McGeorge Law Review

Volume 11 | Issue 1 Article 6

1-1-1979

Affirmative Action and a Free Press: Policies and Problems in Promoting the First Amendment

Don Lively

Affirmative Action and A Free Press: Policies and Problems in Promoting the First Amendment

DON LIVELY*

The first amendment furnishes a constitutional assurance that the media generally can say what it wants rather than what the government wants it to say. But the negatively structured terminology that bars Congress from abridging freedom of the press,[1] does not preclude the government from accentuating the positive and promoting first amendment interests. The freedom of the press clause, unlike the freedom of religion clause, contains no antiestablishment bar precluding affirmative governmental action.[2]

Two centuries of technological change have drastically altered the face and force of communications and have created conditions that are ripe for affirmative action. The United States Supreme Court has acknowledged the "vast changes [that have placed] in a few hands the power to inform the American people and shape public opinion[3] . . . [and that] raise serious questions of diversity of information and opinion."[4] The Court recognized those emerging realities three decades ago

* Law clerk for Hon. Jim R. Carrigan, Judge, U.S. District Court, Denver, Colorado (1979-80). A.B., University of California, Berkeley; M.S., Northwestern University; J.D., University of California, Los Angeles.

1. U.S. CONST., amend. I.
2. *Id.*
3. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 250 (1974).
4. *Id.* at 250 n.15.

when it concluded that

> [i]t would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that government was without power to protect that freedom.[5]

Such reasoning provides a basis for drafting government into the role of constitutional soldier in the service of first amendment values. But although the Court has supplied a banner, the government still must determine how to lead the crusade against the forces that would overrun the interests of diverse voices and viewpoints, which are the essence of first amendment concerns. The purpose of this article is to examine the changing realities that require new policies to promote the first amendment, to evaluate existing government programs designed to promote the first amendment, and to propose several affirmative actions designed to protect first amendment values.[6]

THE FIRST AMENDMENT: NEW POLICIES FOR NEW REALITIES

The wording of the first amendment has remained unaltered since its drafting, but circumstances in which it operates have changed significantly. Framers composed the first amendment long before the term (or reality of) "mass media" had emerged and at a time when ideas and opinions generally competed for attention and acceptance in the community forum.[7] Face-to-face interaction was the hallmark of such discourse in the late 18th century, when the dynamics of public opinion were analogous to those of a free economic marketplace.

The architects of the Constitution wrote a first amendment that was designed to prevent interference with the stream of information and ideas that flowed primarily from soapboxes and pamphlets.[8] Given the limited means of disseminating information at the time, it is unlikely that the framers could have visualized the emergence of a mass communications business. Given the technology of the times, it is improbable that they even could have fantasized the forces that would

---

5. Associated Press v. United States, 326 U.S. 1, 20 (1945).

6. Judge Learned Hand wrote that the interest in the dissemination of news from many different sources

> and with as many 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 more 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.

United States v. Associated Press, 52 F. Supp. 362, 372 (1943), *aff'd* 326 U.S. 1 (1945).

7. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment* (unpublished paper delivered at the First West Coast Conference on Constitutional Law, Sept. 15, 1977) at 26-28; *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871, 878-80 (1972) [hereinafter cited as *Media and the First Amendment*].

8. *Media and the First Amendment*, *supra* note 7, at 871.

transform a basic public function into a highly profitable industry (or the methodology that would accomplish that transformation).[9]

The first amendment was forged from the underlying conviction that a free flow of information was the best protection against government tyranny of the mind and that uncensored thought was essential to the proper functioning of society.[10] Such reasoning lends itself to an argument that the first amendment was designed as much for the benefit of the public as for the interests of publishers. And no matter how drastically conditions have changed or will continue to change, the interests of both remain on the charter list of first amendment-protected species.

The free press clause, in the context of the period which shaped it, was designed to eliminate the threat of government censorship.[11] Protection against government interference, therefore, was afforded the transmission of information by speakers, newspapers, pamphlets, and books.[12]

The primary restriction upon dissemination of information was a relatively primitive means of conveyance. The spoken word was shackled by the range of the human voice, and the printed word was handicapped by limited distribution systems. The comparatively underdeveloped transmission system nonetheless was amenable to diversity, since the motive for public speaking and publishing more often was to present partisan views rather than to make money.[13] Diversity was the primary beneficiary of the fashionable custom of using newspapers to conduct political feuds. George Washington, Thomas Jefferson, John Adams, Benjamin Franklin, and Alexander Hamilton each shared the common experience of forming or financing newspapers to further their individual political goals and compete with other partisan voices.[14]

The mutation of communications enterprises from tools of persuasion to instruments of profit, however, has been accompanied by a significant reduction in competition. The United States in 1800, for instance, enjoyed the services of 235 newspapers, including 24 dailies.[15] The number of daily newspapers expanded to 2,400 by 1909, with 689

9. Alexis de Tocqueville wrote that "Americans have nowhere established any central direction of opinion, any more than of the conduct of affairs . . . . In America, there is scarcely a hamlet that has not its newspaper." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 185-88 (1969).

10. *Media and the First Amendment, supra* note 7, at 871.

11. *Id.* at 876.

12. *Id.* at 876-79.

13. The purpose of persuasion rather than profit is illustrated by the fact that most pamphlets were distributed to the public at no charge. A. SCHLESINGER, PRELUDE TO INDEPENDENCE 44-45 (1957).

14. Comment, *New Challenges to Newspaper Freedom of the Press—The Struggle for Right of Access and Attacks on Cross-Media Ownership*, 24 DE PAUL L. REV. 165, 168 (1974).

15. *Id.* at 169.

cities having competing dailies.[16] But by 1970, the number of daily newspapers had shrunk to 1,728, and only 42 cities were served by dailies that were separately owned.[17] Although new electronic sources of information had emerged, they frequently were another arm of the same body that controlled a newspaper in the same market.[18]

The media concentration process has been characterized by the emergence of advertisers, rather than consumers or publishers, as the main subsidizers of the media. Since a basic business interest is to keep important customers satisfied, the advertiser may operate as a subversive element against the interests of diversity. The coverage or prominence of a controversial or sensitive story, for example, may be influenced by a real or perceived danger of alienating a financial contributor.[19] Such purse strings power by its very existence, therefore, can operate as a constricting force upon the flow of information.

The framers of the Constitution, on the basis of their experience and observations, drew a reasonable conclusion that government posed the major threat to a free flow of information.[20] But their vantage point afforded no opportunity to see beyond the horizon of an intervening century. And since the drafters did not address what they could not foresee, their document was constructed oblivious to the eventual stirrings of economic forces that eventually would subordinate face-to-face communications to mass communications. The first amendment, which was shaped by the experiences that led to one revolution, thus became ultimate law long before another revolution ushered in a lockstep of mass technology and mass communications.

The first amendment was well-tailored to suit a free marketplace of ideas, which functions when:

> [t]he people are presented with problems. They discuss them. They decide them. They formulate viewpoints. These viewpoints are organized, and they compete. One viewpoint "wins out." Then the people act out this view, or their representatives are instructed to act it out, and this they promptly do.[21]

But the face-to-face competition of individuals and ideas that characterized society at the time of the first amendment's creation has been

16. *Id.* at 170 n.18.
17. EDITOR AND PUBLISHER, April 4, 1970, at 6.
18. A total of 160 television stations in 1970 had newspaper affiliations. *Id.*
19. McDonald, *The Media's Conflict of Interests*, THE CENTER MAGAZINE, Nov.-Dec. 1976, at 19-20. And a programmer or publisher may tend toward bland, noncontroversial programming or publishing to avoid any risk of offending advertisers. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 187-89 (1973) (Brennan, J., dissenting).
20. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 627 (1970); Chatzky and Robinson, *A Constitutional Right of Access to Newspapers: Is There Life After Tornillo?*, 16 SANTA CLARA L. REV. 453, 456 (1976); *Media and the First Amendment, supra* note 7, at 876.
21. C. MILLS, POWER, POLITICS AND PEOPLE 357 (1953).

supplanted largely by the dissemination of prefabricated, synthesized information by centralized communications networks. A communications industry has diminished "the ratio of communicators to receivers, made the possibility of answering back more difficult as face-to-face discussions decline, and, to some degree, allowed instituted authorities to 'infiltrate the public' so as to interfere with the autonomy of the public."[22]

The emergence of institutionalized centers of communication has transformed radically the methodology of information exchange and competition. The primary mode of communication in pre-mass media America was interpersonal discussion. Newspapers and pamphlets served to "enlarge and animate discussion, linking one primary public with the discussions of another."[23] The dominant means of communication in a mass media society, however, "is by the formal media. . . . [T]he public becomes media markets . . . exposed to the contents of given mass media."[24]

The same first amendment that was designed to protect against abuses from centers of public power has seen the United States in general, and communications in particular, undergo a transition "from widely scattered little powers and laissez-faire to concentrated powers and attempts at monopoly control from . . . centers of private power."[25] Given the shift from decentralized public debate and easy entry to concentrated information centers and limited entry, the free marketplace of ideas concept seems to have become antiquated. Nevertheless, first amendment analysis remains anchored to a romantic assumption of personal interaction and exchange of ideas rather than being geared to an information infrastructure dominated by strong economic forces.[26] The realities of society as they exist nearly 200 years after the first amendment was drafted suggest that it now may be more fitting to consider communications

> not entirely in terms of Eugene Debs' speeches[27] or Abrams' written heresies,[28] but also in terms of a sophisticated, complex, massive and intrusive phenomenon that is subject to control by powerful forces, the most powerful of those being large economic enterprises, the mass media and government.[29]

---

22. *Id.* at 353-55.
23. *Id.* at 355.
24. *Id.*
25. *Id.* at 581.
26. The Supreme Court, for instance, looked to the marketplace of ideas as a rationale for upholding a fairness requirement for broadcasters. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
27. Debs v. United States, 249 U.S. 211 (1919).
28. Abrams v. United States, 250 U.S. 616 (1919).
29. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the*

Thus, although the media, which controls the flow of information, has changed considerably since the Constitution was drafted, first amendment analysis of the protection of this information remains rooted in interpersonal communications theory. This is not to say that the government has ignored the changed environment in which information flows, but rather that current programs promoting the first amendment within this changed environment have been ineffective. The next section of this article will examine the rationale behind governmental attempts to ensure the continued free flow of information and the necessary diversity of sources of this information.

PROMOTING THE FIRST AMENDMENT

The marketplace of ideas concept still furnishes a useful analogy for first amendment theory and analysis. But the make-up of the marketplace has shifted from a decentralized and laissez-faire marketplace to a monopolistic and regulated one. Although neither marketplace is guided entirely by laissez-faire principles, neither is totally regulated by government. Such a setting affords a climate that is conducive to a middle-of-the-road policy of balancing first amendment values and first amendment rights. This balancing process, which results in government programs designed to promote first amendment values, requires a two-step analysis.

Affirmative first amendment policy-making first must ascertain whether the interests of diversity are being served and, second, determine whether a hands-off or hands-on policy would be more promotional. Government action under the banner of the first amendment, even though it is legitimate,[30] often may step upon as many interests as it serves. At least four often-competing concerns must be factored into any positive equation. Such interests include those of information disseminators in using their media as vehicles of self-expression,[31] those of consumers in receiving information,[32] those of groups and individuals in obtaining access so that competing ideas can be delivered,[33] and those of society in having the media educate and protect.[34]

Prevailing first amendment policies and analysis afford neither equal

First Amendment (unpublished paper delivered at First West Coast Conference on Constitutional Law, Sept. 15, 1977) at 24.

30. *See* Associated Press v. United States, 326 U.S. 1 (1945).

31. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 120-21 (1973).

32. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).

33. A general right of public access was denied in *CBS v. Democratic National Committee*, 412 U.S. 94, 121-25 (1973).

34. *Media and the First Amendment*, *supra* note 7, at 888.

weight nor equal opportunity to all competing interests.[35] The consequent juggling of conflicting first amendment interests has fostered a series of confusing balancing acts that afford viewers and listeners "paramount rights" in one setting[36] and elevate journalistic discretion in another.[37]

A government policy that affirms the rights of one, however, need not necessarily disaffirm the rights of others. Since the Court has expressed as much concern for the receipt as for the expression of viewpoints,[38] the interests of free-flowing, wide-ranging information ideally would be served by an affirmative action plan that enhances the first amendment position of each without detracting from the other. Such a policy would be not only the least restrictive alternative but, for practical purposes, a nonrestrictive alternative.

The selection of alternatives for promoting diversity, however, has been a limited one that has enjoyed only limited success. An assortment of statutes, rules, and policies have been deployed in the cause of diversity and have traveled different avenues of the mass media with varying degrees of success and failure. An examination of government programs designed to promote first amendment values in the media areas of newspapers, broadcasting, cablecasting, magazines, and books indicates that the current selection of alternatives designed to promote diversity is both confusing and nonresponsive to the problems of a concentrated communications network.

The enactment of the Newspaper Preservation Act (NPA) rested upon Congress' express recognition of the public's interest in maintaining a competitive press.[39] The Act announced a government strategy for dealing with the depletion of newspapers as a national information resource. The NPA provides that two newspapers, under certain circumstances, may enter into a joint operating agreement to wed their business operations.[40] The conditions for such a marriage are that one of the publications must be in danger of probable failure[41] and that editorial and reporting functions must be maintained independently.[42] If those requirements are met, such a combination is exempted from antitrust laws.[43]

35. The first amendment rights of broadcasters, for instance, are subordinate to those of viewers and listeners. 395 U.S. at 390. But individuals and groups have no general right of access to broadcast stations or to newspapers. 418 U.S. at 255; 412 U.S. at 121-25.
36. 395 U.S. at 390.
37. 418 U.S. 241; 412 U.S. 94.
38. 395 U.S. at 389.
39. 15 U.S.C. §1801 (1976).
40. *Id.* §1802(2).
41. *Id.* §1803.
42. *Id.* §1802(2).
43. *Id.* §1803.

Congress thus attempted to draw a line between a newspaper's business and editorial efforts. Such a distinction afforded the means to prop up a newspaper that otherwise might fold and thus allowed the preservation of a voice that otherwise might disappear.

The legislative policy of maintaining content diversity without economic competition amounts to a genuine preservation act, rather than an attempt to attract new publishers into the newspaper industry. The legislation, which protects existing players, actually may have a negative rather than a neutral effect upon prospective entrants into the field. The endeavor to preserve the remnants of existing rivalry may effectively discourage new competitors who discover too many disadvantages in competing with the economies of scale and advertising rate-to-circulation ratio of a publishing combination.[44] Thus the NPA's contribution to first amendment values is one of insuring that conditions for newspaper diversity will not worsen. But the cost of such maintenance may be the assurance that those conditions will not improve.[45]

The government's efforts in promoting first amendment values in broadcasting may be more affirmative than efforts within the newspaper media, but these efforts are seldom aggressive.[46] Fairness or access opportunities arise only upon the airing of controversial views, the delivery of a personal attack or the appearance of a political candidate. The fairness doctrine requires broadcasters to devote a reasonable percentage of time to coverage of public issues, which "must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view."[47] If the broadcaster makes an on-the-air personal attack upon a group or individual, a right of response is thereby created.[48] If a legally qualified candidate uses a licensee's broadcasting facilities, the broadcaster must afford equal opportunities for air time to opposing candidates.[49]

Except for the fairness doctrine's requirement that licensees (as pub-

44. A newspaper combination that can deliver morning and evening readership to advertisers at a lower cost than the sum of the separate rates enjoys a decided economic advantage. The Supreme Court held that a requirement by a newspaper combination that advertisers purchase space in both the morning and afternoon papers was not an illegal restraint of trade. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 624-26 (1953).

45. Since the NPA's enactment, the number of newspapers in the United States has remained stable. WORLD ALMANAC AND BOOK OF FACTS 426 (1978).

46. The FCC, for instance, in 1973 received 2,400 fairness complaints but forwarded only 94 of them to licensees for their comments. 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, 8, 30 R.R.2d 1261 (1974) [hereinafter cited as Fairness Report]. And it was not until 1976 that the Commission, for the first time, applied the first part of the fairness doctrine which obligates broadcasters to devote a reasonable percentage of time to coverage of public issues. Rep. Patsy Mink, 59 F.C.C.2d 987, 37 R.R.2d 744 (1976).

47. 48 F.C.C.2d at 7.

48. 47 C.F.R. §73.369 (1977).

49. Communications Act of 1934, 47 U.S.C. §315 (1976).

lic trustees) cover and balance controversial issues,[50] the government's first amendment promotional activity in broadcasting represents an effort to encourage a balance of contrasting viewpoints. But since licensees, except for their affirmative duties under the fairness doctrine, are not required to present controversial ideas, personal attacks or political broadcasts, such a balance of contrasting viewpoints depends upon an original appearance or expression that can be balanced or opposed. Thus, absent initiatives by licensees, the government's first amendment policies often may promote first amendment values within a vacuum.

The arrival of cable television delivered high expectations of programming that could be an alternative to traditional broadcast fare and that could serve the information needs and interests of specialized groups. The so far unfulfilled promise of cable is that it will live up to its capability of serving discrete groups to whom over-the-air broadcasters cannot afford to cater. The existence of multi-channel cable in itself is no absolute boon to diversity. Cable systems, which ordinarily operate under the grant of exclusive franchises, concentrate multiple channels into the hands of a single cable operator. Such concentration amidst multiplicity prompted the FCC to impose a public access requirement as one spur to diversity.[51] Such a requirement originally was upheld as "reasonably ancillary" to the Commission's responsibility to regulate broadcast television.[52] Cable systems with 3,500 or more subscribers subsequently were ordered to set aside time on one channel for public access on a first-come, nondiscriminatory basis,[53] and to lease access to those who were not first in line but who could afford the price.[54] But the Commission's order[55] imposing origination and access requirements upon cablecasters who have "nothing to do with retransmission of broadcast signals on existing channels" has been held to be beyond the FCC's "reasonably ancillary" jurisdiction.[56]

The government's effort to open up cablecasting to the public has represented a departure from its affirmative first amendment action in over-the-air broadcasting. Instead of having first amendment interests hinge upon licensee initiative or the appearance of a controversial view or a political candidate, the FCC's cable policy carved out a public right to speak out without the precondition of a preceding statement. Since the Commission barred cable operators from exercising control

50. Fairness Report, *supra* note 46, at 7.
51. 47 C.F.R. §76.254 (1977).
52. United States v. Midwest Video Corp., 406 U.S. 649 (1972), *rehearing denied*, 409 U.S. 898 (1972).
53. 47 C.F.R. §76.254 (1977).
54. *Id.*
55. Report and Order in Docket N. 20508, 59 F.C.C.2d 294 (1976).
56. Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052 (8th Cir. 1978) (*app. pending*).

over the content of access programming,[57] entry into cable's marketplace of ideas under such a policy would be controlled primarily by time, small money requirements, and the public's motivation. However, if the Commission lacks the power to oversee programming originating in the studios of cablecasters,[58] efforts to undertake affirmative action within the existing cable structure will be met by the same barrier that so far has blocked access to newspapers. A final analysis[59] of cable systems on the same plateau as newspapers,[60] therefore, would protect the private editorial process in cablecasting precisely as it has been protected in newspapers.[61]

The government, which has adopted a highly visible role as a regulator and promoter of first amendment values in broadcasting, has maintained a lower profile in the fields of magazine and book publishing. The government's contribution to, and the main stimulation for, the growth of the magazine industry through most of the 20th century were low cost postage rates.[62] Government's affirmative action to subsidize indirectly the distribution of magazines has been regarded as one of the most significant contributions to the first amendment interest in diversity.[63] The resounding success in promoting the first amendment in this area, however, did not deter Congress from backing away and deciding that mail must pay its own way under an independent postal service.[64] The creation of an independent postal service with a philosophy that each mailing must pay its way led to a substantial boost in second class rates,[65] the disappearance of some magazines,[66] and the end of a first amendment subsidy.

The new postage costs for magazines, that triggered an increase in magazine prices, left readers with a new cost-benefit decision in choosing their sources of information. Magazines, which must compete with other information outlets in a mass media society, were placed at a further disadvantage in competing with the electronic forum. Television and radio generally can increase their audience without additional

57. 47 C.F.R. §76.255(b) (1977). Cable operators, however, are required to assure no advertising, lottery information, or obscene material is aired. *Id.* §76.255(d)(l).

58. Home Box Office, Inc. v. FCC, 567 F.2d 9, 28-29 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 988 (1977).

59. An appeal of *Midwest Video Corp. v. FCC* is pending in the Supreme Court.

60. 571 F.2d at 1056.

61. *Id.*; Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

62. T. PETERSON, MAGAZINES IN THE TWENTIETH CENTURY 1 (1964).

63. Ablard and Harris, *The Post Office and the Publishers' Pursestrings: A Study of the Second Class Mailing Permit,* 30 GEO. WASH. L. REV. 567, 601 (1962).

64. 39 U.S.C. §3622(2) (1976). The government still could subsidize magazines by adding such a basis for appropriations under 39 U.S.C. §2401 (1976).

65. *Media and the First Amendment, supra* note 7, at 927.

66. *Id.* at 928. Cowles Communications, Inc. blamed the new postal rates for forcing Look magazine out of business. TIME, Sept. 27, 1971, at 55.

cost. But a magazine, in enlarging its readership, must bear additional costs of printing, paper, and postage that may not be offset by additional advertising.[67]

The government, therefore, which has been busy promoting first amendment values in broadcasting and newspapers, has been thwarting those same interests in the magazine business. Such conflicting results demonstrate lack of a coherent first amendment affirmative action policy. These conflicting programs graphically illustrate the considerable influence of positive or negative action by the government in the first amendment domain.

The mixture of promotional policies and mixed results of affirmative first amendment efforts seem to have had the least concern for (and thus the least impact upon) the publication of books. The book publishing industry generally has displayed an inherent tendency toward diversity and thus has been the least urgent candidate for affirmative action. Controversial ideas have fared relatively well in the book publishing field, which has proven to be more amenable to smaller audiences, specialized topics, and controversy.[68] Since books are supported by individual purchasers, the danger of content influence or control by advertisers is eliminated.[69] The fear of an advertiser's reaction to a controversial or unpopular idea, by contrast, has been blamed for bland television programming[70] and toned-down or nonexistent newspaper coverage.[71]

The comparative health of diversity in the book publishing industry is spelled out in figures that show several hundred book publishers in operation, "none of which achieves more than five percent of the total market, [with a] number of new firms open[ing] each year."[72] Unlike the newspaper business, book publishers ordinarily do not own a physical production plant. So entry into the book publishing field is facilitated by lower capital requirements.

Book publishing, however, is not immune to the type of concentration and cross-ownership that characterizes newspaper and magazine publishing and broadcasting.[73] Such consolidation of previously disparate information outlets occurred with the acquisition of Pantheon

67. *Media and the First Amendment, supra* note 7, at 931.
68. *Id.* at 919.
69. *Id.*
70. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 187-89 (1973).
71. McDonald, *The Media's Conflict of Interests*, THE CENTER MAGAZINE, Nov.-Dec. 1976, at 19-20.
72. *Media and the First Amendment, supra* note 7, at 920.
73. A model of concentration and cross-ownership has been established by the Post-Newsweek Company, which owns one of the three national news magazines, the morning newspaper in Washington, D. C. and television or radio stations in Michigan, Connecticut, Florida, and Washington, D. C., BROADCASTING YEARBOOK 201 (1977).

Books by Knopf, a subsequent merger between Knopf and Random House, and an eventual acquisition by RCA.[74]

A trend toward heightened concentration in the book publishing industry could lead to less risk-taking with, and fewer chances for, controversial ideas.[75] Fewer outlets would mean fewer publishing opportunities for those who want to publish. The only consolation with such a reality would be that a "troublesome" figure,[76] whose manuscript was rejected by 30 publishers, would not have to make as many as 30 wasted trips.

Thus, existing government efforts in promoting first amendment goals, except in the area of books where none are needed, are inadequate to promote diversity in the changing economic and social environment of mass media. Having examined governmental attempts to promote diversity of opinion under the first amendment and the obstacles that stand in the way of that promotion, this article will now discuss the feasibility of expanding present programs in order to more affirmatively promote first amendment aims.

THE CALL FOR ACTION THAT IS MORE AFFIRMATIVE: PROBLEMS WITH EXPANDING EXISTING PROGRAMS

A belief that ongoing efforts to promote diversity of expression do not go far enough has stirred an appeal for more effective affirmative action policies. The most common battlecries on behalf of such proposals call for extension of the fairness and right to reply concepts to newspapers and enlargement of the right of access to radio and television. Such aims are the objectives of a strategy that presumes diversity can be achieved and maintained within the existing concentrated media framework. In order to evaluate the effectiveness of affirmative action programs based on expansion of the "fairness" and "right to access" doctrines, these existing programs will be analyzed in terms of the probability of judicial acceptance of expansion, their practicality, and their constitutionality.

A. Judicial Considerations

The goal of securing a public right of access to newspapers probably has yielded the least return, and encountered the most judicial resist-

74. Dempsey, *Publishing's Agonizing Reappraisal*, THE NEW REPUBLIC, May 14, 1966, at 23, 25.

75. *Media and the First Amendment*, *supra* note 7, at 920.

76. Abbie Hoffman eventually formed his own book company to publish *Steal This Book*. Although he could not find an established book company to publish it, the ease with which he published it himself comments favorably upon the ease of entering the book publishing field. *Id.* at 917.

ance, among existing endeavors to "open up" the media. The Supreme Court, in upholding the sanctity of a publisher's editorial judgment, noted that the growing concentration and scarcity of newspapers pose a threat to the public interest in diversity of information and opinion.[77] But although the Court's support for journalistic discretion may have put many publishers at ease, the Court's decision has not put the argument for public access to rest. Instead, the case is still being made for a newspaper fairness doctrine that would require equal space for opposing sides of controversial issues and a right to respond to personal attacks.[78]

Although the Court has rejected such a fairness proposal,[79] the media concentration it alluded to still lingers. So long as the Court is willing to justify fiduciary obligations for broadcasters because of scarcity of frequencies,[80] it will unwittingly continue to breathe life into the argument that the scarcity of newspapers warrants the same duties for publishers.

If Congress were to build upon the same scarcity rationale that is used for broadcasting, it seemingly could establish a fiduciary standard at least for those newspapers that are exempt from antitrust laws. The basis of such an obligation for publishers might be equated with the duty of public interest broadcasting that is imposed with the grant of a license.[81] The "grant" of an exemption from antitrust laws similarly could be predicated upon a legislated *quid pro quo* of public interest publishing. The federal government, under its commerce power,[82] would be authorized to monitor complaints and compel newspapers to provide balancing space when warranted.

For now, however, advocates for such access can only talk about the merits of their idea rather than do anything about it. The Court's last word has manifested an underlying fear of such change because "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with first amendment guarantees of a free press as they have evolved to this time."[83] Therefore, although the Court has offered a tempting rationale for access by acknowledging

77. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 250 n.15 (1974).

78. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 627 (1970); Comment, *New Challenges to Newspaper Freedom of the Press—The Struggle for Right of Access and Attacks on Cross-Media Ownership*, 24 DE PAUL L. REV. 165, 178 (1974); McDonald, *The Media's Conflict of Interests*, THE CENTER MAGAZINE, Nov.-Dec. 1976, at 24-25.

79. 418 U.S. at 258.

80. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-89 (1969).

81. *Id.* at 389.

82. The United States Constitution, Article I, Section 8 provides that "The Congress shall have power to regulate commerce among the several states . . . ." *See also* Wickard v. Filburn, 317 U.S. 111, 125 (1942).

83. 418 U.S. at 258.

the reality and danger of concentration in the marketplace of ideas,[84] it has not yet persuaded itself that the proposed cure is better than the ailment.[85]

Even the most meager right of public access in broadcasting is more access than is available to newspapers. Some access to radio and television already exists in the form of fairness, personal attack, and political candidacy provisions.[86] But those access rights offer the only access opportunities presently available in the electronic forum. The argument for broader access rights rests upon the belief that fairness and balancing concepts generally are more harmful than helpful. Fairness imposes an affirmative duty to raise controversial issues, but licensees may be overly sensitive to the possibility of advertiser distaste for controversy. Enforcement requires the FCC either to play an intrusive role in determining program content or to lay back and adopt a less influential posture of deference to licensee discretion.

A general right of public access, by contrast, would supply diversity and controversy by drawing upon competing voices and viewpoints within the community. The government's role could be diminished from determining what types of programming were necessary for implementation of fair programming to a role of simply issuing a standard for required access time and making certain that licensees set aside the minimum amount.

An effort to broaden the rights of, opportunities for, and access to fair programming was turned back by the Supreme Court, which held that licensees are not obligated to sell time for editorial advertisements.[87] The Court, in making that decision, concluded that the public's right to be informed already was protected adequately by the fairness doctrine.[88] So although the Court was willing to keep the door open for a limited form of access, it reaffirmed that the licensee was the doorman who could keep the public outside.[89]

The Court, in holding the line on access, did not dash all hopes for an expanded right of access in the future. It in fact refused to foreclose all possibilities for access and suggested that "at some future date Congress or the Commission—or the broadcasters—may devise some kind

84. *Id.* at 249-50.
85. *Id.* at 248-59.
86. See notes 47-49 and accompanying text *supra.*
87. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 121-32 (1973).
88. The Court noted that Congress and its chosen regulatory agency had established a "delicately balanced system of regulation intended to serve the interests of all concerned" and that it would afford "great weight" to the Commission's experience and decisions. *Id.* at 102-03. Justice Brennan, in his dissent, criticized the Court for relying upon the fairness doctrine "as the sole means of informing the public." *Id.* at 188-89.
89. *Id.* at 130-31.

of limited access that is both practicable and desirable."[90] Although the Court and the Commission have emphasized the importance of licensee discretion in editorial decisionmaking,[91] broadcasting remains a field in which access inroads have been made. Greater access, however, depends upon greater willingness of the Court to find any proposal "practicable" and "desirable."[92]

B. Practical Considerations

The existing avenues of fairness and access in broadcasting (and as proposed for newspapers) have been paved to balance the competing first amendment interests of suppliers and receivers of information. The statutory right of access for opposing political candidates and the personal attack rule afford only a limited form of access in limited circumstances. And although fairness is a more frequent subject of attention, it is almost as frequently dismissed as it is considered.[93]

The futility of fairness stems from the fact that it must be enforced either by the broadcaster (or publisher, if applied to newspapers) or by the government. If fairness is left to editorial discretion, no guarantee exists that balanced programming will follow. But if government vigorously enforces fairness the danger of government interference with and control of program content arises.

The record of fairness in broadcasting offers little to commend its continuation and even less to commend its extension to newspapers. The FCC, in attempting to juggle the need for diversity and for governmental restraint, has adopted broad guidelines which in turn afford licensees broad discretion in serving the cause of fairness.[94]

A licensee who airs an editorial advertisement,[95] for instance, need "do nothing more than to make a reasonable, common-sense judgment as to whether the advertisement presents a meaningful statement which obviously addresses and advocates a point of view on a controversial issue of public importance."[96] The only ground for a successful challenge of a licensee decision would be "if that relationship could be

90. *Id.* at 131.
91. *Id.* at 120-21; Reconsideration of the Fairness Report, 58 F.C.C.2d 691, 36 R.R.2d 1921 (1976).
92. A proposal now under FCC consideration would give licensees a choice between furnishing one hour per week of public access time or remaining subject to the fairness doctrine. Comments of Committee for Open Media, BC Docket No. 78-60 (FCC, filed Sept. 6, 1978).
93. Fairness Report, *supra* note 46, at 8.
94. *Id.*
95. The FCC considers an editorial advertisement to be a commercial that presents a "meaningful statement which obviously addresses, and advocates, a point of view on a controversial issue of public importance." *Id.* at 23.
96. *Id.*

shown to be substantial and obvious."[97]

Such deference to licensee discretion, at least in part, appears responsive to the fact that standards such as "meaningful statement," "substantial and obvious relationship," and "controversial issue of public importance" are criteria that, when applied, could lead different persons to different conclusions on the same set of facts. Nevertheless, a consequence of that approach is that if the Commission errs in deciding a complaint, it more likely will err on the side of the licensee rather than on the side of balanced programming.

Although the FCC has been inclined to defer to licensees' "reasonable, common sense judgments,"[98] such a tack is not without its benefits. A more activist role in enforcing fairness would inject the Commission more deeply into a station's programming decisions in determining what broadcasts required balance. If it can be assumed that many fairness decisions may be close calls anyway, it is arguable that the difficulty of making such judgments, coupled with the hazard of government intrusion into program content, represents a danger that should be avoided and often is avoided by a habit of agency deference.

The FCC's announced position, however, that "what we are really concerned with is an obvious participation in public debate,"[99] sets forth an agency-approved formula for any message-maker interested in avoiding the fairness doctrine. If an issue is incorporated subtly into a spot or program and not discussed explicitly, different viewers are likely to have different opinions about how "obvious" the participation is "in public debate." The Commission's position, therefore, of limiting its attention to "obvious participation" is a valuable guide to licensees and advertisers who may want to shape political and economic messages in a way that forecloses the chances of having the "other side's" position aired.

An example of a message that probably would escape fairness obligations might be an oil company's spot encouraging consumers to conserve energy, while the company endeavors to develop alternative energy sources.[100] Even if the sponsor's actual intent was to communicate the desirability of having oil companies develop and control other energy sources (thus presenting a controversial issue of public importance), a licensee reasonably could claim that the spot only addressed the need for alternative energy sources. The licensee's interpretation,

97. *Id.* at 24.
98. *Id.* at 23.
99. *Id.*
100. Exxon Corporation advertisement aired on NBC Sunday Evening News, October 30, 1978.

therefore, would be that the message did not "meaningfully and obviously relate to a controversial issue of public importance." The result would be that the company not only delivered its message, but also that its technique probably erected effective barriers against the entry of competing viewpoints.

The lesson for advertisers and broadcasters, in a world of deference to licensee discretion, would appear to be that it matters not so much what is said as how it is said. And whether or not such messages contribute to the formation of opinions or simply reinforce existing attitudes, either of those effects translates into an impact upon public opinion. If that opinion is supposed to be the product of a reasonably broad-based and balanced debate, it would appear that the fairness doctrine fails to serve as a forceful ally in the struggle for diversity.

Since the fairness doctrine can be so easily circumvented, the question that cannot be easily avoided is why it should continue to exist. Although fairness may have its failings, good intentions is not necessarily one of them. The fairness doctrine essentially is the product of a balancing act in which the licensee's interest in broadcasting what he wants has been weighed against the viewer-listener's right in receiving the information he needs.[101]

The objectives of the fairness doctrine largely have been sacrificed upon the altar of deference to licensee discretion. But even (and perhaps especially) if fairness were enforced vigorously, the trade-off for increased vigilance would be a higher-profile presence of government perched over editorial shoulders. Since the remedies for a fairness violation are wide-ranging, the Commission is armed with powerful weapons to shape program content if it chooses to use them.[102]

Fears of government manipulation of the regulatory apparatus to influence program content have proved not to be misplaced, given certain practices that occurred during the Nixon administration. Speeches, statements, and memos that hinted at sanctions against broadcasters erased any doubt that the government possesses considerable leverage to intimidate.[103]

---

101. Fairness Report, *supra* note 46, at 2-6.

102. The FCC is empowered to revoke a station's license, issue a short-term renewal, impose a forfeiture, or request that the licensee provide time for a contrasting view. 47 U.S.C. §§307(d), 312(b), 503(b) (1976).

103. The possibility of intimidating broadcasters through the licensing process seems to have been especially well recognized by the Nixon administration. White House Office of Telecommunications Policy Director Clay Whitehead, in a speech to Sigma Delta Chi in 1972, warned that stations which did not correct "network inbalance" or bias might find themselves in trouble at renewal time. THE POLITICS OF BROADCASTING 228-34 (M. Barrett, ed., 1973). A tape recording revealed that President Nixon discussed the possibility of "retaliating" against the Washington Post via its broadcast licenses. New York Times, May 16, 1974, at 1.

A memo from presidential aide Charles Colson to H. R. Haldeman stated that: "I will pursue

A reduced threat of government-shaped programming may be one consolation for the FCC's less than vigorous pursuit of fairness. But the discovery of merit in a feeble enforcement effort serves only to render more suspect the value of the fairness doctrine itself. So long as fairness is the guiding light, it never can be truly effective unless enforced more energetically—but always will be subject to abuse by a government that chooses a course of exploitation. The net result for the public and for diversity, therefore, would seem to be a protective device that affords little protection but creates a lingering danger of misuse.

C. Constitutional Considerations

The practical shortcomings of fairness and access are at least equalled by their constitutional deficiencies. The government, in promoting first amendment values by means of fairness and access, is by the same means imposing upon a broadcaster's or publisher's first amendment rights of self-expression.

The Supreme Court's conclusion, that a state right of reply statute for newspapers was a form of compulsion that violated the first amendment,[104] is consistent with a literal reading of the first amendment guarantee that government shall not abridge freedom of the press. The state law had made no reservations about regulating the content of newspapers, and the Court had no reservations about opposing any restriction compelling newspapers to publish "that which reason tells them should not be published."[105]

An earlier claim by broadcasters, however, that the first amendment also protects their desire to use their allocated frequencies to broadcast whatever they choose and to exclude whomever they choose,[106] failed to pass muster with the Court. Instead, the Court advised licensees that their rights of self-expression were secondary to the "paramount rights" of viewers and listeners to receive diverse information.[107]

The Court decisions that afford different degrees of first amendment protection to different types of media operators[108] inevitably create gradations of first amendment protection for self-expression within the

with Dean Burch (then FCC Chairman) the possibility of an interpretive ruling by the FCC . . . I think this point can be very favorably clarified and it would, of course, have an inhibiting effect on the networks . . . I think we can dampen their ardor . . . ." Washington Post, Dec. 3, 1973, §A at 24.

104. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

105. *Id.* at 254-56.

106. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

107. *Id.* at 390.

108. The Court has held that "[d]ifferences in the characteristics of news media justify differences in First Amendment standards applied to them." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). *Compare* 418 U.S. 241 (1974).

media. The effort to justify lower-grade rights of self-expression for broadcasters rests upon the conclusion that frequencies are scarce and that part of the price of a license is the obligation to perform as a fiduciary.[109]

Such a rationale, even if it creates a better balance of expression, perpetuates the myth that special circumstances of scarcity that demand regulation in broadcasting do not exist in the newspaper business. Since newspapers are in fact more of a rarity than broadcasting outlets in many cities, the scarcity rationale would seem to argue even more urgently for fairness in and access to newspapers. Even if government regulation is justified because of extensive government involvement in creating and preserving order in the electronic media,[110] it would seem to be as easily warranted by government's prominent role in legislating to keep much of the newspaper industry alive.[111]

The Supreme Court has acknowledged that access (and arguably fairness) erodes the right of self-expression by increasing the cost of expression and confiscating the time or space that could have been devoted to self-expression.[112] Such realities are equally restrictive for broadcasters and for publishers, whose choice of material and decisions of content, treatment, and exposure "constitute the exercise of editorial control and judgments."[113] Ultimately, therefore, "every encroachment by government, no matter how narrowly circumscribed, will inevitably effect the 'content.' "[114]

If affirmative action within the existing mass media structure is a cause of action worthy of being pursued, it deserves a constitutional rationale that is convincing rather than contrived and that rests upon reality rather than myth. Until a compelling and consistent reason for such action becomes the foundation for consequent legal decisionmaking, the government quite simply would seem to be engaged in the business of abridging freedom of the press with a less than satisfactory basis for so doing.

Even if fairness and access did not erode some rights of self-expression, their failure so far to serve the interests of diversity effectively argue for their recall and replacement. Since those balancing devices make minimal contributions to diversity and intrude upon some forms

109. 395 U.S. at 389-90.
110. *Id.* at 393-95.
111. The Supreme Court has acknowledged the Newspaper Presesrvation Act's special support but did not discuss the possibility of a parallel to government involvement in broadcasting. 418 U.S. at 251 n.16.
112. *Id.* at 256-57.
113. *Id.* at 258.
114. Chatzky and Robinson, *A Constitutional Right of Access to Newspapers: Is There Life after Tornillo?*, 16 SANTA CLARA L. REV. 453, 480 (1976).

of expression, the only trade-off is that first amendment values are benefitted insubstantially at the cost of burdening first amendment rights. The need to strike a balance among competing first amendment interests insures unending bickering among those interests in search of new balances. Even a juggling act that promoted "equal liberty of expression" for publishers and readers and for broadcasters and viewer-listeners,[115] still would have problems and must be reconciled with the explicit proscription against abridging freedom of the press.

The methodology of fairness and access has been to parcel out bits of rights to some by chipping away at the rights of others and leaving no one constitutionally intact. The effort to justify such a redistribution has rested upon inconsistent and shifting sands of reasoning and has reflected a strategy of working within the existing system to make it more responsive to first amendment values. But the limited returns from first amendment investments in a system that has not yielded to diversity suggests the need to expand or look beyond that system. Given the difficulties of justification and goal-realization within the prevailing system, it would appear that affirmative action is the right tune being played on the wrong instrument.

ALTERNATIVES FOR AFFIRMATIVE ACTION

The government, in attempting to promote diversity, has two general options from which to choose. It may endeavor to diversify programming by regulation that leads to content determinations and to opportunities for access within the system or by creating or encouraging new additions to the system.

Efforts to create diversity within a centralized media structure have followed a narrow and well-worn path. Progress along that route, however, has fallen considerably short of its destination and has encountered serious first amendment obstacles. The intellectual chaos that is the fall-out from selective line-drawing and convoluted reasoning, however, might have been averted altogether if the government had opted for a more forceful policy of media expansion rather than media oversight.

The justifications for attacking media concentration upon economic grounds, and for encouraging structural diversity, generally are more accessible and more acceptable than those used to regulate content. The Supreme Court, in addressing the problem of restraint of trade in the mass media, upheld the validity of regulation that was aimed at

115. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

controlling the hazards of concentration.[116] The Court, in recognizing the need for antitrust regulation, supplied the springboard for economic regulation by noting that "[f]reedom of the press from governmental interference does not sanction repression of that freedom by private interests."[117] It would seem sufficient for the purposes of economic policymaking, therefore, that repression need not be caused solely by antitrust practices so long as it is a dangerous by-product of a concentrated media industry.

Regulation of the media on economic grounds has been at least as inconsistent in application and results as regulation on content-related grounds. Economic regulation in the newspaper industry represents an effort to live with concentration rather than to overcome it. Any attempt to hold back the tide of concentration was swept away by the Newspaper Preservation Act. The Act, which was designed to prevent further shrinkage of print space, protects established newspapers that otherwise might fail. The preferred treatment dispensed in the form of antitrust exemptions reflects a belief that some concentration is necessary to preserve diversity.[118]

The FCC, by contrast, has undertaken economic regulation aimed at promoting multiplicity rather than protecting concentration. The Commission has assembled its set of anticoncentration policies under the mantle of its authority to regulate in the "public interest."[119] Such regulations include proscriptions against certain exclusive dealing practices between networks and affiliated stations,[120] multiple ownership rules limiting the total number of stations a single or common owner may hold,[121] and restrictions upon cross-ownership.

The Commission also pursues a policy of promoting diversification among licensees when it evaluates applicants in comparative hearings. The validity and the merit for diversity has been acknowledged by a court which held that "[p]lainly the Commission does not exceed its

116. "The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immuity." Associated Press v. United States, 326 U.S. 1, 20 (1945).

117. Mansfield Journal Co. v. FCC, 180 F.2d 28, 33 (D.C. Cir. 1950). The FCC, in refusing to grant a license that might have adversely affected diversity, was upheld for reasons that have implications for a concentrated media industry as a whole. The agency was supported by a court holding that "monopoly in the mass communications of news and advertising is contrary to the public interest even if not in terms proscribed by the antitrust laws." *Id.*

118. *See* H.R. REP. No. 91-1193, 91st Cong., 2d Sess., *reported in* [1970] 2 U.S. CODE CONG. & AD. NEWS 3547.

119. 47 U.S.C. § 309 (1976); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Televison Regulation*, 52 MINN. L. REV. 67, 73 (1967).

120. FCC, *Report on Chain Broadcasting* (1943), *aff'd*, NBC v. United States, 319 U.S. 190 (1943).

121. Multiple Ownership, 50 F.C.C.2d 1046, 32 R.R.2d 954 (1975), *aff'd in part, vacated in part sub nom.* National Citizens' Comm. for Broadcasting v. FCC, 555 F.2d 938 (1977), *aff'd in part, rev'd in part*, FCC v. National Citizens' Comm. for Broadcasting, 98 S. Ct. 2096 (1978).

powers in seeking to avoid rather than foster a concentration of control of the sources of news and opinion."[122] The court thus endorsed the agency's affirmative endeavor "in the public interest to certify as licensees those who would most naturally initiate, encourage and expand diversity of approach and viewpoint."[123]

Although the Commission's willingness to award a plus for diversity reflects positive intentions, the outcome of license hearings do not necessarily amount to a victory for diversification. Any plus that a licensee receives for his potential contribution to diversification ordinarily is available only in a comparative proceeding.[124] The effect of such a merit may be diluted and outweighed by such licensing considerations as area familiarity, integration of ownership with management, broadcast experience, preparation and planning, past broadcast experience, and financial resources.[125] The weighing of such considerations as an applicant's broadcasting record, experience, and wealth, in fact, often may assure that for each point an applicant loses on concentration he may win three others. So even such a policy designed to reward diversity may be thwarted by associated policies that operate to stack the odds against diversity.

The failure to halt the trend toward concentration and to safeguard diversity from within the existing system argues for the expansion of or addition to the system or the creation of competing systems. Such expansion and construction projects could be undertaken in the form of government subsidization of new media outlets, government creation of its own media facilities, or the encouragement of new communications technologies. Affirmative action in any of those directions ideally would permit government to leave the business of overseeing a system that defies diversity and to concentrate upon creating new opportunities for diversity.

A. Subsidizing the First Amendment

Subsidization is one affirmative action alternative that emphasizes government assistance over government interference. A practical lesson in subsidizing first amendment values may be learned from other countries that have adopted such affirmative measures to promote diversity of expression in their media. Sweden, for instance, funnels $40 million in direct subsidies and an equal amount in indirect subsidies to

122. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 859 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

123. *Id.* at 86.

124. A rare exception is Laurence A. Harvey, 13 F.C.C. 23, 99 R.R. 378 (1948), *aff'd sub nom.* Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950).

125. *See* Grand Broadcasting Co., 36 F.C.C. 925, 2 R.R.2d 327 (1964).

keep newspapers economically healthy.[126] The willingness to make such investments in first amendment-type values has paid off to the extent of halting a trend of newspaper failings. The number of newspapers in Sweden had dwindled from 234 in 1920, to 207 in 1948, to 144 in 1960, and to 116 in 1970.[127] During the five years after the Swedish government initiated its subsidization program, however, only one newspaper collapsed.[128]

Such a subsidization effort seems to have had essentially the same impact in Sweden that the Newspaper Preservation Act has had in the United States. Although both efforts have protected the vestiges of diversity, neither has succeeded in attracting new voices. The Swedish experience with subsidization, therefore, would seem to demonstrate that unless a society is willing to pay for creation of new outlets, rather than just for the protection of existing ones, it can only prevent further deterioration of the conditions for diversity.

The federal government cleared one path for the subsidization of diversity by enacting the Public Broadcasting Act.[129] That legislation created an alternative to standard commercial broadcast fare by setting up the privately-incorporated Corporation for Public Broadcasting (CPB),[130] which in turn spawned the Public Broadcasting Service (PBS) as the network and production arm of public television.[131]

Public television is a congressional creation that theoretically was designed to be free of federal government interference. But public television's dependence upon federal funding leaves it subject to governmental pressure and interference.[132] The danger of government intrusion that lurks in government funding already has been put on display. CPB, in 1973, reacted to criticism from Congress and the Nixon administration by moving to wrest program decisionmaking from PBS.[133] CPB, in proposing the termination of several programs that it considered too controversial, demonstrated that the interests of diversity can be as easily sacrificed by pressure from a government concentration of power as from a private one. Although a compromise was reached between CPB and PBS, whereby "[q]uestions of 'balance' and 'objectivity' would be resolved by a monitoring committee of" CPB

126. Indirect subsidies include tax exemptions and reductions, lower postal rates, and a loan fund. Campbell, *Free Press In Sweden and America: Who's the Fairest of Them All?*, 8 Sw. U. L. Rev. 61, 63-64 (1974).
127. *Id.* at 63.
128. *Id.*
129. 47 U.S.C. §§390-399 (1976).
130. *Id.* §396(b).
131. *Media and the First Amendment, supra* note 7, at 1022.
132. Hearings on H.R. 6736 and S. 1160 before the House Committee on Interstate and Foreign Commerce, 90th Cong., 1st Sess., 31-33 (1967).
133. New York Times, Jan. 12, 1973, at 66, col. 4.

and PBS representatives,[134] the Achilles heel of public television in its present form was graphically portrayed.

An alternative to federal funding, that would provide steady and dependable revenue for public television, would be to establish a trust fund consisting of grants from private sources and an excise tax on the sale of television sets.[135] If the government is to become truly serious about promoting first amendment values without inhibiting the flow and influencing the content of information, it should begin by affording public television such an improved funding mechanism or other means of support that is safe and secure.

B. The Government Broadcasting Network

An even more direct form of government participation than direct aid would be government operation of a media network. The federal government, despite having no domestic media outlet,[136] probably has some of the most extensive media experience. The government has a well-established background in creating and operating such information facilities as art galleries, libraries, and schools.[137] The government has picked up professional broadcasting experience through its operation of the Voice of America. And the federal government has become the nation's most prolific filmmaker, radio and television producer, and pamphleteer.[138]

If a government-operated domestic print or broadcast outlet were created to serve diversity, it would be subject to the same purse string pressures that subvert such interests in public television. Such potential dangers would argue for a trust fund type of financing, which was rejected by Congress for public television, and for authority to be vested in a board of directors with a diverse enough composition to immunize it from political pressure as much as possible.

If the federal government operated a broadcasting network, its media facilities might be a more reachable target for the access arguments that have failed with the existing media. Justice Stewart, speaking for himself, has contended that the first amendment confers no "protection on the Government."[139] And he has argued that a finding of governmen-

134. Canby, Jr., *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1158 (1974).

135. Such a proposal was made by a Carnegie Commission report but rejected by Congress. *Media and the First Amendment*, *supra* note 7, at 1023.

136. The government-operated Voice of America is barred from broadcasting domestically. 22 U.S.C. §1461 (1976).

137. Canby, Jr., *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1129 (1974).

138. *Government II, Uncle Sam's Angels*, TIME, May 8, 1978, at 29.

139. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring).

tal action would obligate the state "to grant the demands of all citizens to be heard over the air, subject only to reasonable regulations as to time, place and manner."[140] Such a finding, in effect, would transform a government media operation into a public forum and leave the state with the task of policing traffic.[141]

The Stewart analysis, however, is not necessarily the final one. An argument could prevail that the state, when editorializing, is engaged in a government function and thus that the state could deny public access.[142] If government control and operation of media facilities were found to be essential to the success of affirmative first amendment action and preservation of first amendment values, the government might have as compelling a reason for denying or limiting public access as it does for certain other government facilities.[143]

The Supreme Court passed up the opportunity to reach such a conclusion when it refused to hear the appeal of a would-be author whose article was rejected by a state university's law review.[144] The appeals court ruling thus stood, and a state engaged in an editorial function was permitted to deny access.[145]

Even if the government could deny public access, it would not serve the interest of diversity to deny such access altogether. Rather, first amendment values would be enhanced by access provisions that afforded an outlet for new viewpoints and voices. Although the government probably would be faced with the problem of more speakers than speaking time, it could permit access on a nondiscriminatory first-in-line or representative spokesperson basis.[146] Such a system that responded to appeals for access would, in so doing, be responsive to the needs of diversity.

An affirmative government role as broadcaster (or as publisher) could have a positive effect upon first amendment values and interests. But a potentially troublesome consideration is whether a contribution to diversity would be adequate compensation if government used its power to distort information and to lie. The example of the French

140. *Id.*
141. *Id.*
142. Adderley v. Florida, 385 U.S. 39 (1966).
143. The Court, in rejecting public forum arguments, has upheld government authority to deny access to jails, courthouses, and military bases. *Id.*; Greer v. Spock, 424 U.S. 828 (1976); Cox v. Louisiana, 379 U.S. 559 (1965).
144. A federal appellate court concluded that the exercise of editorial judgment was a compelling enough reason to deny any general right of access and to prevent transforming such a state publication into a public forum. Avins v. Rutgers, State Univ. of N.J., 385 F.2d 151, 153-54 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).
145. *Id.*
146. Comments of Committee for Open Media, BC Docket No. 78-60 (FCC, filed Sept. 6, 1978).

government-owned media provides fuel for such fears, given its performance as a state propaganda tool during major national crises over Suez and Algeria and during the 1968 riots.[147] And since the American government at times has undertaken to manipulate or intimidate a media it does not even own,[148] the prospects for self-restraint on its own outlet would seem remote.

But such fears of information management and manipulation by the government would be justified if the government were the only source of information[149] or the dominant source thereof. Even without its own media outlet, the federal government has displayed considerable dexterity in producing, packaging, and orchestrating information campaigns that flow through the media to the public.[150] But if government broadcasting enjoyed a secure funding mechanism, and if its directors were diverse enough and far enough removed to be insulated from political pressures, the government's own media would not be subject to significantly more manipulation than the existing media. In fact, creation of access time would be an additional check on government that does not exist elsewhere. An equally significant counterbalance to the influence of a government-operated system would emerge if government's role was limited to competing with rather than overseeing private media programming.

If government, which already uses the private media for releasing information, operated its own outlet, its presence would enlarge the contours of the media forum but would not necessarily dominate it. The government's emergence as a media operator alongside private operators simply would reflect the reality that

> [t]he forum is not something we have before government takes a hand and which is "free" until government intrudes. It is a system in which government is a constitutive element. To say that government should, in the name of free speech, leave the forum alone is like saying that government should, in the name of justice have nothing to do with courts.[151]

The logic of such a perspective, however, does not obscure or diminish the fact that one of the ever-present realities of a strong central government is its capacity to abuse its own or someone else's communications system. Concern about government participation in the first amendment-sensitive area of speech and press might reflect an aware-

147. *Media and the First Amendment*, *supra* note 7, at 1031.
148. NEWSWEEK, Nov. 24, 1969, at 88-92.
149. Even if government enjoyed a monopoly ownership of the media, a strong argument could be made for public access. Bonner-Lyons v. School Comm., 480 F.2d 442 (1st Cir. 1973).
150. Corrigan, *Operation Manipulation*, 1977 NAT'L L.J. 1967; *Government II, Uncle Sam's Angels*, TIME, May 8, 1978, at 29.
151. J. TUSSMAN, GOVERNMENT AND THE MIND 99 (1977).

ness that when totalitarian regimes assume power, their first acts ordinarily are to seize the media.[152] But an equally immediate concern of such governments is to revise the public education system in accordance with their values.[153] And worries that attach to the possibility of a government-controlled media network[154] seem to be absent where the government's role is that of educator in the public schools.

Government operation of a public education system seemingly would be the basis for even more concern, given the captive and impressionable audience in the classroom. But the division of educational responsibility among various layers of governments and the classroom autonomy of teachers combine to diminish the danger of government monopolization of information and minds.[155] Comparable diffusing elements in the form of competing media outlets, therefore, should provide as effective a safeguard against undue influence as the public school system enjoys.

The continuing presence of existing media outlets would stand as a significant watchtower over government manipulations or distortions by keeping "propaganda competitive, by throwing the door wide open to everyone, so that every attempt at propaganda can be met by counter-propaganda . . . . [T]he cure of propaganda is more propaganda."[156]

A government that had its own channels of mass communication thus would still be subject to the criticism and monitoring of private broadcasters and publishers (and of the public if access to government media facilities were permitted). The emergence of government as a media power, therefore, should not be an occasion for new linedrawing between government and private expression. Rather, the interests of diversity would be promoted more effectively if government were permitted to compete with equal opportunities in the media marketplace. Government already has the freedom to establish public schools, so long as it does not eliminate competition from private schools.[157] And so long as government operated on a competitive rather than exclusive basis, its media presence could be a significant boon, rather than hazard, to first amendment values.

---

152. *See* H. ARENDT, THE ORIGINS OF TOTALITARIANISM, Ch. 11 (1966).

153. *See id.*

154. *Media and the First Amendment*, *supra* note 7, at 1028-31.

155. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment* (unpublished paper delivered at First West Coast Conference on Constitutional Law, Sept. 15, 1977) (copy on file at the *Pacific Law Journal*).

156. J. FRIEDRICH, MAN AND HIS GOVERNMENT: AN EMPIRICAL THEORY OF POLITICS 169 (1963).

157. Pierce v. Society of Sisters, 381 U.S. 510 (1925). Such a rationale would permit government "to add its own voice to the many that it must tolerate, provided it does not drown out our private communications." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 589 (1978).

C. The More Media the Merrier

The casting of government into a leading role as media subsidizer or media operator would represent a departure from past and present government performances. A preliminary consideration that should precede any such dramatic leap, however, is whether the cost and effort of such endeavors would be essential ingredients for an affirmative action recipe that should serve the future as well as the present.

Media subsidization or operation by the government would be most sensible in the overall context of a static media structure. Such remedies, however, might amount to overreaching in a media environment subject to being shaped by the evolutionary and revolutionary influences of technological progress.

If existing media forms are to be protected and preferred species and the beneficiaries of regulatory favoritism,[158] government subsidization and operation may be among the few weapons available in the affirmative action arsenal. But if new and existing media technologies[159] are permitted to compete equally upon their own merits, the range upon which affirmative action may roam would be considerably broadened.

The lowering of barriers to new media forms at least would pave the way for more inter-media competition. Such a development could create conditions ripe for more consistent rulemaking and regulation with less cause for content regulation. Even if time, space, or competition within an established or new medium were limited, the emergence of more media forms would curb the power and importance of any one medium. Such a dilution of influence, if it were to occur, would undermine any genuine basis for a scarcity rationale as a reason for regulation. Consequently, the existing double standard between print and broadcast media, which has become no more than an embarrassment to those who invoke it,[160] might be eliminated.

---

158. The FCC's regulation of cable television, for instance, has been more of a handicap than an aid to the medium's development. The Commission denied a license for construction of a CATV microwave relay station that would have been used to carry distant signals. The agency concluded that a decision otherwise would have an adverse effect upon local television. Carter Mountain Transmission Corp., 32 F.C.C. 459, 22 R.R. 193 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963). The Commission since has adopted, modified, and sometimes deleted various cable rules against importing distant signals, regulations affording broadcasters exclusive rights to certain types of programming, requirements for public access and local origination, and prohibitions against siphoning programming that has been viewed without charge on "free" television. Leapfrogging Rules, 57 F.C.C.2d 625, 35 R.R.2d 1673 (1976); Cable Television Report and Order, 36 F.C.C.2d 143, 24 R.R.2d 1501 (1972); 47 C.F.R. §§76.91-76.95 (1975); Channel Capacity and Access Rules, 59 F.C.C.2d 294, 37 R.R.2d 213 (1976); Anti-siphoning Rules, 47 C.F.R. §76.225 (1975).

159. Potential competitors for existing media forms "are springing from new technologies—videocassettes, videodiscs, pay-TV, cable television, pay cable and satellite distribution systems." U.S. NEWS AND WORLD REPORT, June 19, 1978, at 83.

160. The Supreme Court acknowledged the reality of scarcity and concentration in the newspaper industry in *Miami Herald Pubishing Company v. Tornillo*, 418 U.S. 241, 250 (1974). But the

The arrival of new media forms would not dictate a shift from a "do something" to a "do nothing" government role as much as it would necessitate an undoing of policymaking that plays favorites with traditional media forms over emerging ones.[161] The government, in changing its ways, however, should not abdicate its role as an economic regulator. The reduction of power in the hands of a government overlord would be an insignificant accomplishment if the same power were subsequently assumed by and vested in the hands of a few private overlords.

The encouragement and welcoming of new media forms, however, need not exclude them from regulatory scrutiny for characteristics that would undermine diversity. The cable industry, for instance, has offered itself as a tonic for what ails diversity.[162] Even though cable operators can deliver more channels, and thus more information outlets, the cable business itself is a model of a highly concentrated, vertically integrated industry.[163] If inter-media competition alone proved to be an inadequate safeguard for diversity, regulatory solutions should be available to the government. But the regulatory cure, especially in the presence of more types of media, could be an economic or structural one rather than a content-oriented one. Regulation that required separation of ownership and control between programming and distribution functions, for instance, might advance the cause of affirmative action more efficiently and less intrusively than programming inspection.

Given the potential for significant changes in the nature of the mass media, a sound affirmative action policy would be one that not only accepted the alterations and additions but also would adapt to and en-

---

Court wrote its *Tornillo* opinion as if *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1967), did not exist. Not once in *Tornillo* did the Court even mention the *Red Lion* scarcity rationale that has become the basis for broadcasting regulation. The Court thus left the impression that it would rather avoid the inconsistency altogether by refusing to face the incongruity.

161. The FCC and the courts have manifested recent moves toward eliminating some of the barriers for new media technologies and forms. The Commission itself lifted rules against importation of distant television signals by cable operators. Leapfrogging Rules, 57 F.C.C.2d 625, 35 R.R.2d 1673 (1976). A federal appeals court rejected the agency's origination and access requirements for cablecasters. Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978). And the chairman of the FCC has issued warnings to broadcasters to prepare themselves for competition from a new wave of media technology. Speeches of FCC Chairman Charles Ferris to National Association of Broadcasters, April 24, 1978, Las Vegas, Nevada, and at Network Inquiry Symposium, Feb. 2, 1979, Los Angeles, California (copy on file at the *Pacific Law Journal*).

162. S. BAER, CABLE TELEVISION: A HANDBOOK FOR DECISION MAKING 177 (1973); Price, *Requiem for a Wired Nation: Cable Rulemaking at the FCC,* 61 VA. L. REV. 541, 546-51 (1975). The United States Supreme Court itself has noted that "the advent of cable television will afford increased opportunities for the discussion of public issues." CBS v. Democratic Nat'l Comm., 412 U.S. 94, 131 (1973). A detailed listing of cable's potential contributions to diversity and other potential uses was set forth in Cable Television Report and Order, 36 F.C.C.2d 141, 144 n.10 (1972).

163. Goldberg and Couzens, *"Peculiar Characteristics": Analysis of the First Amendment Implications of Broadcast Regulation*, 31 FED. COMM. L.J. 1, 50 (1978).

courage those new realities. Such circumstances, though, inevitably would insist upon the departure from interventionist actions and standards aimed at forcing diversity out of the status quo. And they would summon the arrival of a revised policy that built upon and beyond traditional media forms to encourage more information sources and products.

CONCLUSION

The classic concept of freedom of the press as a restraint upon government has limited worth for a society that has grown up with a concentrated media industry unforeseen by the constitution's architects. The limited tools so far employed in building diversity into the existing media framework have failed to serve first amendment values and interests adequately.

Past experience dictates that future affirmative action policies should be carefully selected and applied to enhance rather than to undermine first amendment interests. Less effective and more intrusive regulatory policies now in effect equip the government with the weapons for subverting such interests in the name of fairness, balance, and preservation. And so long as the government chooses to wield the reins of regulation over content, the flow of information will remain subject to scrutiny and control by government, as well as by private, centers of power. Such leverage reveals the flimsiness of first amendment guarantees, especially in their ability to serve first amendment values, in the face of existing policies. And it continues to validate the answer Alexander Hamilton furnished his own question 200 years ago.

> What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude of evasion? I hold it to be impracticable; and for this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion and on the general spirit of the people and of the Government.[164]

If government is to serve any worthwhile first amendment purpose, it should be one of policymaking that promotes rather than inhibits first amendment values. An affirmative action policy that is also an effective first amendment policy, therefore, not only must safeguard a marketplace of ideas but must help keep the shelves well stocked with a diverse selection of information products.

164. THE FEDERALIST No. 84 (A. Hamilton), *reprinted in* 43 GREAT BOOKS OF THE WESTERN WORLD 253 (1971).