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MEDIA ACCESS AND A FREE PRESS: PURSUING FIRST AMENDMENT VALUES WITHOUT IMPERILING FIRST AMENDMENT RIGHTS

DON LIVELY*

The concept of free expression was constitutionalized at a time when public communication was highly personalized and the roles of speaking and listening were easily interchanged. Nearly two centuries later, however, first amendment guarantees operate in a technological context that has operated to dichotomize those roles and create distinct classes of speakers and listeners. The evolution of public expression, from a setting characterized by unamplified speech, community forums, and hand printed or set publications, to one dominated by prolific and pervasive media forces has created great "distortions in [the] system of free expression." Media concentration and scarcity of media outlets have lowered the ratio of communicators to receivers and have contributed to the decline of face-to-face dialogue and the rise of institutionalized information brokers.

The consequences of those changes have occasioned protective efforts to safeguard first amendment values (if not always first amendment rights) by attempting to regulate diversity into the mass media. Such diversification schemes rest upon the principle that dissemination of information: with as many different facets and colors as possible is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are

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1. U.S. Const. amend. I.
most likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.\footnote{7}

Government policies designed to promote diversity of expression in the mass media have focused primarily upon broadcasting. Although the public possesses a paramount right of access to information in the electronic forum,\footnote{8} it only has limited speaking rights therein. Access rights arise only upon the presentation of a controversial view on an issue of public importance,\footnote{9} broadcast of a personal attack,\footnote{10} or appearance of a legally qualified political candidate.\footnote{11} Such opportunities create only narrow and contingent access rights for ideas and individuals. Even such rudimentary access rights, however, exceed those available in the print media, where the public has no first amendment right of expression or information reception.\footnote{12}

Efforts to structure diversity into the media\footnote{13} by providing special access rights have sought to correct imbalances in first amendment rights and privileges.\footnote{14} Limited access has not proved to be entirely fit for that purpose, but so far proposals to carve out more expansive access rights have failed to win lasting judicial favor.\footnote{15} Despite no record of significant victories on the legal battlefield, the banner of broader access rights continues to lead a pursuit of first amendment values in the mass media. The purpose of this article is to: (1) examine existing opportunities for limited access; (2) ascertain why the concept of broader access rights survives despite judicial rebukes; (3) assess the constitutional hurdles that a more sweeping access system must clear; (4) suggest an access plan that would pass tests of constitutionality and practicality; (5) evaluate the implications of access for the print media; and (6) consider whether access concepts may be rendered obsolete by the continuing evolution of the media.

\footnote{9} In the Matter of the Handling of Public Issues under the Fairness Doctrine and the Public Interest Standard of the Communications Act, 48 F.C.C.2d 1, 19 (1974) [hereinafter cited as Fairness Report].
\footnote{10} 47 C.F.R. \S\ 73.1920 (1977).
\footnote{11} 47 U.S.C. \S\ 315 (1977).
\footnote{13} Policies for promoting diversity of information in the mass media may be broken down into categories of direct and indirect content regulation. Indirect content regulation consists of policies intended to structure the media so that it is more conducive to multiple views. Prominent examples of indirect content regulation include the Newspaper Preservation Act, 15 U.S.C. \S\S\ 1801-04 (1976), which is designed to save failing newspapers through rules limiting the number of broadcasting outlets a single entity may own. \textit{See} Multiple Ownership Rules, 47 C.F.R. \S\S\ 73.35, 73.240, 73.636 (1979). Direct content regulation is restricted to the electronic forum, which is governed by fairness rules and regulations providing limited access opportunities upon the airing of controversial views, personal attacks, or appearances of political candidates. \textit{See} Fairness Report, \textit{supra} note 9, at 1; 47 C.F.R. \S\ 73.369 (1977); 47 U.S.C. \S\ 315.
I. THE EXISTING CONTOURS OF ACCESS

Media access rights range from limited to none depending upon the nature of the media form. In the print media, editors have the sole discretion in deciding what material to print. Although any enforceable right of access to newspaper space may conflict with the first amendment, restricted access rights in the electronic forum so far have survived such constitutional confrontation. Thus the Supreme Court, in Red Lion Broadcasting Co. v. FCC, encased and elevated the public's right in broadcasting "to receive suitable access to social, political, aesthetic, moral and other ideas and experiences." Those access rights, however, have been specifically and narrowly drawn and reflect a general regulatory strategy of promoting fair and balanced programming.

The most conspicuous manifestation of that approach, and most prominent right of access in the electronic forum, is embodied by the fairness doctrine. The underlying premise of fairness regulation, that the public interest requires opportunities for expression of contrasting viewpoints on issues of public importance, dates back more than half a century. Essentially, the fairness doctrine obligates broadcasters to set aside reasonable amounts of air time for coverage of public issues and to provide opportunities for contrasting points of view. By properly discharging their fairness duties, broadcasters presumably provide their audiences a balanced diet of information on public issues.

Fairness obligations arise upon presentation of "a controversial issue of public importance." However, the duty to provide balanced programming does not vest any person or group with the right to present an opposing viewpoint. Instead, broadcasters retain discretion to "decide what issues are 'important,' how 'fully' to cover them, and what format, time and style of coverage are 'appropriate.'" Access rights under the fairness doctrine thus operate on behalf of ideas rather than exponents of ideas and are designed to meet a first amendment standard requiring not "that everyone

17. Id. at 254.
19. 395 U.S. at 390. The public's right to receive information in the electronic forum arose from a balancing of the first amendment interests of broadcasters and the public in a context "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate." Id. at 388. Given the scarcity of broadcasting frequencies, and the danger that some ideas and views might go unexpressed, the Court concluded that the first amendment was not a bar to government regulations obligating broadcasters to function as fiduciaries and present representative voices and opinions. Id. at 389.
20. A right of access arises only in response to the broadcasting of controversial views, personal attacks, or appearance of political candidates. See supra notes 9-11.
21. See Fairness Report, supra note 9, at 7.
23. Fairness Report, supra note 9, at 7.
24. Id.
25. Id. at 10.
26. Id. at 18.
shall speak, but that everything worth saying shall be said." The resulting "separation of the advocate from the expression of his views" leaves broadcasters rather than the public with the power to initiate debate and maintain editorial control of it.

When the Federal Communications Commission (FCC) receives a complaint that a broadcaster's programming is one-sided, the licensee's editorial judgment is tested against a standard of reasonableness and good faith. If the Commission finds merit in the complaint, it ordinarily asks the broadcaster to provide air time for a balancing viewpoint.

A broadcaster's affirmative duty under the fairness doctrine to cover issues of public importance is the only obligation licensees have to provide programming opportunities for such matters. That responsibility may be attenuated at the expense of robust debate, though, if programming decisions reflect anxieties that controversy may alienate audiences and advertisers. Even a program with a large audience would be unprofitable if advertisers did not want to be identified with it. But the suggestion that it is "bad business to espouse . . . the heterodox or controversial . . ." or that advertisers are paranoid about being identified with controversy is capable of being stretched too far. To the extent that advertising is an essential step toward commercial profit, in a nation where the electronic media are plugged into more than ninety-eight percent of the homes and operate in a context of spectrum scarcity, it is less than a foregone conclusion that controversy necessarily will lead to self-censorship or non-sponsorship.

Although fairness regulation relies heavily upon good faith licensee decisions, its history is not devoid of triumphant moments. The fairness doctrine, for instance, was the triggering mechanism for a widespread information campaign to counter cigarette advertisements and educate the public about the hazards of cigarette smoking. Any such specific benefits, however, must be measured not only against the overall performance of fair-

30. The Commission depends upon the public to bring fairness problems to its attention. Fairness Report, supra note 9, at 18.
31. Id. at 20.
32. Id. at 17.
33. Id. at 7.
35. 412 U.S. at 187.
38. By 1978, 98.6% of the nation's homes had at least one radio and 98% of them had at least one television. Broadcasting Y.B. Section C, at 341 (1979).
40. The FCC, upon determining that cigarette advertisements implied that smoking was healthful, ordered broadcasters to furnish free air time for anti-cigarette spots. WCBS-TV, 8
ness in promoting first amendment values but also its compatibility with the first amendment itself. And “[u]nlike some venerable institutions, . . . old age has hardly secured the fairness doctrine from the tarnish of corrosive controversy.”

Fairness policing poses the most potent threat to first amendment guarantees of free speech and press. By directing licensees to provide opportunities for balancing viewpoints, the FCC elevates its own editorial judgments over those of broadcasters. Fairness enforcement, therefore, requires the Commission at times to arrogate to itself the reins of editorial control.

In striving to accommodate the competing concerns of diverse information and government restraint, the FCC has pursued a general philosophy of least possible intrusion. Policy manifestations of that regulatory attitude in fairness matters have included agency reliance primarily upon licensee judgment and discretion. The Commission thus operates under the assumption that the public is best served, not by having the agency make decisions as to what is desirable in each situation, but “by a system which allows individual broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation.” Given the potentially unlimited number of controversial issues in some communities, agency deference to reasonable and good faith licensee judgment evinces a realistic sense of regulatory limitations.

Nonetheless, a fundamental and persisting problem with fairness regulation is not merely that the standard is “difficult to determine, but the fact that someone other than the speaker . . . with far-reaching enforcement powers . . . has the task of determining it.” It already is established that the Commission is “more than a traffic policeman concerned with the technical aspects of broadcasting and that it [may interest] . . . itself in general program format and the kinds of programs broadcast by licensees.” If the FCC were to conclude that licensees were too timorous in their programming, it would have wide-ranging enforcement powers at its disposal.

Fairness enforcement at the very least contemplates agency oversight of and balancing supplements for a broadcaster’s own programming decisions. However, the Commission’s arsenal of enforcement weapons includes its license granting, renewing, and revoking authority and power to impose fines. In a zone where the FCC’s “lifted eyebrow” may be sufficient to achieve regulatory objectives, the mere availability of powerful enforce-
ment devices and potential for their misuse create a lingering threat to expression. Fairness controls enable "administration after administration [if they so choose] to toy with radio or TV in order to serve . . . sordid or . . . benevolent ends."50

In any event, the Commission, through its general policy of deference to licensee discretion, so far has endeavored to minimize government influence upon broadcast fare.51 Thus the agency has concluded that "further government intrusion is less desirable than the possibility of occasional licensee lapses."52 Accordingly, the FCC's record as a disciplinarian is devoid of any punishment for a broadcaster who failed to comply with the fairness doctrine.53 The agency's reluctance to become entangled in fairness complaints is illustrated by the rarity of fairness findings against licensees.54

The advantages of such leniency and restraint, however, do not diminish the generally negative effects and potential of fairness regulation. Fairness cannot optimally promote diversity unless energetically enforced, but aggressive policing creates a danger of undue government influence in programming. No matter how administered, therefore, the fairness principle translates into an unsatisfactory proposition.

Despite its drawbacks and dangers, fairness regulation continues to govern the electronic forum on the assumption that it enhances rather than abridges the first amendment guarantees of free speech and a free press.55 Fairness in practice, however, creates a hierarchy of free speech rights. The unusual ordering of rights,56 that makes paramount the public's right to information,57 allows some persons or government to "snuff out"58 the first amendment rights of others. Fairness regulation at its constitutional worst, therefore, creates gradations of speaking rights and restricts the speech of some members of society to magnify the relative voice of others.59

Policymaking presuming that a more regulated press necessarily will translate into a more perfect press must assume whatever risk that attaches to disregarding past lessons of tampering with individual speech and pub-
lishing rights. The Sedition Act, for instance, purportedly was conceived to elevate the level of public discourse — but more accurately could be catalogued as a government “attempt to eliminate political criticism, create a one-party press in the country, and by controlling public opinion insure . . . victory in the elections.” Especially given such lessons in government perversion of first amendment rights in the name of first amendment values, the fairness concept should be recognized as a regulatory form of suspect and potentially damaging character.

II. THE PURSUIT OF MORE ACCESS

A general right of access for multiple voices, as well as views, was conceived to equalize the power to communicate ideas and to protect rights of expression by creating more opportunities for their exercise. Essentially, a public right of access would lower media barriers to the entry of unedited community voices. The proffered basis for such a right to be heard is the interest in confrontation of ideas from more voices.

The first major constitutional showdown over access occurred in the electronic forum, where limited access inroads, carved out by fairness regulation, already had been made. Initially, but only temporarily, it was determined that a blanket prohibition on paid public issue advertising contravened the first amendment. That expansion of access rights, however, failed to survive an appeal to the Supreme Court which, in CBS v. Democratic National Committee, concluded that the public’s right to information already was protected adequately by the fairness doctrine. In the past, the Court had suggested a possible reevaluation of fairness regulation if it failed to measure up to expectations. Despite the demonstrated flaws of fairness, however, the Court refused to abandon such regulation in favor of access. Rather, a right of access was rejected as “too radical a therapy” that exceeded the FCC’s authority. Although the Court reaffirmed the public’s paramount right of access to information in the electronic forum, a right of public expression in that arena remained illusory.

64. Id. at 1678.
66. 412 U.S. 94 (1973). Despite its willingness to uphold limited access rights created by fairness regulation, the Court rejected the argument that broadcasters were constitutionally obligated to sell at least some of their time for unedited discussion of public issues.
67. Id.
70. Id. at 102.
71. Id. at 130-31.
The failure to secure broader access rights in a forum characterized by spectrum scarcity augured unfavorably for the prospect of access in a medium distinguished by multiple channel capacity. Accordingly, an effort to establish a foothold for access in cablecasting failed to survive judicial scrutiny. The FCC, which in *CBS v. Democratic National Committee* had opposed radio or television access, nonetheless had determined that cable access channels served a useful social purpose. Consequently, it had directed cablecasters to furnish public, governmental, educational, and leased access channels. Despite the agency’s assertion that cablecasting access served first amendment values by facilitating an exchange of ideas, the Supreme Court in *FCC v. Midwest Video Corp.* concluded that such regulatory provisions exceeded the FCC’s authority. Since cable operators are not common carriers, the Court disallowed imposition of common carrier duties upon them. In so doing, it reiterated that such intrusions “on the journalistic integrity of broadcasters would overshadow any benefits associated with the resulting public access.”

Shortly after the Court’s second rebuff to broader access rights, the access issue resurfaced again when a corporation attempted to purchase network time for presentation of its own editorial advertisements. The networks, at least partly out of concern that the messages would be too controversial, refused to sell the air time. Since the advertiser’s purpose was to present its views and take stands on controversial public issues, fairness obligations probably would have been triggered by such messages. The company, by insisting that its first amendment rights had been infringed, and the networks, by refusing to sell air time, merely replayed the same right of access versus editorial control arguments aired in *CBS v. Democratic National Committee*. Given the case law on the networks’ side, their position for practical purposes was legally unassailable.

Although government is “constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue,” a licensee’s refusal to admit speakers into the electronic forum does not necessarily constitute government action.

76. *Id.* at 708.
78. 440 U.S. at 708-09.
79. *Id.* at 705.
80. Newsweek, July 2, 1979, at 57.
81. *Id.*
82. Fairness Report, supra note 9, at 23.
83. Newsweek, July 2, 1979, at 57.
85. In *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973), three justices concluded that licensee action in refusing to sell time for editorial advertisements did not amount to government action. *Id.* at 117-19. One justice was unwilling to decide the issue. *Id.* at 146 (White, J.,
Consequently, the first amendment may preclude government from channeling the flow of ideas and views, but media operators have been left free (subject only to such specialized restrictions as fairness) to function as forum bouncers.

Despite two adverse decisions by the Supreme Court in less than a decade, media access has not been abandoned as a promotional vehicle for first amendment values. The continuing pursuit of access, in fact, derives a measure of its lingering vitality from the Court's own observation that "at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." Although the Court twice has struck down access schemes, it has refused to bury the concept completely. Still, the future of access hinges upon the structuring of a system that can prove itself to be "practicable and desirable."

III. CONSTITUTIONAL CONSIDERATIONS FOR ACCESS

Although broad public access is cosmetically alluring as a means for advancing the cause of diversity, it also may pose significant constitutional hazards. By downgrading the speaking rights of broadcasters and upgrading those of the public, media access as a matter of right leaves nobody constitutionally whole. Even if a redistribution of first amendment rights may represent a "delicately balanced system of regulation intended to serve the interests of all concerned," such a scheme also may be pregnant with mischief.

The First Amendment may indeed belong to everybody—but it cannot truly belong to everybody unless it first belongs to each and every particular somebody. To deny the individual right in the name of the collective right transforms the First Amendment from a guarantee of individual freedom into its very opposite, rule by public clamor.

Since an unusual ordering of speech rights has been permitted for purposes of fairness regulation, conceivably such a hierarchy could pass judicial muster for purposes of broader access. If so, media access—like fairness regulation—might be justified upon grounds of spectrum scarcity. A renewed life for the scarcity rationale, however, would prolong the mythology that special operating circumstances of broadcasting require special regulations.
In reality, newspapers (which are not subject to any form of access regulation) already had become more scarce than broadcasting outlets when the Supreme Court lent its imprimatur to the scarcity rationale for fairness regulation. Although the scarcity dogma continues to operate, widespread criticism may deplete it of any supportive strength if and when broader access rights emerge. Consequently, the pursuit of access may necessitate a search for more persuasive rationales.

One proposed justification for access, that actually preceded the scarcity rationale, is that a community's interest and dependence upon the media warrant reasonable access thereto. Another suggested rationale posits that a right of free speech presupposes a right of access to the instrumentalities of expression, because speaking rights are meaningless absent effective means for communicating. Such proposed foundations for access rights essentially invite balancing the public's interest in expression against the interests of media operators. In so doing, they too would foster a hierarchy of rights similar to what exists under the fairness doctrine.

It also has been propounded that "the constitutional values of equality and liberty are fundamentally linked by the notion that equal access to certain institutions . . . is a prime component of any meaningful liberty." Such an "equality principle suggests that if government surveillance can be minimized and compulsion over the private owners of the medium limited to a content-neutral principle, such as a statutory right to paid advertising, then a court should view sympathetically government action to overcome the impact of private censorship."

Despite the ingenuity of the equal liberty premise, it too abandons first amendment rights in a rush toward first amendment values. Media access rights inevitably diminish broadcasters' expression rights by confiscating time that could have been devoted to their own presentations.

92. Scarcity of frequencies is one reason why broadcasting has been subjected to constitutional standards different from those applied to other media forms. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971). Other perceived characteristics used to justify broadcasting regulation include its "uniquely pervasive" and intrusive nature. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 128 (1973).
95. An Ohio court, without addressing the constitutional implications, upheld a right to purchase newspaper advertising on that basis. Uhlman v. Sherman, 31 Ohio Dec. 54 (1919).
97. Karst, supra note 94, at 43-44.
98. Id. at 51.
99. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-57 (1974). The Supreme Court has recognized that compelling a publisher to print material, that he otherwise might not publish, deprives him of space that might be used for other purposes including self-expression. Id. The Court has refused to apply the logic of that principle to broadcasting, although it has been urged to do so. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). Despite basing its holding in Red Lion upon the principle of spectrum scarcity, it refused in Tornillo to carry the newspaper scarcity analogy as far, or even to mention the contrasting decision in Red Lion.
ming decisions concerning content, treatment, and exposure constitute the exercise of journalistic discretion and editorial control. 100 Any encroach-
ment thereon will inevitably affect the editorial process and product. 101

Since the curbing of some rights of expression to enhance the voice of others is foreign to the first amendment, 102 it is difficult to rationalize access rights without the aid of factual or legal fictions and without ultimately derogating the first amendment's protection against press abridgment. Although promotion of first amendment values may be a worthy undertaking, the principal guideline for such a venture is the first amendment; "and one hard and fast principle that it announces is that Government shall keep its hands off the press." 103 Even if the government may endeavor to promote robust and vigorous discourse, "it is precluded by the First Amendment from . . . suppressing expression, even where government would justify such intrusion on personal liberty as a pursuit of First Amendment values." 104

IV. A CONSTITUTIONAL AND PRACTICABLE ACCESS PLAN

Creation of an access system that does not abridge first amendment rights requires voluntary rather than compulsory participation by media operators. A voluntary scheme would not transgress the law enunciated in CBS v. Democratic National Committee, since the Court addressed the issue of mandatory rather than optional access. 105 Before any such plan could leave the drawing board, however, it would have to pass a four-part test devised by the FCC. Specifically, no access system would be acceptable unless it assured that: (1) important issues did not escape timely discussion; (2) licensee discretion was maintained; (3) no right of access accrued to particular persons and groups; and (4) government was not drawn into deciding who received air time and when. 106

The "first serious attempt" 107 to meet those criteria would afford broadcasters an option to provide an hour of public access time each week. 108 Instead of being obligated to balance programming on controversial matters of public interest, licensees who opted for such an access would be in presumptive compliance with fairness requirements. 109 Although the FCC originally determined that the access proposal was neither perfected nor ready for adoption as a rule, 110 it since has undertaken to reevaluate the plan. 111
Essentially, the scheme would provide access in two separate ways. Half of a station's access time would be allocated on a first come, first served basis. To prevent system monopolization, the remaining access time would be provided to representative speakers. Even though the Commission originally rejected the proposal, it may have underestimated the plan's capacity for meeting the agency's standards.

Even if a broadcaster furnished time merely to a reasonable spectrum of views, greater programming diversity probably would result than when an individual broadcaster reserves all content decisions for himself. A belief that important issues would not escape timely discussion in such a setting to some extent rests on faith. However, "if an issue is truly of public importance, it is reasonable to presume that it will reach the public forum that an adequate access policy would provide." Especially in comparison to fairness regulation, it is less likely that pertinent public issues would escape attention. Although a broadcaster has an affirmative obligation under the fairness doctrine to cover public issues, only in rare circumstances will the FCC determine that a public issue is so important that it would be unreasonable for a licensee to neglect it entirely.

Licensee discretion, which the FCC and the Supreme Court insist must not be "subordinate[d] to private whim," would be preservable under a voluntary access plan. If licensees could choose freely whether to adopt an access system, selection of that option alone would seem to be an exercise of licensee discretion. Merely affording broadcasters that opportunity to select, however, may not withstand agency or judicial scrutiny. Both the Commission and a court have insisted upon preserving the discretion to determine what issues merit coverage initially and what coverage necessitates the presentation of balancing views. Even if voluntary access vested non-media operators with editorial control, broadcasters who adopted such a scheme still would have unimpaired discretion to initiate and pursue coverage of issues that they chose themselves. Voluntary access, therefore, would impose no undue restraints upon overall licensee discretion.

Both the Supreme Court and the FCC have expressed apprehension of and opposition to any access scheme that would allow any individual or
group to purchase or otherwise obtain a dominant position in the system.\textsuperscript{120} Even under a first come, first served plan, it has been suggested that "the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently."\textsuperscript{121} Voluntary access, however, need not be vulnerable to any special access privilege or leverage. The possibility of undue influence seemingly could be minimized by allocating half of a station's access time to representative spokespersons who would qualify to speak, for instance, by collecting a certain number of signatures on a petition circulated in their community or group. Although it is unlikely that any allocation scheme would be tamper proof against manipulations by bad faith or biased licensees, it is equally improbable that opportunities for abuse would be any greater than under the fairness doctrine.\textsuperscript{122} Moreover, such anxieties over apportionment rest upon presumptions rather than actual evidence that wealthy voices necessarily would be more inclined to speak or have significant influence if they did.\textsuperscript{123} It also seems unreasonably speculative to assert a risk of monopolization by the affluent, given funding possibilities for others from foundations, public interest groups, and resource pooling.\textsuperscript{124}

In any event, concerns that some categories of individuals or ideas may have more exposure than others are antagonistic to the first amendment.\textsuperscript{125} In evaluating the viewpoints expressed by any speaker, the public may consider the source of the message and credibility of the advocate.\textsuperscript{126} The mere disclosure of a speaker's identity probably would suffice to alert the public, if necessary, to evaluate the views they hear. The Supreme Court has observed that only in broadcasting does limited access to the channels of communication not contravene the first amendment.\textsuperscript{127} Yet, no less with electronic transmissions than any other means of communication, the public may judge and evaluate the relative merits of conflicting viewpoints.\textsuperscript{128} Even though the framers of the first amendment may not have anticipated the emergence of the electronic media, the possibility that the public might not scrutinize the information and ideas communicated is a danger they contemplated and a risk they assumed.\textsuperscript{129}

It may be impossible to strike a perfect balance of viewpoints and safeguard against all potential abuses in a voluntary access system, but such incapabilities should not unduly demean such a system. Rather it probably

\textsuperscript{121} Id.
\textsuperscript{122} Reconsideration of the Fairness Report, \textit{supra} note 41, at 713-14 (Commissioner Robinson dissenting).
\textsuperscript{127} Id. at 792 n.30.
\textsuperscript{128} Id. at 791.
\textsuperscript{129} Id. at 792.
is more useful to measure voluntary access not against perfection but against the performance of fairness regulation. Although some questions about access may be answerable only from experience, experience with fairness tends to suggest that "the law couldn't be any worse than it now is."\textsuperscript{130}

A voluntary access plan finally would remove the FCC farther away from programming decisions.\textsuperscript{131} Under a fairness system, wherein licensees without public input determine the coverage of public issues, government interference, in the form of agency second-guessing and content review, is unavoidable.\textsuperscript{132} Government participation in programming decisions is contrary to the spirit if not the letter of the FCC's stated refusal to be drawn into deciding who should receive air time and when.\textsuperscript{133} An access system, in contrast, would diminish the government's supervisory function. No scheme short of complete agency abdication would eliminate government monitoring altogether, but access would alter oversight responsibilities to those of making quantitative rather than qualitative judgments.

Although it is possible to structure a voluntary access system that works on paper, it is essential that such access provide meaningful speaking opportunities for the public. If, for example, access time were relegated to hours of low audience potential, such a system would be seriously flawed.\textsuperscript{134} A government directive requiring access programming at particular times would undermine the voluntary (and thus constitutional) nature of access. Consistent with notions of voluntariness, though, the FCC could create incentives designed to encourage access programming during preferred viewing hours.

Non-compulsory encouragement of access programming would fit within a broader category of diversity promoting policies for the mass media. Especially since some diversity-oriented policies are burdensome to or restrictive of licensees, the possibility of regulation trade-offs or immunities exists as inducement for excellence in access programming. Such flexible regulation seemingly would serve the public interest efficiently by custom tailoring to specific circumstances those policies that best would facilitate the interests of diversity.\textsuperscript{135}

A "practicable and desirable" access system, for instance, would serve directly the same goal that station ownership restrictions serve indirectly and...
less effectively.\textsuperscript{136} Such rules have been designed to procure diversity of views from diversity of ownership.\textsuperscript{137} That purpose, however, is impaired by a frequency allocation scheme\textsuperscript{138} that curtails the availability of outlets in a community and by the failure to resolve the problem of horizontal concentration that limits a viewer's choice primarily to the offerings of the national commercial networks.\textsuperscript{139} If an effective access system, therefore, would provide the diversity sought by ownership limitations, the Commission properly might consider loosening those restrictions for broadcasters with impressive access records.

The licensing process itself provides ample room and opportunity for encouraging excellence in access programming. By regarding access programming during peak viewing hours as "superior service"\textsuperscript{140} or "meritorious programming"\textsuperscript{141} for renewal purposes, for instance, the FCC might foster more access programming during desirable time slots. Extensive and well placed access programming, especially during prime viewing hours, might even create a rebuttable presumption that a broadcaster operated in the public interest during the term of his license.\textsuperscript{142}

In providing incentives for access, it is necessary that some caution be exercised to assure that inducements are not actually a guise for regulatory coercion. The distinction between blandishment and subtle arm-twisting may be a fine one. However, the boundaries of impropriety are probably best drawn at the point where free choice becomes encumbered by suspect alternatives. An offer to eliminate fairness duties in exchange for adopting an access scheme, for instance, would seem to be a proposition crossing that line. By conditioning freedom from a constitutionally suspect system upon

\textsuperscript{136} A broadcast licensee is not allowed to own more than one station of the same type in the same market. 47 C.F.R. §§ 73.35(a), 73.240(a)(1), 73.636(a)(1) (1979). Nor may a single licensee own more than seven AM, seven FM and seven television stations. 47 C.F.R. §§ 73.35(b), 73.240(a)(2), 73.636(b)(2) (1979).


\textsuperscript{138} See supra note 4.


\textsuperscript{140} A superior service rating gives a licensee a plus over any competitor for his license in a renewal proceeding. Superior service has been found to be "highly relevant . . . and might be expected to prevail absent some clear and strong showing by the challenger." Central Florida Enterprises v. FCC, 598 F.2d 37, 57 (D.C. Cir. 1978).

\textsuperscript{141} A meritorious programming rating may neutralize the significance of a licensee's misconduct or rule violations during a license term. See Rust Communications Group, Inc., 54 F.C.C.2d 419 (1975); Oil Shale Broadcasting Co., 52 F.C.C.2d 1167 (1975); Action Radio, Inc., 51 F.C.C.2d 803 (1975); Friendly Broadcasting Co., 35 F.C.C.2d 611 (1972).

\textsuperscript{142} Such credit for excellence in access programming would recognize contributions that likely would be directed toward "[t]he major elements usually necessary to meet the public interest includ[ing]: (1) Opportunity for Local Self-Expression, (2) The Development and Use of Local Talent, (3) Programming for Children, (4) Religious Programs, (5) Educational Programs, (6) Public Affairs Programs, . . . (8) Political Broadcasts, (9) Agricultural Programs, (10) News Programs, . . . (12) Sports Programs (13) Service to Minority Groups, (14) Entertainment Programming. Those elements of the public interest unlikely to be served by access (i.e., (7) Editorialization by Licensees . . . (11) Weather and Market Reports . . . ) ordinarily would be performed by the licensee. Granting of a radio or television license is conditioned upon the FCC's determination that "the public convenience, interest or necessity would be served thereby . . . ." 47 U.S.C. § 307(a) (1976).
enactment of a different diversification plan, the offer would deny broadcasters the opportunity to determine whether they wanted any access system whatsoever — and thus would undermine any genuine voluntariness. Since voluntary adoption of access probably is the most fundamental element of a constitutional access plan, it is essential that a broadcaster's decision not be occasioned by illusory choices.

V. IMPLICATIONS FOR THE PRINT MEDIA

Even if a practicable and desirable access plan were structured for the electronic forum, such a system would not necessarily be constitutionally transferable to the print media. Although the Supreme Court has noted that some form of access eventually may be acceptable in broadcasting,\textsuperscript{143} it has been unable to conceive how governmental regulation of the print media's editorial process can be exercised consistent with first amendment guarantees of a free press.\textsuperscript{144}

The Court's willingness to consider access in the electronic but not the print media reflects a dualistic perspective that has permitted deeper regulatory incursions into broadcasting than into publishing.\textsuperscript{145} The variable standards are an outgrowth of the premise that different media forms have different characteristics warranting different types and measures of regulation.\textsuperscript{146} Consistent with such a compartmentalized philosophy of media policy review, the Court has concluded that "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to . . . publish."\textsuperscript{147}

By insisting upon regarding different media forms in different ways, the Court has afforded publishers constitutionally preferred treatment.\textsuperscript{148} But despite "the sweeping and conclusive fashion in which the Court rejected the constitutionality of access [in the print media, the rebuff] . . . may prove less durable than less categorical arguments against broad access requirements."\textsuperscript{149} Even in the face of more intense judicial scrutiny or resistance, a voluntary access system in the print media need not occasion rejection on constitutional grounds. So long as voluntariness were the hallmark of the scheme, media operators would be under no "compulsion to publish that which 'reason' tells them should not be published."\textsuperscript{150}

The success of a voluntary access plan, as in broadcasting, would depend upon the willingness of media operators to effectuate it. Again, as in

\textsuperscript{145} Both broadcasters and publishers may be, and have been, subject to general laws not directed toward the editorial process. \textit{See, e.g.}, Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937). Government intrusion into editorial decision-making, however, has been limited to the electronic forum.
\textsuperscript{148} 395 U.S. at 388.
\textsuperscript{149} B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 13 (1976).
the electronic forum, adequate and non-coercive incentives would be available for at least encouraging experimentation. The Newspaper Preservation Act (NPA), for instance, might be amended so that the availability of its benefits were conditioned upon the willingness of publishers to adopt access.

The NPA was conceived as a rescue device for failing newspapers. The Act permits newspapers in the same community to combine their business operations if: (1) one is in danger of probable failure, and (2) editorial and reporting functions are maintained independently. If those prerequisites are met and a joint operating agreement reached, the combination is immune from antitrust laws.

Such efforts to promote diversity by protecting endangered newspapers operate to preserve existing voices rather than attract new ones. An antitrust exemption actually may place non-combination publishers at a competitive disadvantage and thus discourage new publishing voices from competing within and diversifying the media marketplace. Especially given such inherent disadvantages in the NPA's indirect diversification strategy, a voluntary access provision would seem to be an attractive way of enhancing the NPA's effectiveness. By attaching the access condition to the NPA, communities endangered by the possible loss of a newspaper might be afforded an additional measure of diversity insurance.

Although a voluntary access system may represent a form of governmental regulation which is consistent with first amendment rights, it is arguable that such public outlets as letters to the editor and op-ed sections in newspapers already minimize the need for access in the print media. Selection and publication of letters and guest editorials, however, are controlled by a newspaper editor's discretion. Under a voluntary access plan, space would be available to the public without that screening. Absent such editorial filtering, the public would have some "opportunity to take the initiative and editorial control into their own hands"—thus contributing to more uninhibited public discussion from a multitude of tongues.

VI. The Future of Access

Even if broader access opportunities were to materialize, the long term future of access still would be shrouded in doubt. Access essentially is a remedial device arising from the principle "that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communication." Access, therefore, ultimately is a response to the

152. Id. § 1801.
153. Id. § 1803(b).
154. Id. § 1802(2).
155. Id. § 1803.
156. Newspapers protected by the NPA may realize economies of scale and advertising rate-to-circulation ratios that may place competitors at a distinct disadvantage. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 624-26 (1953).
"vast changes [that have placed] in a few hands the power to inform the American people and shape public opinion."160 Those underlying conditions, however, soon may be consigned to the past, thus disposing of the concerns161 that have engendered the access concept.

Lack of competition within a particular medium has become one of the most compelling arguments for expanding access rights.162 Such a premise, which disregards and thus tends to undervalue any intermedia competition, is the product of the compartmentalized perspective favored by the courts in assessing different media forms. Aside from inadequately perceiving the quality of competition in the information marketplace, such a disunified perspective of the mass media is unlikely to appreciate fully technological contributions toward creating new opportunities for multimedia competition and expression.163 Even if progress did not improve the climate for diversity within a given media form, diversity might flourish anyway if new media forms expanded the contours and capabilities of the mass media. The evolution of the communications universe and intermedia competition to a higher level could transform access into regulatory flotsam.

At the same time that government has endeavored with one hand to promote diversity within the electronic forum, it has with the other delayed the fruits of emerging or developing media forms.164 By protecting over-the-air broadcasters until recently from the competition of cable or subscription television, for instance, the FCC obstructed the overall objective of diversity. Such favoritism has been unraveling in the wake of court decisions striking down protective policies165 and in the face of agency and congressional de-regulatory ambitions.166 Pending the arrival of any new media order, affording inherent opportunities for multiple voices and views, access may be the most acceptable means of promoting first amendment values without burdening first amendment rights. Much as the access concept itself seeks to dislodge poorly drawn but entrenched policies, access should carry the reminder that even if it is suitable for present needs it may become outmoded and thus should be easily disposable if the future no longer requires its presence.

162. BARRON, supra note 14, at 1678.
163. Developing media technologies include satellite and laser transmission capabilities, videocassettes and videodiscs, and cable and subscription television. Barrow and Manelli, Communications and Technology—A Forecast of Change (Part I), 34 LAW & CONTEMP. PROB. 205 (1969). Cablecasting’s multiple channel and two-way capacities may play particularly prominent roles in converting spectrum scarcity into abundance and diversifying programming. Note, Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper, 51 N.Y.U. L. REV. 133, 134, 137 (1976).
164. For a review of FCC rules that until recently governed and inhibited cable and subscription television, see Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C.Cir. 1977).