

Access to Audiences as a First Amendment Right:
Its Relevance and Implications for Electronic Media Policy

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Abstract

When the issue of speakers' rights of access arises in media regulation and policy contexts, the focus typically is on the concept of speakers' rights of access "to the media," or "to the press." This right usually is premised on the audience's need for access to diverse sources and content. In contrast, in many non-mediated contexts, the concept of speakers' rights of access frequently is defined in terms of the speaker's own First Amendment right of access to audiences. This paper explores the important distinctions between these differing interpretations of a speaker's access rights and argues that the concept of a speaker's right of access to audiences merits a more prominent position in electronic media regulation and policy. This paper then explores the implications of such a shift in perspective for media regulation and policy-making.

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Introduction

The concept of access plays a prominent role in electronic media regulation and policy.¹ Policies ranging from the funding of Internet access for schools and libraries,² to the cable must-carry rules,³ to political campaign communication regulations,⁴ all are premised to varying degrees on improving access for speakers and audiences to the mechanisms necessary to engage in the communication process. Although such access policies have been implemented on behalf of a variety of social, political, and economic goals, it is important to recognize that access policies also often have a significant First Amendment component. That is, access policies as they pertain to the media frequently are premised, at least in part, on the notion that the First Amendment guarantees both speakers and audiences sufficient access to the components of the communication process necessary to facilitate the free flow of ideas and information that is essential to both individual liberty and to the effective functioning of the democratic process.⁵

Policymakers and the courts have tended, however, to conceptualize access rights – and their underlying rationales – differently in electronic-mediated and non-electronic-mediated contexts. Specifically, the tradition of a speaker’s First Amendment right of access to an audience that is prominent in non-mediated contexts has not factored as prominently in mediated communication contexts. In mediated contexts, the concept of access to audiences has been supplanted as a policy priority by the

¹ See generally, Andrew D. Auerbach, *Mandatory Access and the Information Infrastructure*, 3 COMM'LAW CONCEPTUS 1 (1995); Philip M. Napoli, *Access and Fundamental Principles in Communication Policy*, 2002 L. REV. M.S.U./D.C.L. 1 (2002).

² *Am. Library Ass'n v. United States*, 201 F. Supp. 2d. 401 (E.D. Pa.) (three-judge court), rev'd, 539 U.S. 194 (2003) (plurality). See also Mark N. Cooper, *Inequality in the Digital Society: Why the Digital Divide Deserves all the Attention it Gets*, 20 CARDOZO ARTS & ENT. L.J. 73.

³ See *Turner Broadcasting v. Federal Communications Commission*, 520 U.S. 180 (1997).

⁴ 47 U.S.C. section 315(a) (1988). See also *CBS v. Federal Communications Commission*, 435 U.S. 367 (1981).

⁵ As the Supreme Court noted in *First National Bank of Boston v. Bellotti*, “decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering

similar, albeit (as this paper will argue) significantly different, concept of access to the media, or to the press. This right of access to the media typically has been premised upon different First Amendment values than the right of access to audiences. Specifically, the right of access to the media has been premised primarily upon “collectivist” First Amendment values such as enhancing the democratic process and preventing abuses of governmental power, whereas the right of access to audiences has been premised primarily upon more “individualist” values such as the preservation and promotion of individual liberty and autonomy.⁶

This paper will explore this distinction between the right of access to an audience and the right of access to the media, and the implications of this distinction for media regulation and policy. This paper will argue that the right of access to audiences that is prominent and well-established in non-mediated speech contexts should receive comparable prominence in mediated contexts, and that this access right should be premised on the same individualist First Amendment values as it is in non-mediated contexts. This paper will then explore what such a shift in priorities might mean for electronic media policymaking.

The first section of this paper outlines the contours of a speaker’s First Amendment right of access to audiences. As this section will demonstrate, the concept of the right of access to audiences has been developed most extensively within the context of the “public forum doctrine,” which addresses speakers’ rights of access to public spaces, and is premised primarily upon the individual liberties that the First Amendment protects. The second section traces speaker access rights as a policy priority in the mediated context. As this section will demonstrate, the concept of speaker access to audiences never has attained comparable prominence in mediated contexts. Instead, as a review of significant access policies and court decisions will illustrate, the predominant access right that policymakers, policy advocates, and the courts have recognized is one of a right of access “to the media.” This access “right” typically is

individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas,” 435 U.S. 765, 783 (1978).

⁶ For a discussion of individualist versus collectivist First Amendment values, see Philip M. Napoli, *FOUNDATIONS OF COMMUNICATIONS POLICY: PRINCIPLES AND PROCESS IN THE REGULATION OF ELECTRONIC MEDIA*, Ch. 3 (2001).

premised primarily upon the First Amendment rights of audiences to diverse sources of information, and the collective benefits that such access provides, rather than upon First Amendment access rights that the speaker possesses, and the individual liberties that such access protects and supports. The third section examines the important applicational distinctions between the right of access to the media and the right of access to audiences. As this section will illustrate, a right of access to audiences is both a more nuanced and a more complex standard to apply to speakers' access rights than a right of access to the media. The fourth section argues that the right of access to audiences merits much greater prominence in policy and legal decision making pertaining to the media in light of the intended functions of the First Amendment. The final section explores the implications of a shift in analytical perspective from emphasizing a speaker's right of access to the media to emphasizing a speaker's right of access to audiences for media regulation and policy. As this section will illustrate, such a shift would require that policymakers focus greater attention on the dynamics of media content distribution and consumption. Such a shift also potentially would strengthen access policies against judicial scrutiny, as well as potentially strengthen the rhetorical stances of the public interest/advocacy community on a wide range of electronic media policy issues.

The First Amendment Right of Access to Audiences

The First Amendment right of freedom of speech traditionally has included a right to a certain – if not particularly well-defined – level of access to audiences. According to Emerson, our “system of freedom of expression . . . demands access to an audience.”⁷ In *Kovacs v. Cooper*, the Supreme Court, in deciding a case involving an ordinance limiting the use of sound amplification equipment, noted that: “The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention. This is the phase of freedom of speech that is involved here.”⁸ This passage carves out the right of access to an audience (expressed in terms of the

⁷ Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 14 GA. L. REV. 795, 808 (1981).

⁸ 366 U.S. 77 (1949).

opportunity to reach the minds of listeners) as a distinct component – or, to use the Court’s words – “phase” of First Amendment rights. As the Court’s statement indicates, free speech not only is a function of the extent to which citizens can say what they want, but also a function of the extent to which their speech has *the potential* to reach an audience. In the context of mediated communication, this right of access to audiences can be thought of in terms of a right that extends beyond the right of “publication,” encompassing also the right to “circulate” or “distribute” ideas or information.⁹ The exact parameters of this right to circulate or distribute speech are, however, not entirely clear.¹⁰

The notion of a First Amendment right of access to audiences has been developed most explicitly within the context of judicial decisions pertaining to access to public forums, such as streets and town squares.¹¹ A public forum generally is a public place where people traditionally gather to express ideas and engage in discourse.¹² In *Hague v. Committee for Industrial Organization* the Supreme Court articulated the basic tenets of the public forum doctrine.¹³ At the core of the public forum doctrine is the ideal that “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁴ Justice Roberts emphasized that “[s]uch use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”¹⁵ Furthermore, “[t]he privilege of a citizen of the United States to use the streets and parks for

⁹ As the Supreme Court noted in *Ex parte Jackson*, the “liberty of circulating is as essential to [freedom of the press] as it is to the liberty of publishing; indeed, without the circulation, the publication would be of little value,” 96 U.S. 727, 733 (1877). See also Michael A. Pavlick, *No News is Good News? The Constitutionality of a Newsrack Ban*, 40 CASE W. RES. 451, 452-456 (1990).

¹⁰ See Pavlick, *supra* note 9.

¹¹ See e.g. *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); see Noah.D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149 (1998).

¹² The phrase “public forum” emerged from a 1965 article by Harry Kalven, see Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. For a critique of the public forum analytical framework, see Daniel A. Farber and John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

¹³ 307 U.S. 496 (1939).

¹⁴ *Id.* at 515. Justice Roberts’ opinion (plurality).

¹⁵ *Id.*

communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.”¹⁶ Thus, individual speech liberties must be balanced with the public interest. As the Court noted in *Lehman v. City of Shaker Heights*, “[I]n the light of the First Amendment,[...]to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.”¹⁷ Thus, the nature and character of the public place is essential to identifying the limits of government regulation of speech in a location, and thus the speaker’s ability to reach such an audience.

Fundamental to the public forum doctrine is the notion that the First Amendment ensures that both speakers and audiences have reasonable access to the communication process. A key function of public forums is to provide access to an audience that the speaker may not otherwise be able to reach effectively.¹⁸ As Zatz notes, “One of the most basic functions of the public forum doctrine is to provide speakers mass access to the general public.”¹⁹

In many public forum cases, the central issue typically involves whether speakers are granted sufficient access to those locations where they have the greatest opportunity to reach audiences. Consequently, time, place, or manner restrictions often are at the core of many public forum cases. While content-based restrictions of speech presumptively violate the First Amendment, the government may regulate the time, manner, and place of speech as long as a substantial state interest exists. Restrictions on the time, place, or manner of exercising First Amendment rights are constitutional if they

¹⁶ *Id.* at 515-16. Justice Robert’s opinion in which Justice Black concurred.

¹⁷ *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), at 302-03.

¹⁸ *See Zatz, supra note 11* at 161.

¹⁹ *Id.* at 201.

pass a three prong test²⁰ in which: (1) the restrictions are content-neutral; (2) they serve a significant government interest; and (3) there are “ample alternative channels for communication of the information.”²¹

As this third prong of the time, place or manner test suggests, restrictions imposed on speech must allow for sufficient alternative opportunities for speakers to access their desired audience. It has, however, been noted that “the Court has never clearly defined the alternate means test.”²² As a result, two interpretations of the alternate means test have developed.²³ The first test requires only that the speaker have some viable alternative for communicating his message, regardless of whether that option is public or private.²⁴ Under this interpretation, the speaker may be required to incur additional costs or inconveniences associated with pursuing these alternate means of expression.²⁵

The second interpretation of the alternative means test requires that the speaker have alternative access to *his chosen* public forum at some time or place.²⁶ This approach considers the alternative channels left open within the public forum, not the alternatives available elsewhere. This is obviously the more stringent interpretation of the test, in that it allows for a more limited range of alternative communication channels than the other interpretation. Such an approach reflects the possibility that, in some instances, a message’s effectiveness depends upon it being delivered at a particular time or place – often in order to reach a particular audience – a consideration that becomes relevant to the extent to which an individual speaker is able to effectively exercise his/her First Amendment rights.²⁷

²⁰ See *United States v. Grace*, 461 U.S. 171 (1983).

²¹ *Id.* at 177.

²² Pavlick, *supra* note 9 at 483.

²³ *Id.*

²⁴ See Harold L. Quadras, *Content-Neutral Public Forum Regulations: the Rise of the Aesthetic Interest, the Fall of Judicial Scrutiny*, 37 HASTINGS L.J. 439, 449 (1986).

²⁵ Pavlick, *supra* note 9 at 484-485. For a critique of this approach, see William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 762-771 (1986).

²⁶ See *Providence Journal Co. v. City of Newport*, 655 F.Supp. 107, 118 (D.R.I. 1987).

²⁷ In an effort to bring greater consistency to the application of the alternative means test, Lee proposes an analysis that considers the following three factors: a) cost; b) ability to reach the intended audience; and c) the communicator’s autonomy from gatekeepers. See Lee, *supra* note 25, at 809-810.

Obviously, these different interpretive approaches to the alternative means test hinge very much on the question of the level of access to audiences to which the speaker is entitled. There are a number of cases that help illustrate variations in the judiciary's analytical process in this regard. In *International Society for Krishna Consciousness and Brian Rumbaugh v. Walter Lee*,²⁸ the Court denied the International Society for Krishna Consciousness the right to perform rituals (as part of their fund raising process) within Port Authority of New York and New Jersey airports. The Court concluded that the Society had sufficient access to audiences if they were to conduct their activities on the sidewalks outside the airports (which was permissible under Port Authority rules). In reaching this conclusion, the Court noted that "This sidewalk area is frequented by an overwhelming percentage of airport users . . . no more than 3% of air travelers passing through the terminals are doing so on interterminal flights . . . Thus the resulting access of those who would solicit the general public is quite complete."²⁹ Here, then, the extent of access to an audience facilitated by alternative means is actually quantified, and then used to determine whether a First Amendment violation has taken place.³⁰ Given the fact that, under the alternative access plan, speakers would be denied access to, at most, three percent of the audience they were seeking to reach, the Court concluded that there was no First Amendment violation of a magnitude to overcome the compelling government interests in the safe and efficient operation of airports.³¹

Similarly, in *Lloyd Corporation v. Tanner*, the Court upheld a shopping mall's restriction against the distribution of handbills on the premises in part because "[a]ll persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles. When moving to and from the privately owned parking lots, automobiles are required to come to a complete stop."³² Therefore, "[h]andbills may be distributed conveniently to pedestrians and also to occupants of

²⁸ 505 U.S. 672 (1992).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 680. The Court also held that an airport terminal was a nonpublic forum for First Amendment purposes, and that the prohibition on solicitation activities was reasonable.

³² *Lloyd Corporation*, 407 U.S. 551 at 566-567.

automobiles, from these public sidewalks and streets.”³³ Here again, the extent to which comparable alternative means of accessing the desired audience were available was central to the analysis.

In *Amalgamated Food Employees Union v. Logan Valley Plaza*,³⁴ the Court utilized a similar analysis to reach a different conclusion. In this case, the Court found that a shopping center’s ban against picketers in the center’s parking lot was a violation of the picketers’ First Amendment rights, as the alternative locations available for the picketers (surrounding streets and sidewalks) were judged to not provide sufficient access to the audience that the picketers were trying to reach (customers of a supermarket located within the shopping center). The Court raised the concern that, if the picketers were placed on the surrounding streets and sidewalks, “the placards bearing the message which petitioners seek to communicate to patrons must be read by those to whom they are directed either at a distance so great as to render them virtually indecipherable . . . or while the prospective reader is moving by car.”³⁵ Neither alternative was judged by the Court to grant the petitioners sufficient access to their desired audience to fulfill their First Amendment rights. This decision also illustrates the important point that such access rights have been – and can be – granted to *privately-owned* facilities.³⁶

As the *Amalgamated* case indicates, in some instances, audience access decisions have revolved around access to a very specific audience. In *Amalgamated*, access to the supermarket customers in particular was key to the fulfillment of the picketers’ First Amendment rights. Along similar lines, the United States District Court overturned a University of Virginia regulation that prevented students from constructing a mock shanty town in front of the University’s Rotunda in order to call the attention of the university’s Board of Visitors to the plight of South Africans suffering under apartheid.³⁷ The court’s

³³ *Id.* at 567. See also *Frisby v. Schultz*, 487 U.S. 474, 483-484 (1988), in which the Court upheld an ordinance forbidding picketing an individual residence on the basis of the conclusion that ample alternative means of communication were available

³⁴ 391 U.S. 308 (1968).

³⁵ *Id.* at 322

³⁶ See also *March v. Alabama*, 326 U.S. 501 (1946), in which a Jehovah’s Witness was granted the right to distribute literature on the sidewalks of a town completely owned by the Gulf Shipbuilding Corporation.

³⁷ *Students Against Apartheid Coalition v. Robert M. O’Neil*, 660 F.Supp. 333, 339 (1987).

decision was based on the judgment that alternative venues (i.e., other locations on campus) for constructing the shanty town did not provide adequate alternative means of communication because these alternative venues were not in sufficient proximity to areas of campus frequented by the Board of Visitors. According to the court, “The option of building shanties on spots invisible from the Rotunda eliminates the students’ ability to win the attention of the Board of Visitors and is thereby an inadequate alternative outlet for the plaintiff’s expressive conduct.”³⁸ The court went on to say that the university’s suggestion that the mail and other forms of media offer ample alternative channels for communication neglects the fact that “these options involve more cost and less autonomy than the shanties, are less likely to reach the Board of Visitors who may not deliberately be seeking information about apartheid, and might be less effective for delivering the message that is conveyed by the sight of a shanty in front of the Rotunda.”³⁹ This statement is particularly significant as it articulates a wide range of factors (cost, autonomy, persuasive impact) that can be incorporated into the assessment of whether sufficient alternative means of accessing a specific audience are available.

Reflecting this breadth of relevant factors to consider in terms of whether sufficient access to audiences has been granted, the United States Court of Appeals for the Ninth Circuit found that a city ordinance banning the use of signs attached to sticks or poles was unconstitutional because it limited access to audience members in crowded contexts such as marches or parades.⁴⁰ In such contexts, “where individual voices cannot be heard above the din, and ‘dramatic performances’ and hand-held signs are easily swallowed up by the crowd . . . [s]igns attached to supports such as poles or sticks are effective tools by which to overcome the communication problems endemic to these types of situations. A sign that can be hoisted high in the air projects a message above the heads of the crowd to reach spectators, passersby, and television cameras stationed a good distance away.”⁴¹ For these reasons, the court

³⁸ *Id.* at 339-340.

³⁹ *Id.* at 340.

⁴⁰ *Edwards v. City of Coeur D’Alene*, 262 F.3d 856 (Ct. App. 9th Cir., 2001).

⁴¹ *Id.* at 867.

concluded that the ordinance did not allow for ample alternative means of communication, as it limited the audience reach of individuals participating in crowded demonstrations or parades.⁴² This decision would seem to suggest that proximity to the potential audience is not necessarily sufficient for meeting the First Amendment's access to audiences criterion. Some consideration for the mechanisms for communicating, and the ability to amplify one's message is appropriate as well.⁴³

It is important to emphasize, however, that these issues of time, place, or manner restrictions – and thus the issue of a speaker's right of access to an audience, are not confined exclusively to public forum cases,⁴⁴ and in some of these cases the issue of alternative means of accessing an audience is central. In *City of Renton v. Playtime Theatres*,⁴⁵ the Supreme Court upheld a zoning restriction on adult theaters, based in large part on the judgment that sufficient alternative avenues of communication were available. As the Court noted, the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites."⁴⁶ It was, however, this question of sufficient alternative avenues of communication that was at the core of the dissent of Justices Brennan and Marshall, who argued that much of the 520 acres cited above was already occupied, and therefore not realistically available to theater owners.⁴⁷

The right to door-to-door solicitation has been upheld in part on the basis of a First Amendment right of access to audiences, and the doorway of a private residence never has been classified as a public forum. In *Martin v. City of Struthers*,⁴⁸ the Supreme Court overturned the conviction of a Jehova's Witness for violating a city statute forbidding door-to-door distribution of literature. The Court noted that

⁴² *Id.*

⁴³ See also *Kovacs v. Cooper*, 366 U.S. 77, in which a ban on sound amplification equipment was overturned for similar reasons. Here again, the Court granted speakers a right to a means to project their message in order to reach a larger audience.

⁴⁴ See *U. S. Postal Service v. Council of Greenburgh*, 453 U.S. 114 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-536 (1980).

⁴⁵ *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

⁴⁶ *Id.* at 53.

⁴⁷ *Id.* at 64.

⁴⁸ 319 U.S. 141 (1943).

the right to approach homes and offer discussion or literature was “in accordance with the best tradition of free discussion.”⁴⁹ This right to approach and offer information,⁵⁰ then, is premised in large part upon speakers having a right of access to an audience. In upholding a speaker’s right to knock on a stranger’s front door in order to present ideas (ideas that the resident may even be hostile to),⁵¹ the Court upheld a fairly powerful First Amendment right of access to an audience.⁵²

In the examples discussed in this section, the courts’ analyses have revolved around the role of the First Amendment in protecting individual liberty (i.e., the freedom to convey one’s ideas to others), not around alternative First Amendment values such as the value to the citizenry of being exposed to – or having the opportunity to be exposed to – the information that these speakers were providing. In this regard, these access to audiences decisions fall squarely in the traditional “individualist” interpretation of First Amendment rights,⁵³ where the liberty and autonomy of the individual speaker are paramount (even to the extent that the speaker has the right to annoy people by knocking on their doors while they are at home). This perspective is well-illustrated by Justice Reed’s statement in *Kovacs v. Cooper*, that free speech guarantees “every citizen that he may reach the minds of willing listeners and to do so there must be opportunity.”⁵⁴ In this regard, then, a speech environment in which there is ample opportunity for the citizenry to exercise their First Amendment right of access to audiences must be maintained.

First Amendment Right of Access to Media

When we examine the issue of speaker access in the realm of electronic media, we generally find that the concept of speaker access to audiences described above is much less prominent. Instead much

⁴⁹ *Id* at 144-145.

⁵⁰ See Darrin A. Hostetler, *Face-to-Face with the First Amendment: Schenck v. Pro-Choice Network and the Right to “Approach and Offer” in Abortion Clinic Protests*, 50 STAN. L. REV. 179 (1997).

⁵¹ “A debate can not be ‘uninhibited, robust, and wide open’ if speakers can speak only to those who request that they do so,” Note: *The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 HARV. L. REV. 1314, 1317 (2005).

⁵² See also *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (an ordinance prohibiting door-to-door or on-street solicitation of contributions was held unconstitutional; the regulation was overbroad in violation of the First and Fourteenth Amendments.)

more focus has been placed – by policymakers, policy advocates, and the courts – on the concept of speaker access to the media, or to the press. In the transition to an increasingly mediated communications environment, and as a response to the distinguishing characteristics of the electronic media environment, the specific characteristics of a speaker’s access rights seem to have undergone a subtle but significant change.

A useful introduction to this notion of a speaker’s right of access to the media is provided in the work of Jerome Barron.⁵⁵ According to Barron, the evolution of our communications environment from one of individual street corner speakers and pamphleteers to one of corporate-controlled mass media outlets necessitates a reconsideration of how to conceptualize and apply the First Amendment. Specifically, the contemporary media environment brings unprecedented levels of inequality to the extent to which different speakers have the opportunity to have their voices heard. And, according to Barron, as the media industries grow more concentrated, fewer and fewer individuals control the flow of information to the public. To counteract these processes, Barron argues for an affirmative right of access to the media, such that individuals or viewpoints that might not otherwise be heard can be heard.

In developing this argument, Barron draws support from judicial decisions in the public forum area that have articulated a speaker’s right of access to audiences.⁵⁶ According to Barron, the migration of this access principle from the public forum realm to the mass media realm is a logical transition. As he argues, “The influence of the privately-owned mass media on the information and opinion process is too great for an access-oriented first amendment theory to be halted in its tracks because the monopoly

⁵³ See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); R.H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994).

⁵⁴ *Kovacs v. Cooper*, 366 U.S. 77 at 87.

⁵⁵ Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARVARD L. REV. 1641 (1967).

⁵⁶ See Jerome A. Barron, *An Emerging Right of Access to the Media?* 37 GEO. WASH. U. L. REV. 487 (1969).

newspaper, for example is privately rather than publicly owned.”⁵⁷ Barron’s ultimate hope is for the construction of “a public forum model . . . within the context of privately owned mass media.”⁵⁸

It is important to note that Barron advocated a right of individual speakers to media outlets owned and operated by other individuals or organizations. In this regard, this access right, as originally conceived, was “micro” rather than “macro” in its orientation. That is, the proposed access right focused on granting some individuals access to other individuals’ media outlets, rather than on crafting a media system or speech environment in which access to the media was more widely disseminated (i.e., in which ownership was more diversified). In this regard, Barron’s access policy proposal was more behavioral than structural, in that it was in fact a reaction against specific structural changes (i.e., ownership concentration) that had begun to affect the mass media.

A key detail of Barron’s argument is that as he transfers the public forum principles into the realm of the mass media, he employs a slight shift in terminology. Specifically, he abandons the right of access to audiences language that is central to the public forum decisions and adopts instead language that focuses on the right of “access to the media,”⁵⁹ or, in some cases, a right of “access to the press.”⁶⁰ This is a subtle but important distinction, for instead of advocating a direct right of access to audiences, Barron is advocating a more indirect process, wherein speakers are granted a right of access to particular institutions (the media) in order to then (presumably) achieve access to audiences.

This issue of a right of access to the media has found its way into the Supreme Court’s decision making on a number of occasions – though the right of access to the media has been both affirmed and rejected by the Court, depending upon the particular media technology at issue. In perhaps one of the most well known media access cases, *Red Lion Broadcasting v. Federal Communications Commission*,⁶¹ the Supreme Court upheld the constitutionality of the FCC’s political editorial and personal attack rules

⁵⁷ *Id.* at 492.

⁵⁸ *Id.* at 506.

⁵⁹ *See supra* note 56 (throughout).

⁶⁰ *Id.*

(components of the Fairness Doctrine⁶²), which required broadcasters to provide political candidates with an opportunity to respond on-air to broadcast editorials against their candidacy, or other forms of criticism. This decision was premised in large part upon what were deemed to be the unique characteristics of the broadcast medium – specifically, the scarcity of available spectrum.

The Court reached similar conclusions in *CBS v. Federal Communications Commission*,⁶³ upholding an FCC regulation requiring that political candidates receive “reasonable access to . . . the use of a broadcasting station.”⁶⁴ As the Court noted, the FCC’s reasonable access rule created a new “right of reasonable access to the use of stations,”⁶⁵ a right which the Court concluded did not intrude significantly upon broadcasters’ First Amendment rights in light of the compelling government interest in providing citizens with access to political campaign messages.

However, in *Miami Herald v. Tornillo*,⁶⁶ the Court rejected a similar access right in the context of newspapers as an infringement upon newspaper publishers’ First Amendment rights. In this case, granting an unaffiliated speaker the right to respond to a newspaper story within the pages of the paper was deemed an infringement on the First Amendment rights of the newspaper publisher. These different outcomes help illustrate how the different technological characteristics of the individual media have factored into the extent to which speakers have a right of access to them, with the most pronounced right of access to the media being found in the electronic media context.

In each of these cases, the focal point of the access advocates’ arguments, and of the Court’s analysis, is the speaker’s right of access to the particular media outlets. This is particularly well

⁶¹ 395 U.S. 367 (1969).

⁶² For detailed discussions of the Fairness Doctrine, see Handling of Public issues under the Fairness Doctrine and the public interest standards of the Communications Act (Fairness Report), 48 F.C.C. 2d 1; Inquiry into section 73.1910 of the Commission’s rules and regulations concerning the general Fairness Doctrine obligations of broadcast licensees, 102 F.C.C. 2d 145. See also, Timothy J. Brennan, *The Fairness Doctrine as Public Policy*, 33 J. OF BROADCASTING & ELECTRONIC MEDIA 419 (1989); Mark A. Conrad, *The Demise of the Fairness Doctrine: A Blow for Citizen Access*, 41 FED. COMM. L.J. 161 (1989).

⁶³ 435 U.S. 367 (1981).

⁶⁴ *Id.* at 377.

⁶⁵ *Id.* at 381.

illustrated by the repeated use of the terminology “access to the press” in the *Miami Herald* decision⁶⁷ and the repeated use of the terminology “access to broadcast stations” in the *CBS* decision.⁶⁸ Nowhere in these decisions do we find any *explicit* identification of a speaker’s First Amendment right of access to audiences of the sort that we find in many access decisions in non-mediated contexts.⁶⁹

Certainly, implicit in this notion of a right of access to the media is the assumption that such access simultaneously grants sufficient access to audiences. Consider, for instance, that although Barron never explicitly argues for a speaker’s First Amendment right of access to audiences, the concept of access to audiences is implicit in much of his argument. When he argues that “[a]n analysis of the first amendment must be tailored to the context in which ideas are or seek to be aired,” he emphasizes the need for assessing the relative “impact” of different media.⁷⁰ Similarly, he emphasizes the importance of considering which media are most “important,” “dominant,” and “significant.”⁷¹ All of these somewhat ambiguous terms are given a bit more clarity when Barron argues that “[i]f ideas are criticized in one forum the most adequate response is in the same forum since it is most likely to reach the same audience.”⁷² Thus, *implicit* in Barron’s medium-specific approach is the idea that the extent to which different media provide access to different audiences must be considered when implementing access rights. However, the *explicit* access right being argued is that of a right of access to the media, rather than the right of access to audiences.

Perhaps more significant than this shift in terminology is the accompanying shift in underlying First Amendment rationales. Specifically, unlike the right of access to audiences described above, the right of access to the media has not been premised primarily upon preserving and promoting the liberties and autonomy of the individual speaker. Instead, a speaker’s right of access to the media has been

⁶⁶ 418 U.S. 241 (1974).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *supra* notes 43-49.

⁷⁰ *Supra* note 55 at 1653

⁷¹ *Id.* at 1651.

premised primarily upon the benefits that accrue to the public (i.e., the audience) from having access to a diversity of sources of information.⁷³ Thus, while the right of access to an audience, as it has developed in non-mediated communication contexts, is firmly based upon the traditional “individualist” interpretation of the First Amendment, the right of access to the media is not. Instead, the right of access to the media is primarily premised upon the rights, needs, and interests of the collective citizenry.

Such a justification also is grounded in First Amendment theory. There is a long line of legal philosophy and scholarship articulating an interpretation of the First Amendment that places the speech needs of the collective citizenry ahead of the needs of the individual speaker.⁷⁴ Those theories of the First Amendment that emphasize free speech’s contribution to the spread of knowledge, or to the effective functioning of the democratic process, or to the protection of the citizenry from abuses of governmental power, all have at their core a more “collectivist” interpretation of the First Amendment.⁷⁵

This collectivist interpretation of the First Amendment is central to the *Red Lion* decision, in which the Court noted that “the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”⁷⁶ Note in this passage how, in a decision that grants certain speakers (in this case politicians) access to the media, the only articulated First Amendment right is the audience’s right of access to “social, political, esthetic, morel and other ideas and experiences.”⁷⁷ Indeed, nowhere in the decision does the Court argue that the politicians who have been

⁷² *Id.* at 1653.

⁷³ As Owen Fiss notes, the concept of a right of access to the media “does not seek to protect the self-expressive interests of an individual citizen seeking access, but rather it is intended to further a collective goal: the production of robust public debates.” See Owen Fiss, *Building a Free Press*, In *RIGHTS OF ACCESS TO THE MEDIA* (Andras Sajo and Monroe Price, Eds.) at 99 (1996).

⁷⁴ See, for example, Owen Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405 (1986); Fiss, *THE IRONY OF FREE SPEECH* (1996); Alexander Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1972).

⁷⁵ See Napoli, *supra* note 6..

⁷⁶ See *Red Lion*, 395 U.S. 367, 390.

⁷⁷ *Id.*

granted a right of access to the media have been granted such access on the basis of their individual First Amendment rights.

Similarly, in justifying its decision in the *CBS* case, the Court drew heavily upon its decision in *Red Lion*, noting again that “It is the right of the public to receive suitable access....”⁷⁸ Moreover, the Court noted that the reasonable access provisions make “a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.”⁷⁹ Again, an access right is being granted primarily on behalf of collective benefits (in this case, the effective operation of the democratic process), not on behalf of preserving and promoting the liberties and autonomy of the individual speaker.

Even advocates of a speaker’s right of access to the media have relied upon this same interpretive stance. Consider, for instance, that, in his initial articulation of a right of access to the media, Barron justifies this access right on the grounds of producing a better-informed citizenry and in terms of preserving “public order.”⁸⁰ Both of these functions of First Amendment rights have been categorized as belonging to the “collectivist” bundle of First Amendment functions, given that the benefits accrue to the community as a whole.⁸¹ Thus, audiences are the primary beneficiaries of a vigorous First Amendment in this context. Nowhere in his piece does Barron develop an argument that the First Amendment rights of speakers, in particular, are being abridged by the changes in technology, distribution, and ownership affecting the system of communication in this country. Such an argument could have been particularly compelling in the (pre-Internet) era in which Barron was writing, when information dissemination via the electronic media truly was dominated by relatively few sources, and the distribution of individual rights of access to the media was significantly inequitable.⁸²

⁷⁸ See *CBS*, 435 U.S. 367 at 728 (citations omitted).

⁷⁹ *Id.* at 729.

⁸⁰ *Supra*, note 55 at 1648-1649.

⁸¹ See Napoli, *supra* note 6.

⁸² Today, as will be discussed below, access to the media is more widely disseminated (thanks in large part to the advent of the Internet), but access to audiences remains highly imbalanced.

Similarly, when Barron and others argued for a right of access to the print media in *Miami Herald*, they argued “that government has an obligation to ensure that a wide variety of views reach the public,”⁸³ an argument that reflects the philosophy that “diversity of ideas . . . is the primary objective of the first amendment”⁸⁴ and again prioritizes collectivist First Amendment values over individualist First Amendment values. Thus, somewhat ironically, when the courts, policymakers, and policy advocates, speak of a right of access to the media, they typically are not actually talking primarily about an *individual’s First Amendment right of access to the media*; rather, they are talking about a right of access to the media that has been granted to the individual in the name of the First Amendment rights of the community/audience as a whole.

Distinctions Between Access to Audiences and Access to the Media

On the surface, it may seem that the concepts of access to audiences and access to the media basically are synonymous. This is not the case, particularly in the highly complex, fragmented, and increasingly consolidated media environment of today.⁸⁵ Indeed, just 30 years in the past it may have been easier to assume congruence of the concepts of access to the media and access to audiences, given that 30 years ago we were still very much in an era of true “mass” media, in which there were far fewer content options, each of which could be better guaranteed large, heterogeneous audiences than they can today.⁸⁶ At that point in time, it seems reasonable to presume that their was greater equivalence in the audience reach potential of those with access to the media than there is today.

Certainly, gaining access to the media is central to the process of gaining access to audiences; however, there are other factors at work that ultimately affect the level of access to audiences that a

⁸³ See *Miami Herald*, 418 U.S. 241, 247-248.

⁸⁴ See Barron, *supra*, note 56 at 498.

⁸⁵ See generally, James.N. Horwood, *Public, Educational, and Governmental Access on Cable Television: A Model to Assure Reasonable Access to the Information Superhighway for All People in Fulfillment of the First Amendment Guarantee of Free Speech*, 25 SETON HALL L. REV. 1413 (1995).

⁸⁶ For a discussion of media and audience fragmentation, see Philip M. Napoli, *AUDIENCE ECONOMICS: MEDIA INSTITUTIONS AND THE AUDIENCE MARKETPLACE* (2003). For a discussion of the increasing challenges that the

mediated communicator enjoys. Access to the media is, for the most part a binary concept (either one has access to a media outlet or one does not), whereas the extent to which a speaker possesses access to an audience is a matter of degree, with the degree of access a function of a variety of factors, including the technological characteristics of the medium, the system of content distribution, and audience awareness and availability. Thus, for instance, a cable network placed at channel 110 on a cable system does not have the same degree of access to audiences as a network placed at channel 12, due not only to the fact that many audience members likely don't subscribe to a channel package that includes all upper-tier channels, but also due to the fact that demonstrated patterns of the typical individual's media consumption indicate that channels located further up the dial are less likely to be accessed by the typical viewer.⁸⁷

Similarly, a web site does not have the same level of access to the typical audience member in a particular media market as a broadcast station/network, due not only to the lower levels of Internet penetration relative to television penetration, but also due to factors such as the lower level of audience awareness that the web site is likely to have in a media environment that is much more fragmented than what exists in the television context.⁸⁸ Similarly, when we focus solely on the Web, individual web sites are not equivalent in their levels of access to audiences due to factors such as variations in placement by search engine listings and linkages and cross-promotional arrangements with other web sites.⁸⁹ Ironically,

contemporary communications environment poses for speakers attempting to access audiences, *see generally, Note: The Impermeable Life, supra* note 51.

⁸⁷ *See generally* James G. Webster and Patricia F. Phalen, THE MASS AUDIENCE: REDISCOVERING THE DOMINANT MODEL (1997).

⁸⁸ Of course, from a global standpoint, the web site's audience access may be greater, but as the examples of the application of the alternative means of communication test discussed previously indicated, it often is necessary to take into consideration the specific audience that a speaker is trying to reach. Thus, even today, for television broadcasters the web does not represent a viable alternative to the broadcast spectrum for reaching their desired audience, otherwise these broadcasters would have abandoned the broadcast spectrum, with all of the onerous government regulations associated with it, for webcasting. This has not happened, suggesting that the web does not yet represent a sufficiently effective alternative means of reaching the audiences sought by broadcast stations or networks.

⁸⁹ Andrew Chin, *Making the World Wide Web Safe for Democracy: A Medium-Specific First Amendment Analysis*. 19 HASTINGS COMMUNICATIONS AND ENTERTAINMENT L.J. 309 (1997).

as the research of political scientist Matthew Hindman⁹⁰ shows, in the web environment, where equality in the level of access to the particular medium is greater than has ever been achieved in traditional media, the level of access to audiences afforded to those with access to the medium appears to be at its most unequal. Hindman reaches this conclusion on the basis of data showing the enormous disparity across web sites in terms their quantity of “incoming links” (i.e., the number of other sites linking to a particular site),⁹¹ and on the basis of data showing that audience attention is, in fact, more heavily concentrated around a select few speakers in the on-line media realm than it is in the off-line media realm.⁹² Such findings suggest vast differences in the level of access to audiences available to speakers on-line, though, as economist Bruce Owen has noted, it is often difficult to effectively distinguish between “access” and “success.”⁹³

Access variations can exist across individual content types as well. For instance, policymakers traditionally have valued broadcast programming produced within local markets and/or addressing local issues and concerns (e.g., local public affairs programming).⁹⁴ Unfortunately, when programmers have provided such programming, economic incentives frequently have led them to air such programming in very poor time slots (with the quality of the time slot defined in terms of the size of the available audience).⁹⁵ It perhaps goes without saying that the producers of such programming are not enjoying the same level of access to audiences as the producers of programming that is aired in prime time. A program

⁹⁰ See Matthew Hindman, *A Mile Wide and an Inch Deep: Measuring Media Diversity Online and Offline*, In *MEDIA DIVERSITY AND LOCALISM: MEANING AND METRICS* (Philip M. Napoli, ed.) (in press); “*Googlearchy*”: *How a Few Heavily Linked Sites Dominate Politics Online*, unpublished manuscript (2003).

⁹¹ See Hindman, “*Googlearchy*,” *supra* note 90.

⁹² See Hindman, *A Mile Wide and an Inch Deep*, *supra* note 90.

⁹³ See Bruce M. Owen, *Confusing Success with Access: “Correctly” Measuring Concentration of Ownership and Control in Mass Media and Online Services*. Stanford Law School, John Olin Program in Law & Economics Working Paper 284. Available: <http://ssrn.com/abstract=545302> (Accessed January 1, 2005).

⁹⁴ See Broadcast Localism. Notice of Inquiry, 19 FCC Rcd. 12425 (2004).

⁹⁵ Philip M. Napoli, *Market Conditions and Public Affairs Programming: Implications for Digital Television Policy*. 6 HARV. INT’L J. OF PRESS/POLITICS 15 (2001).

that airs at dawn on Sunday does not have the same level of access to an audience as a program that airs at 8:00 PM.⁹⁶

Policymakers, have, in certain instances, been sensitive to such disconnects between the concept of access to the media and the concept of access to the audiences. Consider, for instance, the now-defunct Prime-Time Access Rule, which prohibited broadcast networks from offering programming to their affiliates during the first hour of prime-time (7:00 to 8:00 EST), in order to make this time slot and, most importantly, the large audiences accompanying this time slot, available to independent program producers, thereby expanding the range of content providers with access to large audiences.⁹⁷ The time slot specificity of PTAR represents the recognition that mere access to the media may not be sufficient for certain policy objectives. Additional steps may need to be taken to ensure adequate access to audiences.⁹⁸ Similarly, the FCC's "reasonable access" provision, which grants political candidates access to broadcast facilities,⁹⁹ includes a requirement that broadcasters provide candidates with access during prime time,¹⁰⁰ in recognition of the fact that politicians will achieve their greatest level of access to audiences during this time period, when HUT (households using television) levels generally are at their highest. As the FCC noted, "Such a refusal would deny the candidates access to the time periods with the greatest audience potential."¹⁰¹

More recently, in describing its efforts to craft a Diversity Index to facilitate the formulation of effective media ownership regulations, the Federal Communications Commission noted that, "we retain

⁹⁶ See Fiss, *supra* note 73 at 9 for a similar point. As Fiss notes, "Access to a radio or television station or newspaper is provided only as a way of affording access to the public, and any access regulation should be judged accordingly. That explains why so-called public access channels on cable T.V. – allowing the citizen to appear on camera at 3:00 AM – are inadequate. Such appearances play no more role in public deliberations than having a book deep in the stacks of a university library."

⁹⁷ Review of the Prime Time Access Rule, 11 FCC Rcd 546 (1995)

⁹⁸ It is worth noting, however, that regardless of the extent to which PTAR helps to illustrate the distinction between access to the media and access to audiences, PTAR, like many media access policies, was premised and justified primarily on the basis of the rights of the audience to access to diverse sources, rather than upon the basis of the rights of speakers to access to audiences. *Id.*

⁹⁹ See *supra*, note 4.

¹⁰⁰ Licensee Responsibility under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971, 47 F.C.C.2d 516, 516-517 (1974).

our emphasis on . . . ensuring that viewpoint proponents have opportunities to reach the citizen/viewer/listener.”¹⁰² Clearly, this statement reflects a concern with facilitating speakers’ access to audiences. However, the Commission’s perceived failure to adequately reflect this concern in its Diversity Index methodology was a key reason the U.S. Court of Appeals for the Third Circuit remanded the Commission’s ownership decision.¹⁰³ As the court noted in its extensive criticism of the Diversity Index, “Not all voices, however, speak with the same volume,”¹⁰⁴ a statement that clearly reflects the notion that access to the media and access to audiences are far from synonymous – and, perhaps most important – should not be treated as such from a policymaking and policy analysis standpoint.

These examples are meant to illustrate the distinction between the concept of access to the media and the concept of access to audiences, not necessarily to serve as specific examples of First Amendment access problems requiring some sort of policy remedy. In each of these cases, speakers with comparable access to the media have very different levels of access to audiences. Treating the concept of access to the media as synonymous with the concept of access to audiences is therefore inappropriate and represents a dramatic simplification of the access to audiences concept.

Necessity of a Right of Access to Audiences to Media Policy

One certainly could question whether the notion of a speaker’s First Amendment right of access to audiences is necessary or appropriate in the realm of media regulation and policy. In terms of necessity, one could argue that the access to the media concept is sufficient, and that any deeper analysis simply tells us nothing other than the distribution of media consumers’ preferences.¹⁰⁵ Such a perspective, however, completely ignores the important dynamics of the relationships between media

¹⁰¹ *Id.* at 517.

¹⁰² *See* 2002 Biennial Regulatory Review, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13620 (2003).

¹⁰³ *Prometheus Radio Project. v. Federal Communications Commission*, 373 F. 3d 372 (C.A. 3rd Cir. 2004). The court took particular issue with the Commission’s decision not to weight the importance of individual media outlets in accordance with either their potential or actual audience reach.

¹⁰⁴ *Id.* at 408.

¹⁰⁵ *See* Owen, *supra* note 93.

ownership and distribution structure and the dynamics of media consumption that should be at the core of policymakers' analytical concerns. In this regard, the concept of a right of access to audiences is particularly vital to analyzing the regulatory and policy issues emerging in the contemporary media environment. The contemporary media environment is one in which, on the one hand, ownership of the most prominent media outlets is becoming increasingly concentrated and in which, despite the increasing array of available content options, the majority of audience attention remains focused on a narrow range of content providers.¹⁰⁶ On the other hand, new communications technologies such as the Internet raise the possibility of individual speakers having access to global audiences. In such an environment, the issue of speaker access to audiences seems increasingly central to determining whether existing policies are effectively serving the underlying principles of the First Amendment. In an environment in which the definition of a media content provider has essentially expanded from a complex organization to also encompassing an individual in his home office with a PC, and in which the technological characteristics of the media increasingly facilitate access to audiences across local, national, and international boundaries,¹⁰⁷ the question of who does and who does not have access to the media seems increasingly insufficient for analyzing the extent to which the values inherent in the First Amendment are being pursued and protected to their fullest extent. Instead, a more rigorous standard is required.

Balkin develops this idea in his discussion of the promotion of a “democratic culture” as the central purpose of free speech.¹⁰⁸ According to Balkin, “a democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals.”¹⁰⁹ Moreover, the defining characteristics of the contemporary media environment (see above) are central to the achievement of this democratic culture, and therefore must be a point of focus

¹⁰⁶ See James G. Webster and Shu-Fang Lin, *The Internet Audience: Web Use as Mass Behavior*, 46 J. OF BROADCASTING & ELECTRONIC MEDIA 1 (2002).

¹⁰⁷ See Philip M. Napoli, *The Localism Principle Under Stress*, 2 INFO 573 (2000).

¹⁰⁸ Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004).

¹⁰⁹ *Id.*

for policymakers. To the extent that an effective democratic culture relies upon “ordinary people [participating] freely in the spread of ideas and in the creation of meanings that constitute them and the communities and subcommunities to which they belong,”¹¹⁰ an emphasis on maximizing the equitable distribution of the right of access to audiences becomes a central policy priority. This point is particularly important, as it highlights the notion of access to audiences becoming an affirmative policy goal (i.e., the promotion of equitable audience access across the citizenry in order to maximize the extent to which the citizenry’s First Amendment rights as speakers are being fulfilled) as opposed to simply a mechanism for defending against possible intrusions (in the form of private or public policies) on the speech rights of individual speakers.

Another relevant component of Balkin’s argument is that he doesn’t see the changing technological environment (and the increased opportunities for communication that it provides) as a sufficient mechanism for satisfying policymakers’ free speech objectives, but rather as establishing a set of conditions to which policymakers must respond in order to maximize the extent to which contemporary conditions reach their potential to serve and promote a democratic culture.¹¹¹ In this regard, maximizing the equitable distribution of the right of access to audiences remains a policy priority even in the face of technological developments that would seem to inherently promote such distribution.¹¹² Such an

¹¹⁰ *Id.* at 4.

¹¹¹ According to Balkin, “The digital age provides a technological infrastructure that greatly expands the possibilities for individual participation in the growth and spread of culture and thus greatly expands the *possibilities* for the realization of a truly democratic culture.” (emphasis added). To achieve these possibilities, however, “free speech values – interactivity, mass participation, and the ability to modify and transform culture – must be protected through technological design and through administrative and legislative regulation of technology, as well as through the more traditional method of judicial creation and recognition of constitutional rights,” *Id.* at 6. This position stands in stark contrast to the more technologically deterministic position frequently articulated by the Federal Communications Commission, in which the very presence of a more expansive and robust technological landscape is seen as absolving policymakers of their responsibility for monitoring – and reacting to – conditions in the contemporary speech environment; *see infra*, note 127.

¹¹² This is due to the associated abilities to control, limit, and discourage participation in democratic culture that also are being facilitated by these new technological developments. *See id.* at 14-24. *See also* Steve Mitra, *The Death of Media Regulation in the Age of the Internet*, N.Y.U. J. LEGIS. & PUB. POL’Y 415, 429-437 (2000/2001); Jon M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 613 (1999): “Notwithstanding the Court’s reluctance to monitor the outcome of the

approach reflects the fact that media policymakers' perspective on the First Amendment should be one in which they are concerned with the extent to which the contemporary media environment is reaching its full potential to serve the values inherent in the First Amendment, as opposed to one in which the contemporary media environment is being assessed against some past period in media history.

Implications for Media Policy

It has been argued to this point that the concept of speaker access to audiences has been largely supplanted in media contexts as a policy objective to be promoted and protected with the concept of speaker access to the media. However, as described above, the concept of speaker access to the media is less nuanced than the concept of speaker access to audiences. Consequently, a greater emphasis on speaker access to audiences is necessary and appropriate when considering the role of the First Amendment in electronic media regulation and policy issues. This section explores what such a shift would mean for electronic media regulation and policy, particularly in relation to structural media policy issues, which inherently involve the "allocation of speech entitlements."¹¹³ It is important to emphasize that this section does not provide a fully developed system for applying the right of access to audiences to media policy issues. To do so is a complex task that is beyond the scope of this paper. However, this section does attempt to provide a starting point for deeper and more extensive explorations of the role of the First Amendment right of access to audiences in media regulation and policy by examining those cases in which the access to audiences issue has arisen.

The question of a right of access to audiences arose most explicitly in a decision by the United States Court of Appeals for the D.C. Circuit addressing the issue of whether broadcasters had the right to "channel" political advertisements deemed potentially harmful to children to late-night hours, in light of the FCC's "reasonable access" provisions, which require equal access to broadcast facilities for all legally

exercise of free expression, it must remain cognizant that failure to provide a *minimal opportunity for widespread participation* will result in the shrinking and eventual elimination of the marketplace" (emphasis added).

¹¹³ Michael J. Burstein, *Toward a New Standard of First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1060 (2004).

qualified candidates.¹¹⁴ In this case, the issue involved whether the channeling of an advertisement containing graphic abortion footage constituted a violation of the reasonable access provisions.¹¹⁵ The petitioner, Daniel Becker, argued that the reasonable access provisions do not “permit a licensee to deny a candidate access to adult audiences of his choice merely because significant numbers of children may also be watching television.”¹¹⁶ In overturning the Commission’s decision to allow the channeling of political advertisements, the court noted that any channeling denied a candidate “his statutory right of ‘access to the time periods with the greatest audience potential.’”¹¹⁷ The court also went beyond the issue of general audience reach, noting that “while it is possible to visualize accommodations at the margin in which a political message is broadcast during school hours or the late, late evening when significantly fewer children are watching television, any such accommodation is apt to deprive a candidate of particular categories of adult viewers whom he may be especially anxious to reach. . . Thus, the ruling creates a situation where a candidate’s ability to reach his target audience may be limited.”¹¹⁸ Thus, the court interpreted the reasonable access provisions as granting political candidates the right to reach specific audience segments. However, it is important to note that the court reached its conclusions only via assessing the extent to which the Commission’s decision to allow channeling violated the language of the reasonable access provisions, declining “to address Mr. Becker’s argument that channeling a candidate’s campaign advertisement violates the candidate’s First Amendment rights.”¹¹⁹ In this regard, this decision perpetuates the tendency to ignore or neglect the role of the First Amendment right of access to audiences in electronic media policy.

¹¹⁴ Becker v. Federal Communications Commission, 95 F.3d 75 (D.C. Cir. 1996).

¹¹⁵ For detailed discussions of this case, see Lili Levi, *The FCC, Indecency, and Anti-Abortion Political Advertising*, 3 VILL. SPORTS & ENT. L.J. 85 (1996); Milagros Rivera-Sanchez and Paul H. Gates, Jr., *Abortion on the Air: Broadcasters and Indecent Political Advertising*, 46 FED. COMM. L.J. 267 (1994).

¹¹⁶ *Id.* at 79.

¹¹⁷ *Id.* at 80 (citations omitted).

¹¹⁸ *Id.* at 80.

¹¹⁹ *Id.* at 84.

One of the more extensive discussions of the relationship between the First Amendment and access to audiences within an electronic media context can be found in the Court of Appeals for the Eleventh Circuit's decision in *Warner Cable Communications v. City of Niceville*.¹²⁰ In this decision, the court rejected Warner Cable's claim that the city of Niceville's plan to establish a government-owned and -operated cable system to compete with Warner Cable's incumbent system was a violation of Warner Cable's First Amendment rights. According to the court:

We agree that the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. *The government would then be preventing the speakers' access to that audience, and first amendment concerns would arise.* For instance, if a city government builds a better soapbox, equipped with spotlights and powerful loudspeakers, next to the longstanding antique soapbox in the city square, and if government speakers dominate the new soapbox, then speakers on the first soapbox do not truly have the opportunity to communicate their views even to those who might wish to hear them. The city would then be 'drowning out' the voice of the private speakers. But if the soapboxes are equal and the city speakers simply attract more listeners because the listeners prefer the city's message, there is no 'drowning out,' no denial of access, and no first amendment violation. . . . *the speaker on the first soapbox cannot demand to monopolize the information-seeking audience in the name of the first amendment.*¹²¹

This passage makes the important point that communications technologies can be used to "monopolize the information-seeking audience"¹²² in such a way that other speakers' First Amendment rights of access to audiences may be affected. According to this passage, there needs to be some effort towards fairness and equity in the distribution of access to audiences.

¹²⁰ 911 F.2d 634 (1990) (emphasis added).

¹²¹ *Id.* at 638.

¹²² *Id.*

The issue of a First Amendment right of access to audiences arose more recently in the Supreme Court's upholding of the FCC's cable television must-carry rules.¹²³ In assessing the constitutionality of the must-carry rules, the Court assessed the extent to which the rules denied individual cable networks access to audiences. One of the plaintiff's primary arguments was that the must carry rules make it more difficult for cable programmers to achieve carriage on cable systems – essentially, making it more difficult for them to gain access to television audiences. As Justice Breyer noted in his concurring statement, the must-carry rules prevent “displaced cable program providers from obtaining an audience,” which amounts to “a suppression of speech.”¹²⁴ However, citing evidence that 99.8 percent of all cable programming carried before the enactment of the must-carry rules was carried after the enactment of the rules, the Court concluded that the must-carry rules did not violate the First Amendment, in part due to the fact that denials of access to audiences were minimal.¹²⁵ This decision, then, not only suggests that consideration of a speaker's right of access to audiences is appropriate in the realm of media policy, but also that some infringement on certain speakers' abilities to access audiences is permissible from a First Amendment standpoint in order to improve other speakers' (in this case, broadcasters') level of access to audiences.

A number of important points can be gleaned from these cases. First, as the *Warner Cable* decision indicated, monopolies in the context of access to audiences raise significant First Amendment concerns. Given that, as was illustrated previously, access to audiences and access to the media are not synonymous, policymakers need to remain sensitive to the possibility of monopolies (or near monopolies) in access to audiences arising even in instances when there may not be monopolies, or near monopolies, in access to the media. As the court noted, a speaker “cannot demand to monopolize the information-seeking audience in the name of the first amendment.”¹²⁶ From an access to audiences standpoint,

¹²³ *Turner Broadcasting*, 520 U.S. 180.

¹²⁴ *Id* at 226.

¹²⁵ *Id* at 214.

¹²⁶ *See supra* note 120.

policymakers must be more sensitive to the various mechanisms that can produce monopolies in the area of access to audiences, such as characteristics of the distribution process or technologies, that can produce significant inequalities in the level of access to audiences, even when access to media outlets appears fairly equitable.

The more finely nuanced access to audiences concept raises the inevitable possibility that the application of access to the media criterion does not meet standards established by the access to audiences criterion. A focus purely on the issue of access to the media “ignores . . . the problem of audience access. No provision is made to ensure that speakers have a meaningful opportunity to reach an audience.”¹²⁷ Thus, an approach that focuses more intently on the concept of access to audiences ultimately could be more demanding, from a First Amendment standpoint.

In this regard, when policy-makers engage in their increasingly common practice of reciting an exhaustive list of media outlets and sources that are available as evidence of a media environment that well-serves the underlying values of the First Amendment, they may be operating under an overly simplistic notion of the extent to which the First Amendment right of access to audiences is being well-served. For instance, the Federal Communications Commission began its Notice of Proposed Rule Making announcing a reconsideration of the broadcast station/newspaper cross-ownership rules by stating:

The Commission first adopted the rule in 1975, when there were approximately 1,700 daily newspapers, 7,500 radio stations, and fewer than 1,000 TV stations. Three national commercial broadcast networks had a combined prime time audience share of 95%.

Today, the multimedia environment in which broadcast stations and newspapers operate is significantly different. Although there are now fewer than 1,500 daily newspapers, there are not only many more broadcast stations, but also wholly new programming networks and distribution platforms. There are more than 12,000 radio stations, and more than 1,600 full-power TV stations. Commercial TV stations distribute the programming of

seven national commercial networks, and cable television systems and satellite carriers distribute multiples of that number. In the current 2000-2001 TV season just completed, the four largest broadcast networks have a combined prime time audience share of 50% and basic cable networks have a combined prime time audience share of 42%.¹²⁸

This description certainly provides an important indication of the extent to which the media environment has changed and the opportunities for access to the media have increased. However, such a description represents only the most rudimentary level of analysis in terms of determining the distribution of the right of access to audiences, the extent to which the contours of the contemporary media environment are fulfilling their potential to facilitate widespread access to audiences, and whether policy remedies to improve the situation may be needed. Consider, for instance the argument of J.M. Balkin, who notes that,

Communication is scarce . . . in the sense that there is only so much available audience time to go around. Although newer technologies like the mass media can reach more people more quickly, they still do not eliminate this . . . type of scarcity. Indeed, mass communication only increases competition for audience attention. . . . In an earlier age, it may have seemed that there was a plentitude of listeners, and audience scarcity was not a real phenomenon. With the advent of mass media, however, we see all the more urgently that speech rights can come into conflict not only with the property rights of others, but also with the speech rights of others.¹²⁹

From this standpoint, to what extent does the FCC's recitation of the range of available communications channels represent any kind of meaningful analysis of the relative effectiveness of each channel as alternative means of reaching the audiences reached via the most powerful media outlets? How do these different means of communication compare in regards to criteria such as the scope of their audience reach; their ability to reach a speaker's desired audience; the costs associated with reaching desired

¹²⁷ Zatz, *supra* note 11 at 189.

¹²⁸ See, *In re*: cross-ownership of broadcast stations and newspapers; newspaper/radio cross-ownership waiver policy, MM Docket 01-234, 96-197, 1-2.

audiences; and the autonomy from gatekeepers provided? All of these criteria have been explicitly raised in contexts dealing with a speaker's right of access to audiences, and therefore should be central to the analysis and formulation of media policy. Moreover, this type of analytical framework utilized by the FCC perpetuates the troubling tendency amongst policymakers to assess the extent to which the contemporary media landscape effectively serves First Amendment values against past conditions, rather than against the contemporary environment's full potential to serve First Amendment values.

The Supreme Court's decision in *Turner* suggests that policies that reduce the levels of access to audiences for some speakers may be constitutional. In upholding the must-carry rules, the Court acknowledged that some speakers (i.e., cable networks), would have their level of access to audiences reduced due to their diminished cable carriage, but that such a reduction was acceptable in light of the benefits that the must-carry rules brought to viewers in the form of a greater diversity of sources of information and in the form of local sources and information. In this regard, the arguments and analysis surrounding the *Turner* decision follow precedent in that there was very little focus on the extent to which the must-carry rules potentially promoted the First Amendment rights of speakers, only on the extent to which they potentially promoted the First Amendment rights of audiences.¹³⁰ Concerns regarding broadcasters' access to audiences were considered primarily from an economic standpoint (i.e., the possible economic harms that could come from reduced audience reach) rather than from a First Amendment standpoint. Conceivably the arguments and analysis could have focused instead on (or at least given equal prominence to) the issue of the First Amendment rights of speakers from an affirmative standpoint – and the extent to which monopolies in local cable markets potentially infringed on the First Amendment rights of broadcasters by limiting their access to audiences.

¹²⁹ J.M. Balkin. *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 408-409.

¹³⁰ See Justice Breyer's concurring statement for a discussion of the collectivist First Amendment values served by the must-carry decision, *infra* note 148 at 225-226.

Applying an access to audiences analytical framework provides a distinctive interpretive lens for other media policy areas as well. Consider, for instance, policies such as multiple- or cross-ownership restrictions or license allocation preferences. Ownership restrictions, for instance, can be thought of as restrictions on the access to audiences for certain speakers in order to promote access to audiences for other speakers. The Supreme Court has upheld ownership restrictions as constitutional,¹³¹ but in so doing, did not directly address the access to audiences issue. Instead, the Court relied on the unique characteristics of the broadcast spectrum, noting that “there is no unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”¹³² The Court also invoked the unique nature of broadcasting to refute the argument that “the government may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others.”¹³³ This perspective suggests that, in the realm of electronic media policymaking, consideration for the distribution of speech rights is appropriate.

Nonetheless, in *Fox Television Stations Inc. v. FCC*,¹³⁴ the broadcast networks contended that the national audience reach cap limiting television station ownership represented an infringement on their First Amendment rights – essentially, a government-imposed infringement on their right of access to audiences. The networks opposing the limit argued that their First Amendment right to directly access every television viewer in the United States was being violated.¹³⁵ To the extent that a significant

¹³¹ See *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), upholding the FCC’s local newspaper-broadcast cross-ownership limits.

¹³² *Id.* at 799, quoting *Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367. The United States Court of Appeals for the D.C. Circuit responded similarly to Sinclair Broadcasting’s First Amendment argument against the FCC’s local television station ownership limit, in which Sinclair claimed that the Commission’s “eight voices” test represented “an overly broad restriction on television broadcasters’ right to speak,” *Sinclair Broadcast Group v. Federal Communications Commission*, 284 F.3d 148, 168-169 (D.C. Cir. 2002). In contrast, the court devoted virtually no attention to Time Warner’s First Amendment arguments against the cable horizontal and vertical ownership limits in its decision to reverse and remand those limits, *Time Warner v. Federal Communications Commission*, 240 F.3d 1126 (2001).

¹³³ *Supra* Nicevill, 911 F.2d 634, 799, quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

¹³⁴ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

¹³⁵ *Id.* at 1045. “The networks contend that the NTSO Rule violates the First Amendment because it prevents them from speaking directly – that is through the stations they own and operate – to 65% of the potential television audience in the United States.”

relaxation of the ownership rules would facilitate a tremendous level of access to audiences to a very small number of speakers, the question inevitably arises as to whether such a policy decision is in keeping with the First Amendment. If we consider the First Amendment right of access to audiences as a right that media policymakers should promote in the same way that they have acknowledged the need to promote a right of access to the media, then the claims of an infringement on their right of access to audiences articulated by the broadcast networks pale alongside those of the speakers whose ability to reach audiences will be curtailed by the concentration of station ownership (and audience access) facilitated by the relaxation or elimination of the ownership cap. If indeed promoting the right of access to audiences is something that media policymakers should consider as a policy goal, it becomes difficult to justify that it is a right that accrue so disproportionately to a select few speakers.

Although the court did not find that the ownership cap violated the First Amendment,¹³⁶ the court reached this decision without being confronted with the argument that the cap was motivated in part by the desire to promote speakers' First Amendment rights, by preventing further distortion in the allocation of speakers' rights of access to audiences. To the extent that a relaxed national audience reach cap facilitates greater inequality in terms of the distribution of speakers' level of access to audiences, there is a speaker-based First Amendment argument that actually runs counter to the First Amendment argument posed by those opposed to the cap.

Similarly, license allocation preferences (such as the now-defunct minority and gender broadcast licensing preferences¹³⁷) could be thought of as increasing the level of access to audiences for certain categories of speakers – though such a preference necessarily reduces other categories of speakers' abilities to reach audiences. Certainly, the key question that arises from this approach involves when – and to what extent – is it appropriate to restrict some speakers' access to audiences in the name of

¹³⁶ *Id.* at 1045-1046.

¹³⁷ *See Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), in which the Supreme Court upheld the FCC's minority preference in the allocation of broadcast licenses. *See Lamprecht v.*

preserving or promoting other speakers' access to audiences?¹³⁸ The courts have not, at this point, provided clear and explicit guidance to policymakers in terms of when and to what extent such denials of access are permissible.¹³⁹ However, it would appear that such denials of access to audiences can potentially survive judicial scrutiny.

What is particularly interesting is that policies that have reduced certain speakers' levels of access to audiences have, in some instances, survived First Amendment scrutiny despite the fact that potentially the most powerful argument on their behalf has been largely neglected. As was illustrated above, the concept of a right of access to the media generally has been developed and applied with an emphasis on the benefits that accrue to viewers or listeners from the granting of such access rights.¹⁴⁰ Thus, a right of media access generally has been premised more on the First Amendment rights of viewers/listeners than it has upon the First Amendment rights of speakers. This history of justifying a speaker's right of access to the media in terms of collectivist values weakens such access policies from a First Amendment standpoint. This is due largely to the fact that the collectivist interpretation of the First Amendment is not as widely accepted within the courts as the individualist approach.¹⁴¹ Post has gone so far as to describe

Federal Communications Commission, 958 F.2d 382 (D.C. Cir. 1992), for a decision overturning the FCC's gender preference in the allocation of broadcast licenses.

¹³⁸ As Redish and Kaludis note, "what is happening when a right of expressive access is created is, in fact, the redistribution of existing resources rather than the generation of completely new expressive resources. In most contexts, then, from a redistributive perspective a right of access must be viewed as nothing more than a zero sum game; any extension of expressive power to A will automatically and correspondingly reduce the expressive power of B. Thus, the only way we can be sure that extension of a right of expressive access will actually 'enrich' public debate – as its proponents have universally claimed – is to assume that public debate will be enriched more by the expression of those who have been granted access than by the expression that would have been disseminated by the expressive resource operator, but for the government's expressive redistribution" Martin H. Redish and Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 N.W.U. L. REV. 1083, 1085-1086 (1999).

¹³⁹ For a discussion of the question, "to what extent should we limit speech of the powerful and subsidize speech of the disadvantaged in order to maximize the public good?" see Nicholas Wolfson, *Equality in First Amendment Theory*, 38 ST. LOUIS L.J. 379, 383 (1993).

¹⁴⁰ See *supra*, notes 78-80.

¹⁴¹ See S. Ingber, *Rediscovering the Communal Worth of Individual Rights: the First Amendment in Institutional Contexts*, 69 TEXAS L. REV. 1 (1990); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 63 UNIV. OF COLORADO L. REV. 1109 (1993).

the Supreme Court as “largely hostile”¹⁴² to collectivist First Amendment interpretations. Individualist First Amendment interpretations generally are seen as much more widely accepted within the judiciary.¹⁴³ The practical reality, then, is that policies that are justified on the basis of maximizing citizens’ rights of access to diverse sources and content often cannot withstand the scrutiny of an individualist First Amendment interpretation – one in which the rights of the speaker are paramount.

Consider, for instance, *Latera v. Isle at Mission Bay Homeowners Association*, in which the homeowners association’s prohibition against residents installing satellite dishes was upheld.¹⁴⁴ The initial (and, in this case, unsuccessful) rhetorical response against such a prohibition was to assert that audiences are being denied access to speech to which they have a constitutional right.¹⁴⁵ However, such an approach “ignores the rights of persons outside a residential association to communication with those inside.”¹⁴⁶ Perhaps arguments that emphasize the denials of these speakers’ rights of access to the audiences within the area governed by the homeowners association would achieve stronger First Amendment traction with the courts than arguments that emphasize the denials of the audience’s rights of access to the content being provided by the satellite services.

Too often, advocates of increased structural regulation of the media industries have emphasized that, in such cases, “there are legitimate speech interests on both sides of the dispute,”¹⁴⁷ but then have unfortunately explicated the speech interests on one side of the dispute (the side opposing government

¹⁴² Post, *supra* note 141 at 1109. According to Neuborne, “The currently prevailing reading [of the First Amendment] celebrates individual autonomy, viewing the First Amendment as a check on government interference with certain highly favored categories of individual behavior (like political speech ...). Viewed solely as a means of disabling government, a purely “autonomy-centered” First Amendment can be affirmatively hostile to democracy by insulating private activity from regulation despite its deleterious effect on democracy.” Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*. 93 NW. U.L. REV. 1055, 1058 (1999)

¹⁴³ See Ingber, *supra* note 141; Post, *supra* note 141.

¹⁴⁴ *Latera v. Isle at Mission Bay Homeowners Ass’n*, 655 So. 2d 144, 146 (Fla Dis. Ct. App. 1995).

¹⁴⁵ Id. at 145: “Appellant also raised the affirmative defense that the enforcement of a covenant against satellite dishes violates First Amendment rights to privacy and free access to information.” See also Zelica Marie Grieve, *Latera v. Isle at Mission Bay Homeowners Association: The Homeowner’s First Amendment Right to Receive Information*, 20 NOVA L. REV. 531 (1995). The title of this article is indicative of what is inevitably the prevailing First Amendment approach to such issues.

¹⁴⁶ See Note: *The Impermeable Life*, *supra* note 51.

regulation) being those of the speaker and those on the other side of the dispute (the side advocating government regulation) being those of the audience.¹⁴⁸ Such a characterization actually under-represents the relevant speech interests on the pro-regulation side of the dispute, as it neglects the interests of those speakers whose access to audiences would be facilitated or perhaps enhanced by the structural regulation at issue.

From a rhetorical strategy standpoint, those policies that do in fact improve citizens' access to diverse sources need not be justified or defended primarily on the basis of their ability to serve the collectivist functions of the First Amendment, as has been the traditional strategic approach.¹⁴⁹ Rather, such policies can (and should) legitimately be interpreted as preserving and promoting the individual liberties that are at the core the more widely accepted individualist interpretation of the First Amendment, given the extent to which they promote a speaker's First Amendment right of access to audiences. In this regard, then, such policies could be seen as doubly effective from a First Amendment standpoint, in that they directly serve both individualist and collectivist First Amendment values. In the end, adopting a rhetorical approach that extends beyond collectivist values that have become associated with the access to the media concept and more fully embraces individualistic values associated with the access to audiences concept ultimately could strengthen the defensibility of any speaker access policies from a First Amendment standpoint.

¹⁴⁷ Michael J. Burstein, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1032 (2004).

¹⁴⁸ For instance, in the Turner Broadcasting decision, Justice Breyer, in acknowledging that there are "First Amendment interests on both sides of the equation," references primarily the First Amendment rights of the cable operators, which he notes need to be weighed against the need to "facilitate the public discussion and informed deliberation, which . . . the First Amendment seeks to achieve." See *Turner Broadcasting*, 520 U.S. 180 at 1204. Such a description inadequately captures the range of First Amendment objectives at issue, as it neglects the First Amendment rights of broadcasters to have access to the audiences receiving their television programming via cable. For a detailed discussion of Breyer's balancing approach, see Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U.MICH J.L. REFORM 817.

¹⁴⁹ See generally, Jonathan W. Lubell, *The Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunications Act*, 17, ST. JOHN'S J.L. COMM. 11.

Moreover, such an approach would allow for an expansion beyond the traditional contexts in which a right of “access to the media” has been advocated. That is, in most of the most significant “access to the media” cases, what has been advocated is the right of a speaker to temporarily control another speaker’s means of communication.¹⁵⁰ In granting an individual temporary access to a media outlet to deliver his/her message, the voice of the owner of that outlet is, for that time period, silenced. In contrast, in the access to audience cases discussed above, the granting of a speaker or group of speakers access to an audience does not require that they gain temporary, complete control of a communications mechanism owned by another speaker, only that a speech environment be created in which the ideas of multiple speakers can then potentially circulate.¹⁵¹ Translating this latter perspective to the mediated environment would mean focusing less on the issue of speaker access to the media outlets owned by others (i.e., media outlets as pseudo common carriers) and more on creating a speech/media environment in which speakers have access to audiences (i.e., a more competitive, diversified media system). This is the perspective that underlies the public forum doctrine (i.e., creating public spaces for expression, deliberation, and debate among many speakers) and that underlies the alternative means of communication component of the time, place, manner test (i.e., to what extent does the speech environment facilitate the exercise of the speaker’s First Amendment rights?), and to Balkin’s notion of the First Amendment imperative for the creation of a democratic culture.¹⁵² A right of access to audiences perspective, when applied to the mediated environment, should move beyond the right of access to another speaker’s media outlet, and encompass the more wide-ranging objective of crafting a media system in which the right of access to audiences is widely distributed. In this regard, the right of

¹⁵⁰ See *Red Lion Broadcasting*, 395 U.S. 367.

¹⁵¹ In the public forum context, for example, access to the forum is not granted to one speaker at the exclusion of other speakers. The focus is instead on the creation of an environment in which multiple speakers have access to audiences. A similar philosophy should guide electronic media policy, in which the focus is not necessarily on treating individual media outlets as any type of public forum, but as the media system as a whole as such.

¹⁵² See Balkin, *supra* note 108.

access to audiences can – and should – be employed directly on behalf of structural regulation of the media.

If such an approach to the notion of the right of access to audiences were not taken, however, or not accepted by policymakers and the courts, then the First Amendment may compel a more rigorous pursuit of Fairness Doctrine-like policies that grant unaffiliated speakers temporary access to privately held media outlets. To the extent that increased ownership concentration leads to greater inequities in the allocation of audience access rights, perhaps this scenario should be seen as compelling policymakers to, if not address the concentration issue directly, then to respond with policies that counteract the First Amendment harms of such concentration (in terms of diminished equality in access to audiences) by treating these outlets, and the audiences to which they have access, as resources to be shared with a greater portion of the citizenry, in much the same way that the migration of the citizenry from public streets to privately held shopping centers has justified the clear imposition of the public forum doctrine to these private spaces. This of course brings us back to Barron's original contention – that the migration of public discourse and debate to the mediated sphere, combined with the increased privatization and concentration of ownership within this sphere – compels policies that treat private media outlets more like public forums. Perhaps a return to this argument that is more firmly grounded in the First Amendment access rights of speakers, and, consequently, the individualist First Amendment values that are at the core of traditional First Amendment jurisprudence, would strengthen future iterations of this policy argument.

Conclusion

“Much of the complexity and uncertainty in First Amendment doctrine stems from the reality that any comprehensive theory of free speech must cover not only speakers, but listeners as well.”¹⁵³ In the electronic media realm, certainly the listeners have received substantial attention and their rights have been well-articulated. However, this paper has suggested that the emphasis on listeners' rights that is at the core of the right of access to the media that is unique to the electronic media realm, has stunted the

development of a potentially more important, more robust, and more rhetorically effective First Amendment right, that of the right of access to audiences – the right of the speaker to reach listeners.

The differences between a First Amendment right of access to the media and a First Amendment right of access to audiences are significant ones. This paper represents a starting point in exploring the full extent of these differences. This paper has illustrated how the First Amendment right of access to audiences is the more sensitive and analytically rigorous standard, and is in fact the standard more firmly grounded in traditional First Amendment values. For these reasons, to the extent that the concept of a First Amendment right of access to the media has been the predominant guiding First Amendment access right in media regulation and policy, and to the extent that this right has been premised primarily upon collectivist First Amendment values, neither the policy-makers nor the courts, nor, for that matter, the public interest/advocacy community, have been bringing the full force of the First Amendment to bear on their analyses and decision-making.

The application of this right of access to audiences in mediated communication contexts can – and should – be premised upon traditional First Amendment notions of individualistic free speech values, as opposed to (or at least in addition to) collectivist values. Certainly, preserving and promoting speakers' First Amendment rights of access to audiences likely would simultaneously serve collectivist First Amendment values. In this regard, the right of access to audiences may be one of the most powerful rights inherent in the First Amendment, in terms of its ability to fulfill a wide range of the underlying values of freedom of speech.

¹⁵³ See Note: *The Impermeable Life*, *supra* note 51 at 1314-1315.