focus of judicial analysis shifts from the categories of public and non-public forum to a balancing of the state's interest in excluding communication from its property against the importance of communicative access to a particular individual or group.

Canadian courts have no need to adopt the "public forum" doctrine. With the benefit of section 1 of the *Canadian Charter of Rights and Freedoms*,[4] Canadian courts may impose limits on freedom of expression more directly by balancing the competing interests involved — the claim to access for communication against the state use of the property. While this direct approach will clarify the issues, it will also show the pressure that the right of access puts on the adjudicative process. Once the balancing of competing interests is no longer passed through the filter of the "public forum" and "non-public forum" categories, the distributive character of the access right will come to the fore.

American courts have shown a grudging willingness to regard the exclusion of communication from certain *private* properties as a limitation on freedom of expression. Under the First Amendment, individuals have been given a right of access to company towns, labour camps and shopping malls, (although in more recent cases the courts have retrenched somewhat and are no longer willing to require access to shopping malls). The courts have held that when a property is used to perform a "public function" it is subject to the requirement of access under the First Amendment.

The efforts of the American courts to work out a theory of access to private property under the right to free speech have placed a strain on the state action requirement. The courts have eroded the state action doctrine in two ways. First, by enlarging the category of state actors to include private actors who perform "public functions", the courts have recognized that private actors sometimes possess considerable power which may enable them to interfere with the exercise of fundamental rights. Second, by finding state action behind the exercise of private power, the courts have recognized that state and private power are closely tied.

I will argue that the debate about state action — about what should count as state action or whether there should be a state action requirement

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[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

at all — has been the surrogate for a debate about the institutional competence of the courts and the appropriate limits of judicial intervention into the social-political order.

In view of the unequal distribution of communicative property/power in the community, freedom of expression would seem to require some form of redistribution of opportunities to communicate. Large concentrations of communicative power should be opened up to the public so that a wider range of voices can participate in the community discourse. Yet, the institutional character of the courts makes it difficult for them to look behind the system of private property rights and inappropriate for them to interfere in any significant way with the form and distribution of those rights.

Ultimately, the complex redistribution (redefinition) of property rights, which is necessary to the equalization of opportunities to communicate, must be left to the legislatures. However, if the courts can isolate from the background of private property a category of properties which are important forums for communication, and which should be subject to a right of access, they can play an important role in the advancement of freedom of expression without having to engage in an open-ended redistribution of communicative power. This limited grant of access to private property will at least carry some recognition of freedom of expression as a substantial right with egalitarian implications.

It will, of course, be difficult to define the category of privately owned "public forums". There will be pressure to widen the category because of the unequal distribution of communicative opportunities that remains. But there will also be pressure to narrow the category. The courts will be uncomfortable granting access over the decision of the private owner to exclude any or all communication from his/her/its property.

II. Access to Government Property

Property owned by the state is put to a wide variety of uses. On state-owned property, elected representatives set government policy and administrators implement that policy. The state operates schools, prisons, courts, airports, roadways, parks and other institutions and facilities.

When the state prevents an individual from communicating on its property, it limits his/her opportunity for expression. The state, of course, often has good reason for denying access. If the state is to perform the many functions that have been entrusted to it, it must, when necessary, be able to exclude public access for communication. The security of a prison would be threatened if any citizen could enter the institution at any time. Hospitals, courts, legislatures could not operate if public access was unrestricted. Even streets and parks, which have traditionally been associated with public communication, cannot support unrestricted access for communication. Regulation of streets and parks is necessary not only to ensure that transportation and recreation can be carried on, but also

to ensure the co-ordination of communicative activities, since not everyone can speak or parade at once.

But does the state interfere with freedom of expression when it refuses to grant public access to its property? It is sometimes said that in refusing to grant access, the state is simply declining to provide members of the public with a greater opportunity to communicate. A claim of access involves the assertion of an affirmative right to use the property of the state, with a correlative duty on the state to surrender its property to public communication. Freedom of expression, though, requires only that an individual be free from interference with his/her communication and place no obligations upon the state to encourage or facilitate communication by giving access to its property. Freedom of expression gives no "affirmative" rights. This is the view of Chief Justice Thurlow in *New Brunswick Broadcasting Co. Ltd. and C.R.T.C.*:

> The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone else's property to do so. It gives no right to anyone to use someone else's land or platform to make a speech, or someone else's printing press to publish his ideas. *It gives no right to anyone to enter and use a public building for such purposes.*[5]

A similar view was expressed by Mr. Justice Pratte in his dissenting judgment in *Committee for the Commonwealth of Canada* v. *The Queen*:

> Freedom of expression authorizes each individual to express himself by using the property he owns or is entitled to use; it does not authorize him to use things he does not own to express himself.[6]

But, even if it were accepted that freedom of expression requires nothing more than freedom from state interference with one's opportunity to communicate, a claim of access to state property does not have to be viewed as the assertion of a positive right — as a demand that the state facilitate communication. Property rights are not a fixed and natural background to the actions of the state and its citizens. The definition and distribution of property rights are determined by political choice. Property rights may be distributed in different ways and may take many forms, involving different combinations of rights.[7]

Although the right to exclude others is central to private ownership, it does not follow that state ownership must involve such a right. Because the state holds property for the public benefit, it should not be able to

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[5] (1984), [1984] 2 F.C. 411 at 426, 13 D.L.R. (4th) 77 at 89 (A.D.) (emphasis added).

[6] (1987), [1987] 2 F.C. 68 at 73, 36 D.L.R. (4th) 501 at 506-07 (A.D.) [hereinafter *Committee for the Commonwealth of Canada*].

[7] C.B. Macpherson, PROPERTY — MAINSTREAM AND CRITICAL POSITIONS (Toronto: University of Toronto Press, 1978) at 4-6.

limit public access simply by asserting its ownership.[8] The state's right to exclude others from its property should depend on the use to which it has put its property. An individual should have a right of access to state property unless the state can show that access is incompatible with its use of the property. If state property rights are defined in this limited way, then, when a court grants access, it is not compelling the state to facilitate communication because the state does not begin with a general and automatic right to exclude public access.

All this may simply point to the problematic character of the distinction between positive and negative freedom. Where one locates the boundaries of "freedom" (or freedom of expression) will depend on how one views property rights — as a natural and fixed background, which includes a right to exclude others, or as the changeable product of social choice. The location of the boundary will also depend on whether one views property rights as an appropriate subject for judicial review. Property rights, if recognized as a creation of the state, can be seen not as the base-line of freedom of expression but as a limit which must be justified or as a social good that must be distributed in a way that advances the freedom.

The uncertain character (positive/negative) of the access right is reflected in the confusing doctrine that has arisen in the United States. American courts have been willing to grant access to state-owned property and yet they have seen access as exceptional, as something which must be justified. They have not taken the straightforward view that access should be granted unless the state is able to show some countervailing interest which will justify exclusion. In the American case law, access is something between a right and a privilege. The refusal of the state to allow access to its property is sometimes regarded as a limitation on the freedom and other times as a decision not to facilitate communication.

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[8] In *Committee for the Commonwealth of Canada*, *supra*, note 6 at 77, 36 D.L.R. (4th) at 509, Huggessen J. states that:

> As regards the government's right of ownership of the airport terminal, in my opinion it can never be made the sole justification for an infringement of the fundamental freedom of a subject. The government is not in the same position as a private owner in this respect, as it owns its property not for its own benefit but for that of the citizen.

MacGuigan J. expressed a similar view at 89, 36 D.L.R. (4th) at 520:

> Nevertheless, the appellant's position as owner is quite different from that of a private owner. The appellant is not owner for the government's benefit but for the benefit of the public.

A. *The Public Forum Doctrine in the United States*

The American courts have held that an individual has a right under the First Amendment to reasonable access, for the purpose of communication, to parks, streets and other places where by tradition, or by state designation, the public is generally admitted and communication is an ordinary activity.[9] The state may not prohibit communication or regulate the content of communication in these "public forums" unless it can show a compelling reason for doing so. However, the state is permitted to regulate the time and manner of communication in public forums.

But as to prisons, hospitals and other places which are not open to the general public, the individual has no right of access for the purpose of communication. The state may restrict access to any property which is not a public forum provided the restriction is reasonable and "viewpoint neutral".[10] The state may prohibit all communication but it must not exclude the expression of one point of view on an issue, if it permits the expression of other positions.

When the American courts consider whether access should be granted to state property the central issue, then, is whether or not the particular property is a "public forum". The categorization of a property as either a public forum or a non-public forum would *appear* to determine the outcome of an access claim.

In several recent judgments the United States Supreme Court has attempted to clarify the distinction between public and non-public forums.[11] According to the Court, certain properties, such as parks and streets, are considered public forums because they have traditionally been open to the public for communication. As stated by Mr. Justice Roberts in *Hague* v. *Committee for Industrial Organization*:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, they have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.[12]

It is less clear, though, when a property has been *designated* a public forum by the state. The test offered by the United States Supreme Court has been uncertain and unstable. According to the Court, a property is a public forum by designation, rather than tradition, if the state has granted

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[9] *Perry Educ. Ass'n.* v. *Perry Local Educators' Ass'n.*, 103 S.Ct. 948 (1983) at 954-55 [hereinafter *Perry*].

[10] *Ibid.*

[11] *See, e.g., Perry, supra*, note 9, and *Cornelius* v. *NAACP Legal Defence and Educ. Fund*, 105 S.Ct. 3439 (1985) [hereinafter *Cornelius*].

[12] 307 U.S. 496 (1939) at 515 [hereinafter *Hague*].

access for communication to the general public. This type of public forum was described by the Court in *Cornelius*:

> In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. . . .
>
> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse.[13]

From this it might appear that the access requirement attaches to a state-owned property (other than streets and parks) only when the state has opened that property to public communication and extends only to the permitted speakers or subjects. But if this is what is necessary before state property can be considered a public forum, then the finding that a property is a public forum may be of little consequence because public access will be required only if public access is given.[14]

Clearly, the Court did not intend to establish a circular test. And in *Cornelius*[15] and *Perry*[16] there is language to suggest that the test for determining whether the state has designated a property as a public forum is not whether the state has opened up the property to all communication without limit, but whether the state has permitted some communication on its property. Once a threshold of access is permitted by the state, the property becomes a public forum and the state must open the property to the general public. If the state permits any section of the public to communicate on its property, it cannot prevent others from communicating there because of the content of their communication. By allowing access to some speakers the state has made its property a public forum.

With this test the state is required to grant *equal* access to its property. The state is not required to open up its property to public communication even when access would not interfere with its use of the property; the state is simply forbidden to deny access to some individuals while granting it to others on the basis of the content or subject-matter of their communication. Once the state has decided to open up its property, it must

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[13] *Supra*, note 11 at 3449.

[14] This is the complaint made by Mr. Justice Blackman in his dissenting judgment in *Cornelius*, *ibid.* at 3461:

> If the Government does not create a limited public forum unless it intends to provide an "open forum" for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum . . . no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum.

[15] *Ibid.* at 3449.

[16] *Supra*, note 9 at 955.

do so in an even-handed way. "[I]f the streets of a town are open to some views they must be open to all."[17]

But if a property is a public forum only when the state permits some access for communication, what is the access threshold? In most of its judgments the United States Supreme Court appears to bypass the question of how much access must be granted before the property becomes a public forum and before general access must be permitted. The Court attaches the appropriate label — public forum/non-public forum — not just when some access has been granted, but only when general access is reasonably consistent with the state use of the property. Although the Court states the test as "whether the state has opened the property up to general communication", the Court seems to focus on the issue of the consistency of general access with the state use of the property. Mr. Justice O'Connor expressed this in *Cornelius*:

> We will not find that a public forum has been created in the face of a contrary intent, nor will we infer that the Government intended to create a public forum when the nature of the property is inconsistent with expressive activity.
> . . .
> In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the Government intended to designate a public forum.[18]

A property is transformed into a public forum only if general public access is consistent with the purpose to which the property has been put by the state.

In many of its access cases the United States Supreme Court focuses almost entirely on the question of the compatibility of access with the state use of the property. The Court merely recites the test that a property becomes a public forum only when communication has been permitted by the state or only when the state has intended to create a public forum. The actual finding that the state intended to create a public forum appears to be based on the Court's judgment that communicative access to the property is consistent with its use by the state. This larger functional view of the public forum category seems to have guided the Court in cases such as *Grayned* v. *City of Rockford*, where Mr. Justice Marshall stated:

> The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.[19]

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[17] Mr. Justice Black in *Cox* v. *State of Louisiana*, 85 S.Ct. 453 (1965) at 469-70.

[18] *Supra*, note 11 at 3449-50.

[19] 93 S.Ct. 2294 (1972) at 2303 [Hereinafter *Grayned*]. *See also Greer* v. *Spock*, 96 S.Ct. 1211 (1976) at 1220:

> Our inquiry must be more carefully addressed to the intrusion on the specific activity involved and to the degree of infringement on the First Amendment rights of the private parties. Some basic incompatibility must be discerned between the communication and the primary activity of an area.

Not only does this more generous view of the public forum doctrine explain a variety of cases it may also explain the special status of traditional public forums such as streets and parks. The state is forbidden to ban all communication on these properties. These properties have traditionally been used for communication. They are important community gathering places and public communication is reasonably consistent with the use to which they have been dedicated — recreation, transportation and so on.

The shift from a consideration of whether the state has granted sufficient access to make its property a public forum, or has intended to create a public forum, to a more objective assessment of the compatibility of access with the state use of the property, is unavoidable. For it is too much to require, before a property can be considered a public forum, that the state has granted communicative access to the general public. But, at the same time, it cannot be sufficient, to make a property a public forum, that the state has granted a limited form of communicative access. Some state properties could support limited access but could not operate if general access were required.

This functional approach to the doctrine would seem to fit with the policy behind the public/non-public dichotomy. According to Mr. Justice O'Connor in *Cornelius*:

> [T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum.[20]

If the concern is that access to state property must be limited because sometimes it will interfere with the state use of the property, then, the test for determining whether a property is a public forum should be the incompatibility of access with the state use of the property.

On this view, a state property is considered a public forum if communicative access is reasonably consistent with the state function performed on the property, regardless of whether in fact any section of the public has been given access by the state.[21] The classification of a property as a "public forum" is no longer a formal preliminary question. The court will attach the label public forum only after it has decided that public communication can be reasonably accommodated by the state on its property. Once the public forum label is attached to a particular property, the state must permit general access for communication.

An individual's opportunity to communicate may be restricted for reasons, but it is not an adequate ground for limiting his/her freedom

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[20] *Supra*, note 11 at 3448.

[21] S. Cahill, *The Public Forum: Minimum Access, Equal Justice and the First Amendment* (1975) 28 STAN. L. REV. 117.

that the opportunities of all individuals are limited equally. An individual should have a real opportunity to communicate with others and not merely an equal opportunity. If the state cannot show that public access is inconsistent with the state use of the property, it will not be able to justify the exclusion.

Equality of access is not the standard of justification for the restriction of public communication on state property; but it may serve as a test for determining whether the state has sufficient reason to limit public access. If the state allows access for communication to some individuals, then, by the state's own admission, some communication is consistent with the purpose to which the state has put its property and the exclusion of other individuals may be seen as based on the content of their communication.

B. The Breakdown of the Public Forum Doctrine

The American courts' test for determining whether a property is a public forum remains unclear. The courts' language suggests that the issue is whether the state has intended to designate a property as a public forum — to open its property to public communication. Yet ultimately, the central issue, sometimes explicitly and other times not, appears to be the consistency of access with the state use of the property.

However, even this larger version of the public forum doctrine may be too narrow to satisfy the requirements of freedom of expression. If strictly applied, the test for determining whether or not a particular state property is a "public forum", the consistency of public communication with the state's use of the property, may leave little scope for the right of access. If, in order to justify the exclusion of public communication, the state has only to show that public access for communication will interfere with, or inhibit, the state's legitimate use of its property then the right of access would have little substance. Communication on the streets, in the parks or on any state-owned property is bound to lead to a variety of inconveniences and obstructions; litter, noise and personal harassment may interfere with the enjoyment by others of the streets and parks. But the state should not be able to exclude communication in the parks or streets simply by stressing the importance of transportation which is unimpeded or recreation which is peaceful.[22] Not only should the state

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[22] *Schneider* v. *State of New Jersey*, 60 S.Ct. 151 (1939) at 151:

> We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press.

be required to provide a reason for restricting access to its property, but that reason should justify the restriction.

If communication has a positive value, then the courts should not rule out access for communication simply because it, in some way, interferes with the state's use of the property. Instead they should seek a balance, taking into account the importance of access to effective communication and the value of the state's use of the property, accommodating and adjusting these two interests. "Incompatibility with the state's use of the property" should be viewed as a flexible standard. The courts should require communicative access to state property when there would be no interference with its use by the state, regardless of the availability of alternative forums for communication. But even when communicative access would interfere with the state use, if there are not adequate alternative forums for communication, the state should be required to accommodate some communication.

The American courts have generally treated the "public forum" issue as an objective threshold question and have sought to create a rigid division between properties which are public forums and properties which are not. If a particular property is categorized as a public forum then access for communication must be granted. But if the property is not categorized in this way then the state is justified in forbidding all communication. This sort of categorical decision-making allows the courts to avoid balancing and accommodating competing interests in each case (the importance of access against the state use of the property). The court does not tailor the right of access to fit the particular state use of the property. The balancing of interests is generalized and an all or nothing result follows.

But judicial discretion and balancing are not so easily contained. The public forum doctrine, involving a rigid dichotomy between public and non-public forums, shows many signs of dissolving. Dissolution may occur in two ways: (1) The increasing flexibility of the public forum and non-public forum categories and (2) the development of flexible standards of access to both types of forum.

(1) When access to a state property seems vital to the effective communication of a particular message or to the opportunity of certain individuals to communicate or when the *particular* access demanded seems not to interfere with the state use of the property, the courts have allowed the particular access claim, even though *general* access for communication is not permitted by the state and would not be consistent with the state use of the property. The courts have allowed the particular claim and then relied on time and manner regulation to limit the general scope of the access right and protect the state use of the property. Sometimes the American courts do not even ask the threshold question of whether or not the property is a public forum and instead move directly to the issue of whether the *particular* access sought is reasonably consistent with the state use of the property.

For example, in *Tinker* v. *Des Moines Independent Com. School Dist.*, the Supreme Court held that a group of students should be permitted

to wear black arm bands in their school as a way of protesting the Vietnam War.[23] The Court accepted that this particular symbolic expression would not interfere with the proper functioning of the school. The Court simply did not address the issue of whether the property was a public forum.

Similarly, in *Brown* v. *State of Louisiana*, the Court found that five black protesters had a right to conduct a silent vigil in a segregated library.[24] The Court asked only whether this form of communication was consistent with the state use of the property as a library and did not ask whether *general* access for communication would be consistent with the operation of the library or whether the property could be considered a public forum.

On occasion the courts have indicated a willingness to carve a public forum out of a larger property right. This approach is specifically suggested by the Court in *Cornelius*:

> In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.[25]

For example, although a prison could not be regarded as a public forum, perhaps its mail system could be seen as one. General access for communication may not be consistent with the operation of a prison but access could easily be accommodated by the prison mail system. By narrowly defining the property to which access is sought the courts can introduce considerable flexibility into the public forum doctrine. They can grant access to state property and at the same time minimize any impairment to the state's use of its property.

(2) Even after the court has placed the property in the public forum category (an initial determination that public access is reasonably consistent with the state use of the property), the court must consider the appropriateness of state restrictions on access. Access to a public forum cannot be unlimited. There must be regulation even of communication on the streets or in the parks to ensure that these places can be used for transportation or recreation.[26] How much interference with the use of streets, sidewalks and parks the state should tolerate — how the balance

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[23] 89 S.Ct. 933 (1969).
[24] 86 S.Ct. 719 (1966).
[25] *Supra*, note 11 at 3448.
[26] *See Grayned*, *supra*, note 19 at 2304:

> For example, two parades cannot march on the same street simultaneously, and government may allow only one. *Cox* v. *New Hampshire*, 312 U.S. 569, 576, 61 S.Ct. 762, 765, 85 L.ED. 1049 (1941). A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Cox* v. *Louisiana*, 379 U.S. at 554, 85 S.Ct. at 464.

between competing interests is to be struck — must be decided by the courts.

Communication must be regulated not just because it may interfere with other interests or values, such as quiet, privacy, transportation, but also because opportunities to communicate are limited. Rights of access must be distributed in some way because not everyone who wants to speak or parade will be able to do so at the same time. According to American doctrine, when distributing or allocating access to a public forum, the state is forbidden to discriminate on the basis of the content of the communication. A restriction is content-neutral only if it limits communication without regard to the message conveyed (for example, noise limits and restrictions on parades during rush hour). Yet, when deciding whether access to a particular property should be granted, the courts have often taken into account the content of the message to be communicated. They have done so for the obvious reason that certain messages are more appropriately communicated on certain properties. If the right of access must be distributed in some way, it is appropriate that priority be given to the communication of messages which are connected with the particular forum (that is, schools, libraries, court houses).[27]

Even when a property is labelled a non-public forum, the courts have held that the state restriction or regulation of communication must be reasonable and viewpoint neutral. The state may restrict the discussion of certain subjects but it cannot forbid communication of one view on a particular subject. But the line between subject-matter neutrality and viewpoint neutrality is not entirely clear. The more narrowly a subject-matter distinction is drawn the less it will appear to be viewpoint neutral. For example, a ban on street demonstrations concerning nuclear weapons is only superficially viewpoint-neutral.[28] It would be reasonable to suspect that such a ban was meant to inhibit protests against the manufacture/use of nuclear weapons and to reinforce the status quo.

A restriction that is content-neutral on its face is bound to have a differential impact on certain messages or certain speakers because a particular forum (communicative property) is bound to be more valuable to some speakers and more appropriate to the communication of some messages. A restriction on political debate in a prison may be imposed in the interests of security and order. Such a restriction, though, would not be viewpoint neutral in practice since the sort of political debate likely to occur in a prison will involve prison conditions and be supportive of "prisoner's rights". Inmates tend to speak about prisons and not surprisingly they tend to be critical of the prison system.

The movement then seems to be away from the rigid dichotomy between public and non-public forums and towards a more direct assessment of the consistency of communicative access with the state use

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[27] *Supra*, note 23.

[28] *See* G. Stone, *Restrictions of Speech Because of its Content: the Peculiar Case of Subject Matter Restrictions* (1978) 46 U. CHI. L. REV. 81 at 110.

of the property — an assessment which is not filtered through the public forum doctrine. The breakdown of these categories and the emergence of a more flexible approach seems inevitable once the courts recognize that the public forum label rests upon a judgment about the consistency of the state use of the property with access for communication.[29] The breakdown begins with the flexible approach taken by the courts to the determination of whether a property is, or is not, a public forum. The breakdown is furthered by the courts permitting the regulation of access to property which has been classified as a public forum and requiring viewpoint-neutrality in the restriction of access to property which has been classified as a non-public forum.

C. *A Flexible Right of Access in Canada*

In *Committee for the Commonwealth of Canada*, Mr. Justice Dube of the Trial Division of the Federal Court of Canada held that an absolute prohibition on political communication in the public areas of Dorval airport was contrary to freedom of expression.[30] In coming to this conclusion, Mr. Justice Dube relied on American doctrine, emphasizing the importance of certain "public forums" to the exercise of freedom of expression:

> [T]he public terminal concourses in our Canadian airports . . . have become contemporary extensions of the streets and public places of yesterday. They are indeed "modern crossroads" for the intercourse of the travelling public. In principle, freedom of expression and communication ought not to be abridged in these public forums.[31]

The Federal Court of Appeal supported the result reached by the trial Judge. However, the majority of the Court stated that they did not think that the public forum doctrine should be adopted in Canada.[32] The

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[29] *See* the dissent of Mr. Justice Brennan in *Cornelius*, *supra*, note 11 at 3458-59:

> My line between public forums and nonpublic forums "may blur at the edges," and is really more in the nature of a continuum than a definite demarcation.
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> . . .
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> Thus, the public forum, limited-public-forum, and nonpublic forum categories are but analytical shorthand for the principles that have guided the Court's decisions regarding claims to access to public property for expressive activity. The interests served by the expressive activity must be balanced against the interests served by the uses for which the property was intended and the interests of all citizens to enjoy the property.

[30] (1986), [1985] 2 F.C. 3, 25 D.L.R. (4th) 460 (T.D.), *aff'd supra*, note 6.

[31] *Ibid.* at 12, 25 D.L.R. (4th) at 466.

[32] *Ibid. See also Re Canadian Newspaper Co. Ltd. and Director of Public Road and Traffic Services of the City of Quebec et al.* (1986), 36 D.L.R. (4th) 641, [1987] R.J.Q. 1078 (Sup. Ct.).

Court preferred a more direct approach of determining whether access for communication is reasonably consistent with the state use of the property. In the words of Mr. Justice Hugessen:

> It is neither necessary nor advisable for us in Canada to adopt the categories developed by the U.S. courts to limit the overly absolute formulation of certain rights in their Constitution.[33]

As was recognized by the Federal Court of Appeal, the public forum doctrine was developed by the American courts as a response to the absence of a limitation provision in their Bill of Rights. Generally, the American courts have recognized limits on the right to free speech, indirectly, by defining categories of speech which are unprotected or which receive a lesser degree of protection. The use of the public forum/non-public forum categories allows the courts to limit the depth of the right of access to state property without having to engage in a direct balancing of interests. The balancing of competing interests is generalized and concealed behind the application of categorical labels.

Canadian courts have the benefit of section 1 which indicates that the *Charter* rights are not absolute and permits limits to be placed on the exercise of those rights. The incompatibility of communicative access with the use to which the state has put its property can be seen as a ground for limiting the freedom under section 1. And so the Canadian courts are free to take a direct and flexible approach to the issue of access to government property and do not need to define a category of property to which the access right does not apply. Before the state can justify the exclusion of communication on any of its properties, it must show that communication will interfere with its use of the property and that, in the circumstances, the restriction of communicative access is less serious than the impediment communication would cause to its use of the property.

Moving from a categorical approach — public forum/non-public forum — to a variable standard, will make judicial discretion explicit and difficult. Public communication will be more or less consistent with the various uses to which the state has put its many properties. In striking the "balance" between communicative access and state use, the courts must consider the adequacy of alternative forums, the importance of the state function performed on the property and the difficulty the state would have in adjusting its use of the property to accommodate public communication. Only if the state can show that the exclusion of communication is necessary to the performance of an important function, should the state be able to restrict or regulate communication on its property. And even then, the state's restriction of communication should be no more than is necessary to ensure the performance of this function.

The adequacy of alternative forums is a relevant consideration when the state is being asked to accommodate communication — to alter or

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[33] *Ibid.* at 78, 36 D.L.R. (4th) at 511.

adjust its use of the property in the interests of public access. If there are adequate alternatives available to the individual or group seeking communicative access to a particular state property, then, there is no need to interfere with the state's use of its property.

The relevance of alternative forums complicates the court's task by requiring that they consider the background of property rights. The access issue can be seen as a matter of distributive justice (the right of access/the right to exclude) which turns on the availability of communicative opportunities in the community. Often, though, the inadequacy of alternatives can be judged without carefully examining the background of property rights. For regardless of the distribution and use of private property (or perhaps in view of the established distribution of private property rights), a particular state property is often the only significant forum available, because it is an important public gathering place and because it is most appropriate to the communication of certain kinds of messages.

In determining the adequacy of alternative forums some relevant considerations are whether or not the desired audience can be reached in another way and whether or not the speech is connected, symbolically or otherwise, to the property in question.[34] For example, a demonstration against government policy is appropriately conducted on the grounds of the provincial legislature and a protest against the imprisonment of "political prisoners" is appropriately conducted near the court at which they are being tried or the jail in which they are being held. When there are a variety of adequate alternative forums for communication then, perhaps, any reason (any incompatibility with the state function) will support the restriction of communication. When there are not adequate alternative forums, the state should be required to accommodate some public communication on its property, even if this is inconvenient or even, perhaps, if this is burdensome.

Streets and parks are significant community gathering places. Public communication, even if not the primary function of these properties, is an important incident of their use. Because parks and streets are important forums for communication, any effort by the state to exclude communication from these places would cut deeply into the individual's op-

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[34] R. Cass, *First Amendment Access to Government Facilities* (1979) 65 VA. L. REV. 1287 at 1324. *See also* the dissent of Brennan J. in *Cornelius*, *supra*, note 11 at 3456:

> The result of such balancing will depend, of course, upon the nature and strength of the various interests, which in turn depend upon such factors as the nature of the property, the relationship between the property and the message the speaker wishes to convey, and any special features of the forum that make it especially desirable or undesirable for the particular expressive activity. Broad generalizations about the proper balance are, for the most part, impossible.

portunity to communicate and would have a significant impact on those who cannot afford the expense of access to the print and broadcast media. These places are important enough to public communication that the state should have to put up with the risk of litter and the occasional interruption of traffic. The state, of course, is permitted to regulate access for communication in order to ensure that the streets can be used for transportation; but the state's power to regulate is limited, since any regulation of communication must meet the standards of section 1 of the *Charter*.

Other state properties will be less able to accommodate public communication and for that reason the restriction or exclusion of public communication may be more easily justified. However, even in the case of properties to which the public is not generally admitted (properties not ordinarily considered public forums), access for communication should not be completely ruled out. Although prisons, hospitals and military bases are not ordinarily associated with public communication, these institutions may reasonably be able to "accommodate" a limited access for communication. And some individuals will have no opportunity to communicate at all, if communication is not permitted in these places.

Just as the state should be permitted to regulate communication on the streets or in the parks, it should be required to allow some communication in prisons and hospitals. If those who are "stranded" in hospitals and prisons are forbidden to communicate on these properties, they will effectively be denied the opportunity to communicate with "the outside" or with others in the institution. The hospital or prison inmate is without alternatives. Communication (and access for the purpose of communication) should be permitted to the extent that it does not seriously impede the operation of the particular institution. The degree of exclusion or regulation that can be justified will vary depending on the character of the institution and the need for communicative access. The importance of communication will be greater when it concerns the conditions of the institution or when it concerns any other issue that affects its "inmates" — prisoners or patients.[35] The prison or the hospital may have to suffer some inconvenience or incur some costs in order to accommodate communication by its inmates.

D. Conclusion

Canadian courts are in a position to avoid the complex and confusing American public forum doctrine and take a flexible approach to communication on state property. A flexible approach will bring to the surface the considerable discretion exercised by the courts in deciding whether

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[35] In the case of prisons, American courts have been concerned about security and order and have been willing to defer to the judgment of the prison administration that particular communication represents a threat or danger to the institution's operation. For example, *see Jones* v. *North Carolina Prisoner's Labour Union Inc.*, 97 S.Ct. 2532 (1977).

a state can and should accommodate public communication on its property; in particular, it will make the distributive character of the decision more apparent. Such an approach will also allow Canadian courts to give effect to a freedom which is concerned with the real opportunity of individuals to participate effectively in social discourse; isolating state-owned properties from the background of property rights and treating them as important forums which must be made available for public communication.

III. Access to Private Property

A. *Introduction*

American courts have granted public access for communication under the First Amendment to company towns and other large concentrations of privately-owned property. The courts have held that when a property is used to perform a "public function", it is lifted out of the background of private property and becomes subject to a right of access under the First Amendment, as if it were a state property. However, the efforts of the American courts to work out a theory of access to private property under the right to free speech has put a serious strain on the state action doctrine and has brought into question the traditional conception of freedom of expression as a "negative" right to be free from external interference.

In granting access to private property, the American courts have undermined the state action doctrine in at least two ways. First, by expanding the category of state actors to include "private" parties who perform "public" functions, the courts have recognized that private power may sometimes threaten constitutional freedoms. Second, the courts have recognized that private power depends on state action and so have been willing to see state action behind the exercise of private power.

The Supreme Court of Canada has now committed itself to some form of the state action doctrine and so any attempt by Canadian courts to articulate a right of access under the *Charter*'s freedom of expression will be confronted with the same issues that have confounded the American courts.[36] Canadian courts must decide whether the *Charter* should be used to address the effects of private (non-state) power on the exercise of freedom of expression and whether judicial intervention is an appropriate way to correct the imbalance of communicative power in the community.

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[36] *Retail, Wholesale and Dep't Store Union, Local 580* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery*].

B. A "Public Function" Performed by a Private Actor

In several cases the United States Supreme Court has enlarged the category of state action and attached constitutional responsibility to the performance of certain "public functions" by private actors.

In *Marsh* v. *State of Alabama* the United States Supreme Court held that a company-owned town could not prohibit communication on its streets or in its parks.[37] The company's decision to exclude communication and the use of the State's trespass law to enforce that decision were subject to review under the First Amendment because the town was "operated primarily to benefit the public" and its operation was "essentially a public function".[38] According to the Court, the streets and parks of the company town were the "functional equivalents" of state properties. The State of Alabama had permitted the company to "use its property as a town, operate a 'business block' in the town and a street and sidewalk on that block".[39]

The Court recognized that private actors can acquire sufficient power to enable them to supress or impede fundamental rights and that when private actors acquire such power they too should be subject to constitutional limits. Mr. Justice Black, on behalf of the Court, observed that:

> Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.[40]

In his judgment Mr. Justice Black referred to the "public" character of the function performed by the company and to the State's support of the company in the performance of this function. Some commentators have suggested that the constitutional wrong in this case was not the decision of the company to exclude communication from its property but was rather the decision of the State of Alabama to allow the company to perform the functions of a town and its decision to support this exercise of private power with State trespass laws.[41] But since the State could be said to permit any and every exercise of "private" (non-state) power, it was the "public" character of the particular function performed by the company that set this case apart from others. And so even if Alabama was the subject of the claim (being prevented from applying its trespass law) the focus of the claim was clearly on the "public function" performed by the company and the decision of the company not to permit communication on its property.

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[37] 66 S.Ct. 276 (1946) [hereinafter *Marsh*].

[38] *Ibid.* at 278.

[39] *Ibid.* at 279.

[40] *Ibid.*

[41] This view of the case was suggested to me by Professor Robert Sedler of Wayne State University.

The Court in *Marsh* recognized that private power gains its force from state action. The Court observed that the State had given the company the power to run its property as a town. But the Court limited the impact of this observation. The Court did not find that all private action was really in some sense state action — attributable to the state. Rather, the Court focused on the function performed by the private actor. If the function was one traditionally associated with the state then the private actor should be subject to access under the First Amendment just as if she/he were a state actor. When a private party performs a "state function" she/he should be held accountable under the Bill of Rights which governs the exercise of state power.[42]

The Court's analysis involves an important shift in the state action doctrine and in the public/private distinction which underlies the doctrine. No longer is the issue, who performed the act which restricts the freedom: Was it an act of the state? The issue is now, what kind of function was being performed by the party when she/he acted to restrict the freedom (when she/he acted to deny communicative access): Was she/he performing a "public function", the sort of thing traditionally performed by the state?[43]

The public function doctrine, of course, assumes a category of traditional state functions — the kinds of tasks that cannot be privatized without carrying constitutional obligations. The doctrine assumes that there are natural or proper boundaries to state activity. But it is difficult

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[42] *See* D. Kennedy, *The Stages of the Decline of the Public/Private Distinction* (1982) 130 U. PA. L. REV. 1349 at 1351:

> The development of intermediate terms means formal recognition that some situations are neither one thing nor another — neither public nor private — but rather share some characteristics of each pole. . . . [An] example . . . would be a private entity engaged in a "governmental function", such as the owner of a company town in *Marsh* v. *Ababama*.

The converse of this may also hold. A state actor may not be subject to review when it performs a "private" function or task. *See Re McKinney and Bd. of Gov'rs. of the Univ. of Guelph* (1986), 57 O.R. (2d) 1, 32 D.L.R. (4th) 65 (H.C.J.).

[43] *See* M. Horowitz, *The History of the Public/Private Distinction* (1982) 130 U. PA. L. REV. 1423 at 1428:

> The public/private distinction could approximate the actual arrangement of legal and political institutions only in a society and economy of relatively small, decentralized, nongovernmental units. Private power began to become increasingly indistinguishable from public power precisely at the moment, late in the nineteenth century, when large-scale corporate concentration became the norm. The attack on the public/private distinction was the result of a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to governments.

to imagine an objective test to separate state from private functions. It appears that the contours of the public function category will depend on the view of the courts as to the proper role of the state, or more particularly, as to the proper spheres of state and private action.[44]

Given the difficulties involved in defining a category of state functions or activities, the focus of the "public function" extension of the state action doctrine easily shifts from the question of whether a state-like function is performed by the private owner on his/her property (a function more properly performed by the state) to the question of whether the particular privately-owned property is an important forum for communication. A property has a "public" character, if denial of access would affect, in a significant way, the general public's opportunity to communicate. When private parties exercise significant power, controlling important and effective means of communication (displacing traditional public forums), they should be subject to access requirements under the First Amendment. This approach, of course, collapses the state action issue (the issue of the scope of review of private property) into the substantive issue of the requirements of freedom of expression. A "private" owner will be subject to review if access to his/her property is necessary to effective communication.

Whether or not it is broadly interpreted, the "public function" approach followed by the United States Supreme Court represents an erosion of the state action doctrine. It involves a rejection of the assumption which appears to underlie the doctrine: that only government represents a threat to fundamental rights and freedoms. Non-state actors sometimes wield power sufficient to pose a threat to freedom of expression and when this occurs these "private" actors should be subject to judicial review under the Constitution.

C. The Development of the Public Function Approach

Having taken a flexible approach to state action, so that it included not just the actions of the state agencies but also the actions of those who perform state-like functions, or functions of public significance, the courts opened themselves to a variety of claims and to the nearly im-

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[44] *See* K. Swinton, *Application of the Canadian Charter of Rights and Freedoms* in W. Tarnopolsky and G.-A. Beaudoin eds, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto: Carswell, 1982) 41 at 57.

In *Flagg Bros.* v. *Brooks*, 98 S.Ct. 1729 (1978) at 1734 and *Jackson* v. *Metropolitan Edison Co.*, 95 S.Ct. 449 (1974) at 454, the U.S. Supreme Court indicated that the "public function" extension to the state action doctrine applied only when a private entity exercised powers "traditionally exclusively reserved to the State".

This effort to define an objective historical test is bound to fail. Each delegation of a new responsibility to a private (a non-state) actor will alter our view of what is "traditionally exclusively reserved to the State" to some degree.

possible task of drawing a clear and reasoned line between "public" and "non-public" functions.

In *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*,[45] the United States Supreme Court applied the reasoning in the *Marsh* case to shopping malls. A group of individuals wanted to picket a non-union store in the mall but were denied access to the mall property by its owner. Mr. Justice Marshall for the majority of the Court held that,

> because the shopping center serves as the community business block "and is freely accessible and open to people in the area and those passing through", Marsh v. State of Alabama, . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[46]

The extension of the reasoning in *Marsh* to shopping centres was simple and obvious. A shopping centre, like the privately-owned shopping area of a company town, "is clearly the functional equivalent of the business district . . . involved in *Marsh*".[47] The centre replaces the streets of the downtown and so is an important community gathering place. But the application of the public function doctrine to shopping malls raised a variety of problems and, in a later judgment, the *Logan Valley* decision was overturned by the Supreme Court.[48] The Court came to recognize that once the public function doctrine was applied to shopping malls, it became difficult to limit the further expansion of the doctrine.

Drawing on *Marsh* and *Logan Valley*, and the principle that "under certain circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held",[49] a variety of commentators have suggested that the right to free speech should require a wider distribution of communicative opportunities.[50] If the right to free speech is concerned with the effective opportunities an individual has to communicate with others then access to shopping malls and company towns should be only the beginning. Access should be granted to large concentrations of communicative power — significant forums of public communication. In particular, it has been argued that newspapers and broadcast stations should be required to give access to a variety of speakers and viewpoints.[51]

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[45] 88 S.Ct. 1601 (1968) [hereinafter *Logan Valley*].

[46] *Ibid.* at 1609.

[47] *Ibid.* at 1608.

[48] *Hudgens* v. *National Labour Relations Board*, 95 S.Ct. 1029 (1976).

[49] *Supra*, note 45 at 1607.

[50] Most notably J. Barron, *Access to the Press — a New First Amendment Right* (1967) 80 HARV. L. REV. 1641.

[51] *Ibid.*

Access to public property, such as streets and parks (the "poor man's printing press"), and to private property which performs the traditional functions of these public properties, has been treated by the American courts as central to free speech, as the core of the right.[52] Sometimes, the courts seem to believe that an individual can reach a significant audience with his/her communication, by standing on a street corner and distributing pamphlets. Other times the courts seem to make the very different assumption that every individual is "free" to communicate effectively by establishing his/her own newspaper. But, as should be obvious, the real opportunity to communicate in our technology-bound society lies with the wealthy owners of the print and broadcast media or with those who have the resources to buy media time or space.[53] Effective communication requires the possession of property or the expenditure of money. The United States Supreme Court recognized this when it considered the constitutionality of election spending ceilings in *Buckley* v. *Valeo*.[54] According to the Court,

> virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensible instruments of effective political speech.[55]

Speech in the parks and streets reaches a very small audience and tends to be discounted by a social attitude which assumes that all reasonable messages are carried by the media and that only "cranks" must resort to parks and streets. This attitude was recently expressed by Mr. Justice Dubin in *R.* v. *Kopyto*:

> I do not think that a reasonable person with knowledge of the facts would give any greater heed to what the appellant was stating than would be given to what is stated by those who attend every Sunday in Hyde Park, London, England, and who mount their soapboxes and give vent to their complaints.[56]

The American courts' emphasis on access to streets and parks gives false legitimacy to a system in which the means of effective communication are monopolized by a small portion of the population. The equal right to speak from a soapbox in Riverside Park or to establish a newspaper is much like the equal right to sleep under the bridges of Paris.

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[52] *Ibid.* at 1641. *See also* O. Fiss, *Free Speech and Social Structure* (1986) 71 IOWA L. REV. 1405 at 1408.

[53] *But see Gay Alliance Toward Equality* v. *Vancouver Sun* (1979), [1979] 2 S.C.R. 435, 97 D.L.R. (3d) 577 [hereinafter *Gay Alliance*], where the Alliance was willing and able to pay for advertising space which the Vancouver Sun refused to make available to a gay organization.

[54] 96 S.Ct. 612 (1976).

[55] *Ibid.* at 635.

[56] (1987), 62 O.R. (2d) 449 at 527, 47 D.L.R. (4th) 213 at 291 (C.A.).

Access to the media, as a way of distributing opportunities to communicate, seems vital to freedom of expression. Yet the American courts have been unwilling to compel access to privately-owned property, other than company towns, labour camps and shopping malls. Conscious, perhaps, of the difficulties involved in defining access rights to newspapers and broadcast stations the courts have clung to the residue of the state action doctrine, limiting its "public function" extension to properties that the owner "has opened to the general public". As well, the courts have been concerned that ordering access to a property which is used by its owner for communication, might displace or inhibit communication by the owner and so might actually work against the interests of free speech.

In *C.B.S.* v. *Democratic National Committee* the United States Supreme Court held that an individual (or corporation) does not have a constitutional right to purchase broadcast air time in order to present his/her views about controversial issues of public importance.[57] In the Court's view, C.B.S.'s policy of refusing to accept editorial advertisements on controversial issues was not a state act; it was no more than the exercise of "journalistic discretion".[58] And the F.C.C. had "simply declined to command particular action" and could not be seen as responsible for C.B.S.'s policy.[59] According to the Court:

> Were we to read the First Amendment to spell out government action in the circumstances presented here, few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny. In this sensitive area so sweeping a concept of governmental action would go far in practical effect to undermine nearly a half century of unmistakeable congressional purpose to maintain — no matter how difficult the task — essentially private broadcast journalism held only broadly accountable to public interest standards.
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> More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by the respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on Government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest.[60]

The dissenters, Justices Brennan and Marshall, would have subjected broadcasters to review under the First Amendment. They were willing to continue with a flexible approach to the state action doctrine. For them,

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[57] 93 S.Ct. 2080 (1973).
[58] *Ibid.* at 2094.
[59] *Ibid.*
[60] *Ibid.* at 2095.

> [T]he reach of the First Amendment depends not upon any formalistic "private-public" dichotomy but, rather, upon more functional considerations concerning the extent of governmental involvement in, and public character of, a particular "private" enterprise.[61]

It is worth noting that both the American and Canadian Supreme Courts have not simply declined to read freedom of expression as including a right of access to the media, but have actually found that the *legislature* violates the freedom when it enacts laws opening up the print media to a wider range of voices in the community. In *Miami Herald Pub. Co.* v. *Tornillo*,[62] the United States Supreme Court struck down a Florida law which gave a political candidate the right to equal space to reply to attacks on his/her record. Access legislation of this sort was said to violate freedom of the press because it interferred with the "exercise of editorial control and judgment".[63]

The Supreme Court of Canada took a similar view of access legislation in the *Gay Alliance* case.[64] The British Columbia Human Rights Commission had ruled that the Vancouver Sun's refusal to accept a brief advertisement for a gay newspaper was a violation of section 3 of the *British Columbia Human Rights Code*. Section 3 prohibited discrimination "against any person or class of persons with respect to accommodation, service or facility customarily available to the public". The Commission thought that the advertising pages of the Sun were such a service or facility. The Supreme Court of Canada, however, decided that section 3 of the *Code* should not be interpreted as prohibiting discrimination by a newspaper in the sale of advertising space. According to Mr. Justice Martland, if the advertising pages of a newspaper were considered a service "customarily available to the public" and subject to the requirement of non-discrimination, freedom of the press would be violated. To avoid this consequence, Martland J. held that section 3 of the *Code* should not extend to the editorial or advertising pages of the newspapers.[65]

In later cases, instead of expanding the First Amendment requirement of access to private property, the United States Supreme Court has actually reduced the scope of the requirement. In *Hudgens* v. *National Labour Relations Board*, the Supreme Court withdrew its support of First Amendment access to shopping malls.[66] The case involved picketing by striking employees of a business located in a shopping mall. Mr. Justice

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[61] *Ibid.* at 2121.
[62] 94 S.Ct. 2831 (1974).
[63] *Ibid.* at 2840.
[64] *Supra*, note 53.
[65] For an extended discussion of this case, *see* Moon, *supra*, note 2.
[66] *Supra*, note 48.

Stewart, for the majority of the Court, re-invoked the state action doctrine and overruled the *Logan Valley* decision:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. . . . Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution.[67]

According to Mr. Justice Stewart, the *Marsh* extension of the state action doctrine to company towns was exceptional and did not encompass other privately-owned properties.

Apparently, the Court in *Hudgens* considered that exclusion from a shopping mall was less serious than exclusion from a company town and that the public function extension was attenuated when applied to a shopping mall. Clearly, the Court wanted to narrow the category of private property which was subject to the right of access. The Court was uncomfortable placing limits on the private owner's ordinary power to exclude others from his/her property.

The courts were beginning to recognize that if they took a flexible view of the state action requirement and included "private" action when it involved the performance of a so-called "public function" the limits of the access right would become uncertain and contestable. There would be no obvious limit to judicial intervention. As Mr. Justice White had warned in his dissent in *Logan Valley*:

> It is not clear how the Court might draw a line between "shopping centres" and other business establishments which have sidewalks and parking on their own property.[68]

The courts could easily find themselves involved in a significant redistribution of property rights in the community; examining the relative distribution of communicative opportunities in the community in order to determine whether access should be granted to a particular property (and whether the private owner should be required to surrender his/her right to exclude others). In reasserting the "ideological" distinction between private and public activities, the courts were resisting the assumption of a significant interventionist role.

D. State Action Behind Private Action

In the *Marsh* judgment there is the suggestion of another way in which the state action doctrine could be extended. In that judgment, and others, the Court observed that state law is the source of private power.

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[67] *Ibid.* at 1033.

[68] *Supra*, note 45 at 1619.

The state delegates power to the private property owner — permitting and supporting the exercise of private power with trespass, and other, laws. In the words of Mr. Justice Black:

> [That the property was privately owned was] not sufficient to justify the *State's permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties and the *enforcement* of such restraint by the application of a state statute.[69] [emphasis added]

Instead of focusing on the property owner's act of exclusion and the function performed by her/his property, the courts could look to the state act which empowers the private property owner. The restriction of freedom of expression occurs not simply because the individual property owner has made a decision to prevent some or all persons from communicating on his/her property. The state, in establishing a system of private property, or more particularly, in establishing a system in which large amounts of property are controlled by a small number of individuals or corporations, has restricted the places and facilities available for public communication. The state has given to the private owner the right and power to exclude other persons from his/her property and so has restricted the opportunities to communicate available to the general public.[70]

If we see property rights as a creation of the state and not simply as the background against which state and private actors operate, then we can see state action in the exclusion of public communication from private property. Of course, if distributed in a fair and balanced way, property rights may be justified as a limitation on freedom of expression. A system of private property might be justified as a limitation on freedom of expression because it advances a variety of interests. Control over property, real and personal, gives an individual the means to express him/herself in the public world and to withdraw into her/his private world. In a community where property is widely distributed, if an individual has access for the purposes of communication to state property and possesses some property him/herself, he/she is not significantly impeded in his/her communication when denied access to a particular piece of privately-owned property.

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[69] *Marsh*, *supra*, note 37 at 280 (emphasis added). *But see* text accompanying note 41.

[70] *See generally* M. Cohen, *Property and Sovereignty* in Macpherson, *supra*, note 7 at 155:

> The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of the law as merely protecting men in their possession. Property law does more. It determines what men shall acquire.

Cohen, at 159, calls the right to exclude others the "essence of property".

According to this view, freedom of expression is breached when property rights are defined and distributed by the state so that certain members of the community are left without an adequate forum for communication. Property rights may be distributed in such a way that an individual who is denied access to a particular piece of property is denied the opportunity to communicate effectively with others. If the company owning the town prevents speech in the town's parks and streets, little opportunity for communication would remain for the town's occupants. If the shopping mall excludes picketers concerned with a labour dispute or a boycott involving a business in the mall, then the effectiveness of any protest would be severely limited.

As noted above, the "public function" enlargement of the state action doctrine undermines the doctrine because it involves a recognition that non-state actors can wield significant power that may pose a threat to constitutional interests such as freedom of expression. But treating the creation and distribution of private property rights as a state act, which limits freedom of expression and which is reviewable by the courts, undermines the state action doctrine in a different way. Since property rights are a state creation, all private power can be seen to originate with the state — with the social rules that are created and enforced by the political organs of the community. If private power is founded upon state action and attributable to the state, then the private and the public are not two different spheres of decision-making and action. All private action can be seen as grounded in state action.[71] And so, directly or indirectly, all private action may fall within the scope of judicial review.

This approach, of treating the distribution of property rights as a potential constitutional wrong, shifts the focus of judicial review from discrete state acts, and even discrete private acts, to the state created system of property rights. The injustice the courts are striking at when they grant an individual (or the general public) access to privately owned property is an imbalance in communicative power, an unfair distribution of communicative resources, and the consequent restriction on the individual's opportunity to communicate. Although the focus of an action may be on a claim of access to a particular private property, the issue for the court is whether property rights in the community are distributed so that all persons are given a fair opportunity to communicate, a matter of distributive justice. The private owner has acquired his/her property in the market and seeks only to exercise his/her right to exclude any or all forms of communication. The wrong at issue is not so much the exclusion of communicative access by the private owner, but rather the system of property rights which makes the exclusion of access from a particular property so significant. The wrong is systemic rather than the discrete act of a particular actor who invades or restricts an individual's freedom of expression. A determination of the fairness of the exclusion

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[71] Horowitz, *supra*, note 43 at 1426.

involves an examination of the distribution of property rights, and more particularly, a comparison of the communicative opportunities of the various members of the community. And the appropriate remedy involves a systemic redistribution of property rights (rights of access and exclusion) taking into account the available resources and the relative position of the community's members.

The courts, though, are not in the best position to engage in a complete review of the distribution of property rights in the community, redefining or redistributing the rights so that a fairer, more equitable, distribution of communicative opportunities is achieved. In a legislative democracy where the primary responsibility for ordering society is thought to lie with the elected branches of government, it is politically inappropriate for the courts to intervene so deeply into the system of property rights leaving little scope for legislative judgment and control. This is not simply a matter of avoiding legal intervention into a realm that is properly left to private ordering. Because of the complex character of certain legal questions and the extraordinary character of judicial review, even where legal intervention is appropriate, it is not clear that judicial review under the *Charter* should always enter to second-guess legislative judgment.

But more importantly, perhaps, it is structurally inappropriate for the courts to engage in a general review of the system of property rights. The adjudicative model is designed to deal with issues of corrective justice and not with structural or systemic injustice. The adjudicative model directs the courts to look at the particular access claim in isolation from the background distribution of property. The courts are not in a position to review and adjust the overall distribution of property rights. They are limited to examining the interaction of the parties to the case and deciding whether one party, the property owner, should be required to allow the other party, the "speaker" onto the property; looking for a discrete wrong defined by a non-relative standard. In this way, the adjudicative model cuts off from consideration factors that ought to be taken into account in deciding whether a particular property owner should be required to grant access to a particular individual.

The state action doctrine performs the important function of limiting the scope of judicial intervention into the social and political order. Debate about the appropriate limits of judicial review has been channelled through the state action doctrine. Indeed, judicial support for the requirement may depend less on a commitment to the liberal ideology, which appears to be its justification, and more on a recognition of its usefulness as a device for limiting review.

The doctrine confines the courts to review a limited category of discrete acts isolated from larger issues of the systemic distribution of wealth and the exercise of property rights by private owners. If the courts discard the state action requirement as a device for limiting review, issues concerning the kinds of rights or interests that are appropriately dealt with by the courts will surface elsewhere in the process. In some form the courts must address the question of where a line should be drawn

limiting judicial intervention into the distribution of property rights in the community.

E. *Access to Private Property in Canada: State Action and the Limits of Judicial Review*

In *Dolphin Delivery*, the Supreme Court of Canada declared that review under the *Charter* extended only to actions of the state.[72] According to Mr. Justice McIntyre:

> [Section] 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation.[73]
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> . . .
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> It would also seem that the *Charter* would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislature. It is not suggested that this list is exhaustive. Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable.[74]

The Supreme Court of Canada's acceptance of the state action doctrine, might be thought to preclude a claim of access to private property under freedom of expression. The private property owner decides whether or not to allow others to communicate on his/her property (or to use his/her property for communication). Although the legislature gives the owner the right to exclude others from his/her property and although the courts enforce the owner's right to exclude, this sort of participation in the exclusion appears to be simply the "neutral" enforcement of a decision made by the property owner. The courts cannot go behind the state act of enforcing rights to exclude, without basing their review on the justice of the distribution of communicative power in the community.

It appears that the Court in *Dolphin Delivery* decided to exclude the common law from the scope of review under the *Charter* because it feared that the alternative would lead to the dissolution of the state action limitation. If the common law was subject to review under the *Charter*, then every time a court enforced the decision of a private actor, the court's act could be attacked as contrary to the *Charter*.[75] But, of course, the Supreme Court of Canada failed to consider whether a distinction could be drawn between a common law rule which empowers a private actor to interfere with certain interests or rights, such as the law of trespass which allows the bigot to remove someone from his/her property because she/he does not like their skin colour, and the common law rule which itself restricts or violates a fundamental right, such as a law against

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[72] *Supra*, note 36.
[73] *Ibid.* at 598-99, 33 D.L.R. (4th) at 195.
[74] *Ibid.* at 602-03, 33 D.L.R. (4th) at 198.
[75] *Ibid.* at 600-01, 33 D.L.R. (4th) at 196.

defamation which provides that certain kinds of communication are actionable.[76]

The Supreme Court of Canada has followed the course of judicial restraint, excluding the common law from the scope of review, as a way of avoiding review of the "neutral" enforcement by the courts of private decisions. It is quite clear, then, that the Court will not be open to reviewing the ordinary exercise of private property rights nor the distribution and protection of those rights by the state. However, a firm commitment to the state action doctrine does not make it easier to distinguish state and private action. Difficult questions arise concerning the status of instruments of state policy such as Crown corporations, and of agencies which exercise legislative or administrative authority delegated by the state. The courts are bound to recognize some form of public function doctrine, holding a particular actor to constitutional standards if she/he performs important public functions.[77] Such a doctrine is necessary if the courts are to distinguish the delegation of state authority from the creation of ordinary rights, duties and powers. If the state were to privatize the prison system or the policing system, the private actors performing these traditional state functions (under contract with the state) should be subject to review under the *Charter*.

It is apparent that the exclusion of individuals from privately owned properties can have a major impact on their opportunity to communicate, particularly in a society where property is, for the most part, privately owned and unevenly distributed. In this century, traditional public forums have been displaced by privately-owned properties such as shopping malls, to the point that access to state property is often not particularly significant to effective communication.

In Canada the right of access to private property should extend to (and be confined to) properties such as company towns and shopping malls, which perform "public" or "state-like" functions and so can be brought (albeit uncomfortably) under the state action requirement. The streets and parks of the company town should be treated like a state property so that the company will be permitted to regulate only the time and manner of communication. This sort of approach has allowed the American courts to enlarge the coverage of the right of access beyond state properties to include large concentrations of private communicative power and, at the same time, to hold on to some form of the state action requirement, marking the boundary of review.

In reviewing a claim of access to private property, the court must first consider, as a threshold issue, whether the property is a "public forum" (used to perform a public function). Once it has determined that

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[76] *See* L. Tribe, CONSTITUTIONAL CHOICES (Cambridge: Harvard University Press, 1985) at 253-66.

[77] *See* J.D. Whyte, *Is the Private Sector Affected by the Charter?* in L. Smith ed., RIGHTING THE BALANCE: CANADA'S NEW EQUALITY RIGHTS (Saskatoon: Canadian Human Rights Reporter, 1986) 145.

the property is a public forum, the court must then consider whether the particular access claim is justified — taking into account the importance of access to effective communication and the interference access would have with the owner's use of his/her property.

If Canadian courts hold on to some form of threshold requirement of state action and confine the access right to large privately owned properties which perform "public functions", such as company towns, labour camps and shopping malls, they will limit the scope of their potential intervention into the legislatively created system of property rights. The right to exclude others will remain a normal part of private ownership, it will simply be subject to certain limited exceptions.[78] Focussing on this limited group of privately-owned properties will allow the courts to isolate access claims from the larger issue of the fairness of the general distribution of property rights. Judicial review will be confined to properties which have a "public" character. The owner of the shopping mall or the company town loses his/her complete and unqualified right to exclude others because she/he has made his/her property a community gathering place, an important forum for communication which has displaced the traditional state-owned forums. Because judicial review is focussed on properties which have a "public" character and are among the most important forums for communication in the community, the access claims considered by the courts will almost invariably be important to effective communication, regardless of the larger background against which the claim is made.

But even if our courts maintain some form of state action requirement, and focus on only those "private" properties which perform "public functions" and not on the overall distribution of property rights, the object of review remains the creation (redistribution) of opportunities to communicate. The public function doctrine may limit the properties to which the courts will require access under the *Charter*; but the reason for isolating these properties from the background of private property rights is that they are significant forums for communication and without access to these forums many individuals will not have adequate opportunities to communicate. The decision of the private owner to exclude communication from his/her property (the exercise of the ordinary right to exclude any individuals or groups from his/her property) is of concern only because the state-created system of property rights allows control over some of the most important forums of communication to be concentrated in a few private hands.

No matter how it is packaged and presented, access remains an issue of distributive justice and involves a comparative standard which is only partially contained by the public function requirement and the adjudicative framework. Although the courts may isolate a particular

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[78] Cohen, *supra*, note 70 at 159: "But the essence of private property is always the right to exclude others." *But see R.* v. *Layton* (1986), 38 C.C.C. (3d) 550 (Ont. Prov. Ct.).

category of property from the background distribution, and may not allow claims to all forms of private property, the issues before them are whether this property is an important public forum and whether in the circumstances of a particular claim an individual must have access in order that she/he have a fair and effective opportunity to communicate. Whether access to a particular property is necessary generally, and in the particular circumstances, will depend on the background of communicative opportunities and property rights.

If the public function doctrine is used to isolate a narrow and fixed category of private property from the general background of property rights, it might be possible to see access as a "negative right". The owner of the company town or the shopping mall has lost his/her complete and unqualified right to exclude others because, with the state's permission, she/he has made his/her property public in some way. Access is being sought not simply to a piece of property but to a forum which has been created by the property owner, a means by which an audience can be reached. The shopping mall owner has created a gathering place — a place where effective communication is possible and a forum for the expression of ideas and the communication of information — and so she/he must permit communicative access.

But within this framework, access to private property is more likely to have the appearance of a positive right, involving a duty on the part of the private property owner to facilitate communication by opening his/her property to the public. Although the general distribution of property rights might be considered an unfair *limit* on an individual's opportunity to communicate with others, the restricted perspective allowed by the adjudicative model requires the courts to take the overall distribution of property rights, including the ordinary right to exclude others from one's property, as a more or less fixed background. This background may be interferred with in isolated and exceptional circumstances but it cannot be radically revised. The focus of the courts, then, is narrowed to the general threshold issue of whether a particular property is an important public forum and the specific issue of whether the "private" owner of this public forum should be required to allow a particular individual to use his/her property for communication. A decision by a court classifying a private property as a public forum involves a judgment that the private property owner's right to exclude others from his/her property must give way when access for communication is important. The property owner must sometimes surrender his/her right to exclusive control in order that others may have a more effective opportunity to communicate.

The inequity of the general distribution of property rights motivates the courts' review of the private owner's decision to exclude communication from his/her property. The courts' intervention, however, leaves intact the existing distribution of property rights. The courts simply require the property owner to permit communication on his/her property in the particular circumstances. Although the power to exclude is considered central to private ownership, the shopping mall owner's right to

exclude others from his/her property is overridden because she/he is performing a public function with his/her property and because access is considered necessary to effective communication.

Therefore, even if Canadian courts hold a limited form of access to private property, focussing on certain "public" properties which can be assimilated under the state action doctrine, their task will be difficult and uncertain. Once the courts have decided that the existing distribution of property is not to be the firm baseline of review, because it is inequitable and because it involves the concentration of communicative power in the hands of a few, the task of review is bound to place a strain on the adjudicative process.

There is no obvious point at which judicial intervention should cease because opportunities to communicate are sufficiently equalized. The courts could easily expand the public forum category moving from access to company towns and shopping malls to a far more significant intervention into the distribution of property rights, including access to a wide range of "private" enterprises. There is no simple test to determine the appropriate limits of access to private property under freedom of expression. The scope of the "public function" extension of the state action doctrine will reflect the courts' view of the proper role of the state and of the central forums for communication in the community. The courts may have no choice but to make a pragmatic judgment as to where review should end — as to the depth of judicial intervention into the existing distribution of property rights.

There will be pressure to expand the scope of access rights because of the unequal distribution of communicative opportunities that currently exists. But, at the same time, there will be pressure to reduce the scope of the access right because of a formalistic attachment to the state action doctrine and to the conception of freedom of expression as a negative right. As well, there will be pressure to reduce the scope of review on the grounds that the courts should not intervene significantly into the distribution of property rights.[79] These countervailing pressures mean that the scope of review will remain fluid.

Even if the courts are able to fix the scope of the public function doctrine, the issue of whether access should be granted in a particular circumstance will raise complex questions, similar to those raised by the issue of access to state property. Whether, in a particular situation, the need for access to private property outweighs the property owner's right

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[79] In his dissenting judgment in *Logan Valley*, *supra*, note 45 at 1614, Black J. sees the grant of access to private property as an act of expropriation:

> [I]f this Court is going to abrogate to itself the power to act as the Government's agent to take a part of Weis' property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken.

to exclusive possession of his/her property involves consideration of a variety of complex factors such as the nature of the speech, the connection between the speech and the particular property and the availability of adequate alternative forums — the background of property rights.

Formally, broadcast stations and newspapers will be excluded from the category of private properties which are subject to a right of access because broadcasting and newspaper publishing are not functions which have traditionally been performed by the state. The exclusion of these properties, though, is probably necessary for other reasons. The task of enforcing a right of access to the media may be too complex for the courts. Broadcasting stations and newspapers are not like shopping malls. They are not community gathering places where general public communication can occur without interfering with their ordinary operation. Communication is the function of these properties. A right of access to the media would involve a direct interference with the owner's use of his/her property and would displace his/her decisions as to how air time or print space should be filled. In this context, the definition of a right of access is better left to the legislature.

F. Conclusion

Even if it is accepted that the ideal of freedom of expression requires a significant redistribution of communicative opportunities, it is doubtful that the courts are the appropriate institution to bring this about. A right of access to private property which flows directly from freedom of expression must be limited in view of the structural and political limits of judicial review. Judicial intervention compelling access will be appropriate only when there is a serious breakdown in the opportunity to communicate. At the very most the access right should extend to company towns, labour camps and to shopping malls. The larger effort to redistribute opportunities to communicate by redistributing or redefining property rights must be left to the legislature.

But even if our view of what the courts can achieve must be limited, our vision of the freedom should not be bound by the practical limits of the *Charter*. The ideal of "freedom of expression" requires more than the liberty of the individual from interference by the state with his/her communication, with property rights as the fixed background against which individuals interact. It involves a real opportunity to participate in social discourse. In particular, it requires that larger forums for communication (daily newspapers and broadcast stations) be opened up to the public so that a more equitable distribution of the opportunity to communicate can be achieved. There is no true freedom of expression in a community where the means of effective communication are monopolized by a wealthy minority and where the remainder of the population can expect no more than the opportunty to communicate in the streets or parks.

The legislature must be left with the task of working our a fairer distribution of communicative resources, requiring access to the large

concentrations of private communicative power. Perhaps all we should hope for from the courts is that they not strike down the efforts of the legislature to grant wider access to the property holdings of a wealthy minority, including legislation granting a right of reply to criticisms in the media and legislation forbidding discrimination in the sale of media advertising space.[80] If the courts do no more than require access to a narrow range of privately owned properties, they will, at least, have acknowledged the importance of property to the exercise of freedom of expression and they will have given the freedom a significant egalitarian dimension.

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[80] *See* Moon, *supra*, note 2.