A LISTENER'S FREE SPEECH, A READER'S COPYRIGHT

*Malla Pollack**

> [T]he First Amendment . . . is much more than an order to Congress not to cross the boundary which marks the extreme limits of lawful suppression. It is also an exhortation and a guide for the action of Congress inside that boundary. It is a declaration of national policy in favor of the public discussion of all public questions.[1]

I. INTRODUCTION

Two of the necessary conditions for a legitimate[2] republican government are that each competent citizen have an equal vote[3] and that each voter have access to the inputs needed for autonomous, informed decision-making.[4] This Article assumes that the required inputs must be richer than those currently available in the modern United States[5] and

* Professor, American Justice School of Law. My thanks for helpful comments on earlier drafts by James Blumstein, Howard Wasserman, and participants at Hofstra's symposium on this issue. All errors are the author's sole responsibility.

1. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 6 (5th prtg. 1954).

2. *See generally* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (discussing various theories of political legitimacy).

3. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2611 (2006) (recognizing "one-person, one-vote requirement" of the United States Constitution).

4. This last condition is "free speech," one substantive right recognized as a necessary condition by even the most process-oriented commentators. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-16 (1980) (recognizing that the voting process is tainted without free speech regarding political issues).

5. Recent empirical research supports the robustness of the media's impact on voters. Fox News became available on cable shortly before the 2000 election and is "significantly to the right of all the other mainstream television networks (ABC, CBS, CNN, and NBC)." Stefano DellaVigna & Ethan Kaplan, *The Fox News Effect: Media Bias and Voting* 1, 2 (Nat'l Bureau of Econ. Research, Working Paper No. 12169, 2006), *available at* http://www.nber.org/papers/w12169. Empirical analysis implies "that Fox News convinced between 3 and 8 percent of its non-Republican listeners to vote Republican." *Id.* at 3. This media-produced shift is "likely to have been decisive in the close presidential 2000 elections." *Id.* at 2. Fox News had an even stronger effect on convincing its

deals only with the issue of how to enrich them without tripping over the United States Supreme Court's current First Amendment doctrine.

Using the term "assumption," however, is largely academic politeness allied to the scholarly habit of not speaking without expertise and comprehensive investigation. As a citizen, my personal (non-academic) opinion is that the so-called professional or mainstream media have abrogated their traditional watchdog function.[6] My conclusion stands on the recent revelation that the *New York Times'* infamous decision to keep silent about warrantless wiretaps was made *before the 2004 presidential election*. Elections are the only chance the public has to discipline the government. Nevertheless, the most prestigious newspaper in the United States[7] bowed to the sitting President's request that it conceal "a potentially explosive piece of news that could [have] tip[ped] the presidential election to John Kerry"[8] and away from the requesting politician. Doubters should also consider ABC's 2006 anniversary miniseries on September 11th[9] and—in a lighter vein—Fox

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viewers "erroneously" that weapons of mass destruction had been found in Iraq. *See id.* at 3 (citation omitted). Fox News' pro-Republican effect seems to be a "generalized ideological shift," as opposed to one in favor of specific candidates focused on by Fox. *See id.* at 24. The effect appears to be caused by viewers' failures to sufficiently discount the biases—even known biases—of supposed "experts." *See id.* at 4, 31. Most importantly, "the Fox News effect was smaller in towns with more cable channels, consistent with competition reducing the media effect." *Id.* at 2 (citation omitted).

6. Ironically, the Newspaper Association of America supports its argument for deregulation of broadcast ownership with the admission that the "alternative media can play a critical watch-dog role with respect to the major media outlets." Comments of the Newspaper Ass'n of Am., In re 2006 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 06-21 (FCC Oct. 23, 2006), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518534929 [hereinafter Newspaper Ass'n of Am.].

7. *But see* PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, MATURING INTERNET NEWS AUDIENCE—BROADER THAN DEEP: ONLINE NEWSPAPERS MODESTLY BOOST NEWSPAPER READERSHIP 48 (2006), http://people-press.org/reports/pdf/282.pdf ("The New York Times receives roughly the same credibility rating as other print news sources . . . . [Twenty percent of people surveyed] say they believe all or most of what they see in the New York Times.").

8. Joe Hagan, *The United States of America Versus Bill Keller*, NEW YORK, Sept. 18, 2006, (Magazine), at 44, 117.

9. *See ABC Says Criticism of 9/11 Film Unjustified—But Scholastic Drops Companion Guide*, EDITOR & PUBLISHER, Sept. 7, 2006, *available at* http://www.editorandpublisher.com/eandp/article_brief/eandp/1/1003118472 (on file with *Hofstra Law Review*) (quoting the President and CEO of Scholastic as saying "[a]fter a thorough review of the original guide that we offered online to about 25,000 high school teachers, we determined that the materials did not meet our high standards for dealing with controversial issues," and reporting earlier letters to ABC from former Secretary of State Madeleine Albright and former National Security Advisor Sandy Berger objecting to alleged factual inaccuracies in the series); Patrick Healy & Jesse McKinley, *Passions Flare as Broadcast of 9/11 Mini-Series Nears: Changes, After Pressure From Democrats*, N.Y. TIMES, Sept. 8, 2006, at A18 (reporting ongoing editing by ABC in reaction to outcries by both

News' mislabeling of former congressman Mark Foley as a Democrat during a discussion of his inappropriate sexual advances to congressional pages.[10]

II. THE PROBLEM

Free speech affirmative action is anathema to the United States Supreme Court.[11] In the article sparking this symposium, Jerome A.

Democrats and members of the Bush administration's own 9/11 commission); *Clinton, Most Americans, Skip ABC's 9/11 Miniseries*, CNN.COM (on file with Hofstra Law Review) ("Editing changes made by ABC to the first part of the miniseries 'The Path to 9/11' were cosmetic and didn't change the meaning of scenes that had angered former Clinton administration officials, a spokesperson for the former president said Monday. . . . [H]istorian Arthur Schlesinger Jr.[] said it was 'disingenuous and dangerous' not to include accurate historical accounts in the movie."); *American Airlines Latest to Hit ABC's 9/11 Film—Legal Action to Follow?*, EDITOR & PUBLISHER, Sept. 11, 2006, *available at* http://www.truthout.org/cgi-bin/artman/exec/view.cgi/64/22440/printer ("Late Monday, American Airlines released the following statement: 'The Disney/ABC television program, 'The Path to 9/11,' which began airing last night, is inaccurate and irresponsible in its portrayal of the airport check-in events that occurred on the morning of [September] 11, 2001.'"); Edward Wyatt, *A Show That Trumpeted History But Led to Confusion*, N.Y. TIMES, Sept. 18, 2006, at C1 ("It's little wonder that ABC's miniseries 'The Path to 9/11' drew stinging criticism earlier this month for its invented scenes, fabricated dialogue and unsubstantiated accounts of how the Clinton and Bush administrations conducted themselves in the years encompassing the World Trade Center attacks of 1993 and 2001. A more puzzling question is why ABC spent $30 million dollars on what, since it lacked commercials, amounted to a five-hour public service announcement.").

10. *See* Brad Blog, http://www.bradblog.com/?p=3570 (Oct. 3, 2006, 6:07p.m.) (showing a screen capture of the erroneous TV image).

11. The Court has squarely rejected the position that "the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society." Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976). *See also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 685 (1994) (O'Connor, J., concurring in part and dissenting in part) ("[T]he First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals."). In relatively recent cases, the Court has ignored the danger from government when the government is the speaker and, often, when government funding is involved. The level of danger from such conduct is hotly disputed. *See, e.g.*, MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001); Lee C. Bollinger, *The Sedition of Free Speech*, 81 MICH. L. REV. 867 (1983); Stephen L. Carter, *Technology, Democracy, and the Manipulation of Consent*, 93 YALE L.J. 581 (1984) (book review); Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229 (1991); Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. (1984); Abner S. Greene, *Government Speech on Unsettled Issues*, 69 FORDHAM L. REV. 1667 (2001); Steven J. Heyman, *State-Supported Speech*, 1999 WISC. L. REV. 1119; Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005); Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317 (2004); John E. Nowak, Essay, *Using the Press Clause to Limit Government Speech*, 30 ARIZ. L. REV. 1 (1988); Frederick Schauer, *Is Government*

Barron characterized the Court's central error as hypothesizing a romanticized speaker.[12] He argued for refocusing on the listener's access to the full range of disparate information and opinions[13]—a listener's free speech jurisprudence. I agree and add that the Court's copyright jurisprudence is similarly marred by its congruent focus on a romanticized author. Authors and speakers are related agents; authors are that subset of speakers who commit their words to writing.[14]

The Supreme Court recognizes the copyright-free speech link, being simultaneously speaker- and author-centric. Upholding the latest extension of the copyright term, the Court refused strong First Amendment review because "[t]he Framers intended copyright itself to be the engine of free expression."[15] Copyright, purportedly, "incorporates its own speech-protective purposes and safeguards," the primary one being fair use.[16] Fair use, however, generally requires "transformative" use:[17] the re-user must also be an originator. Copyright frowns on mere redistribution of another's expression. Congruently, the Court lectures that "[t]he First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."[18]

Perhaps the clearest example of the obtuseness of this approach is the recent case upholding a federal spending statute requiring filtering of

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Speech a Problem?, 35 STAN. L. REV. 373 (1983); Steven Shiffrin, *Government Speech and the Falsification of Consent*, 96 HARV. L. REV. 1745 (1983) (book review).

12. *See* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1642 (1967) (labeling as a romantic misconception the assumption "that, without government intervention, there is a free market mechanism for ideas" to circulate).

13. *Id.* at 1653 (agreeing with Alexander Meiklejohn that "the point of ultimate interest is not the words of the speakers but the minds of the hearers").

14. In this sentence, "writing" is any tangible embodiment of the work which exists for more than a transitory duration. *See* 17 U.S.C. § 102(a) (making copyright turn on such fixation). Other limits on legally enforceable rights under the copyright statutes are beyond the scope of this Article.

15. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985)).

16. *Id.*

17.

> The central purpose of [the fair use] investigation is to see, in Justice Story's words, whether the new work merely "supersedes the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (citations omitted) (quoting Folsom v. March, 9 F. Cas. 342, 349 (1841); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

18. *Eldred*, 537 U.S. at 221.

all Internet-connected computers in public libraries.[19] The majority refused to characterize library Internet access as a public forum, declaring, "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak."[20] I agree that libraries do not acquire material because they desire to provide soap boxes for speakers; libraries exist to serve *readers*, not authors.[21] Libraries are the epitome of a listener-centric public forum.

Oddly, *First National Bank of Boston v. Bellotti*, the leading case in which the Court resisted its standard speaker-bias, protects corporate political speech.[22] A cynic might argue that the Court simply prefers to protect the rich—media giants and banks—who tend to support the status quo and, perhaps, the Republican party. A more respectful commentator might argue that the Court properly chose to protect political speech from government interference, even when—as with the bank—the speaker has no autonomy interests. Perhaps the Court's highest value is private autonomy, followed, at a great distance, by listeners' interests in hearing political speech, with the censoring government remaining the ultimate enemy.[23] Alternatively, the Court

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19. *See* United States v. Am. Library Ass'n, Inc., 539 U.S. 194, 214 (2003) (plurality opinion).

20. *Id.* at 206. The Court also relied on the need for librarians to have editorial discretion, which it allowed federal funding strings to channel. *See id.* at 205.

21. The Court did not focus on readers despite quoting the American Library Association's Library Bill of Rights calling for libraries to provide "[b]ooks and other . . . resources . . . for the interest, information, and enlightenment of all people of the community the library serves." *Id.* at 203-04 (quoting Am. Library Ass'n Bill of Rights, art. I (1948)). United States copyright law recognizes this by not giving authors a right to demand payment for lending out books, a right which exists even as to non-profit lending in many countries. *Compare, e.g.*, Copyright, Design Right and Related Rights, 1988, c. 48 § 40(A) (Eng.) (granting copyright exemptions to only some lending of books); Public Lending Right Act, 1979, c. 10 § 1 (Eng.) (establishing a system of remuneration of authors for the circulation of their books through the library system), *with* 17 U.S.C. § 109(a) (2000) (ending authors' rights over physical books when each respective book is first sold).

22. 435 U.S. 765, 795 (1978) (holding unconstitutional a Massachusetts statute limiting the use of corporate funds to affect the outcome of most referenda). Some other cases do focus on listeners or readers. For example, the Court focused on the rights of the willing recipient of mail classified as "communist political propaganda." *See* Lamont v. Postmaster Gen., 381 U.S. 301, 302, 305 (1965) ("We conclude that the Act as construed and applied is unconstitutional because it requires an official act (*viz.*, returning the reply card) as a limitation on the unfettered exercise of the *addressee's* First Amendment rights.") (emphasis added).

23.

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather

may have worded *Bellotti* in terms of listeners solely to forebear deciding an unnecessary constitutional issue: whether corporations have independent free speech rights.[24] The Court, however, routinely decides cases about corporate speech without mentioning the issue of corporations' First Amendment status.[25]

Bellotti is an oddity. In most cases, the Court elevates the peripheral above the core by focusing on the autonomy and self-development

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> than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Bellotti, 435 U.S. at 777 (footnotes omitted).

24.

> The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does.

Id. at 775-76. The state court ruled against the bank in *Bellotti* because corporations have only property, not liberty, interests protected by the Fourteenth Amendment. *Id.* at 767; *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925), *construed in* First Nat'l Bank of Boston v. Att'y Gen., 359 N.E.2d 1262, 1270 (Mass. 1977), *rev'd* 435 U.S. 765 (1978). Therefore, corporations' First Amendment rights (as incorporated through the Fourteenth Amendment) are less robust than those of natural persons. Without further analysis, however, the Court has cited *Bellotti* as if it decided the issue of corporations' independent First Amendment entitlements as *speakers*. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 657 (1990) ("The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment.") (citing *Bellotti*, 435 U.S. at 765); *see also* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1021 (1998) ("[C]onstitutional law largely ignores the special character of corporate speech. At most, it treats corporate speech as an instance of ordinary group speech and the corporation as an intermediate institution like those to which the accolades of de Tocqueville are directed."). My thanks to James Blumstein and Howard Wasserman for these points. This reading of *Bellotti* is supported by Justice Brennan's concurrence in *Lamont*:

> These might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders. To succeed, the addressees would then have to establish their standing to vindicate the senders' constitutional rights, as well as First Amendment protection for political propaganda prepared and printed abroad by or on behalf of a foreign government. However, those questions are not before us, since the addressees assert First Amendment claims in their own right.

381 U.S. at 307-08 (Brennan, J., concurring) (citations omitted). In 2007, the Court only interpreted *Bellotti* as deciding that corporations have rights as speakers. *See* FEC v. Wis. Right to Life, Inc., No. 06-969, slip op. at 27 (U.S. June 25, 2007); *Id.* at 6 (Scalia, J., concurring).

25. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 571 (2001) (holding that some state regulations of tobacco advertising violate the First Amendment); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 571-72 (1980) (ruling in favor of corporation which objected to regulation of its mailings); New York Times Co. v. Sullivan, 376 U.S. 254, 264-65 (1964) (holding that the burden of proof in a defamation suit against a media corporation involved First Amendment issues).

rationales of free speech and copyright[26]—the romantic autonomous citizen, author, statesman. The position is elitist; most of us spend more of our time reading and listening rather than writing and speaking—especially if we look only at memorable or self-defining pronouncements. Worse, the position ignores the Court's mantra that political speech is at the core of First Amendment protections.[27] If the speaker's autonomy is the highest of free speech interests, what is the Court's foundation for its seemingly irrebutable presumption that political speech is at the core of each and every person's autonomy, as opposed to, for example, sexuality? The Court insists that government as speech-regulator may not impose an orthodoxy on the public,[28] but this theory is a Court-sponsored orthodoxy.

The original and continuing central purpose of both copyright and free speech is the wide distribution of material to citizens—especially when politically relevant information and opinions are involved. The primacy of political speech rests on the tie between *informed* voters and public control of government. Congruently, the Constitution's Copyright Clause (Article I, Section 8, Clause 8) allows Congress the power to enact only such statutes as encourage the "progress" (meaning

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26. Both of these positions are contested. *Compare* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 244 (1992) (arguing that the core of free speech theory is a right of autonomy against government interference), *with* Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1171 (1993) (agreeing that the Court is correct to reject civic republican "collectivist" concerns with insuring full discussion, but asserting that the Court properly modifies its protection of autonomy with a deep "distrust of government efforts to regulate public debate"), *and with* Barron, *supra* note 12 (arguing for adoption of the collectivist model). *Compare* Jane C. Ginsburg, *"The Exclusive Right to Their Writings": Copyright and Control in the Digital Age*, 54 ME. L. REV. 195, 201 (2002) ("I contend that the Constitution embodies the concept of author control.") *with* Malla Pollack, *The Democratic Public Domain: Reconnecting the Modern First Amendment and the Original Progress Clause (a.k.a. Copyright and Patent Clause)*, 45 JURIMETRICS 23, 24-39 (2004) (arguing that Article 1, Section 8, Clause 8 of the U.S. Constitution is reader-centered).

27. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 205 (2003) (describing "political speech" as "core"); *id.* at 264 (Thomas, J., concurring in part) (using the same words); City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 196 (2003) (discussing the core nature and significance of political speech) (citing Meyer v. Grant, 486 U.S. 414, 421-22 (1998)). As the Court said in *Mills v. Alabama*, "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 384 U.S. 214, 218; s*ee also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-777 (1978) (quoting *Mills*, 384 U.S. at 218).

28. *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 579 (1995) ("The Speech Clause has no more certain antithesis" than "a proposal to limit speech in the service of orthodox expression.") (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .")).

distribution) of "science" (meaning knowledge).[29] This reading explains why James Madison saw no need for a free speech clause despite understanding that "[a] popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."[30] Copyright is the engine of free speech because both prioritize distribution to audiences.

In sum, Barron's problem is still with us—exacerbated both by the increased consolidation and commercialization of media,[31] and by the increased impermeability of intellectual property barriers.[32]

Barron's solution, however, is outdated. Barron believed that citizen-listeners would obtain the needed inputs if would-be speakers

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29. *See* Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article 1, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 755-56 (2001).

30. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* JAMES MADISON, THE COMPLETE MADISON: HIS BASIC WRITINGS 337 (Saul K. Padover ed., 1953). A "gentleman in Rhode Island" was quoted in the Pennsylvania Gazette for similar sentiments:

> Tyrants are the only enemies of literature, and ignorance and slavery always go hand in hand. Nothing but the general diffusion of knowledge will ever lead us to adopt or support proper forms of government—for weak and absurd constitutions are, like slavery, the offspring of ignorance. Nor does learning benefit government alone; agriculture, the basis of our national wealth and manufactories, owe all their modern improvements to it.

Excerpt of a letter from a gentleman in Rhode Island to his friend in [Philadelphia], June 7, 1787, *printed in* PENN. GAZETTE, June 20, 1787.

31. *See, e.g.*, W. Lance Bennett, *New Media Power: The Internet and Global Activism*, *in* CONTESTING MEDIA POWER: ALTERNATIVE MEDIA IN A NETWORKED WORLD 17, 17 (Nick Couldry & James Curran eds., 2003) ("[A] combination of global media trends . . . have diminished the quantity, quality, and diversity of political content in the mass media. These trends include growing media monopolies, government deregulation, the rise of commercialized news and information systems, and corporate norms shunning social responsibility beyond profits for shareholders.") (citation omitted); Robert W. McChesney, *The Emerging Struggle for a Free Press*, *in* THE FUTURE OF MEDIA: RESISTENCE AND REFORM IN THE 21ST CENTURY 9, 11 (Robert W. McChesney et al. eds., 2005) (arguing that the "heart of the problem" is not corruption, but that "[i]n the United States, the media system is set up to maximize profit for a handful of large companies"); BRENNAN CENTER FOR JUSTICE, FACT SHEETS ON MEDIA DEMOCRACY 1 (2006), http://www.fepproject.org/factsheets/mediademocracy.html [hereinafter FACT SHEETS ON DEMOCRACY] (last visited Mar. 27, 2007) ("Six corporations own or have controlling interests in most of the American mass media today"); *id.* at 3 (growing consolidation has been accompanied by a decline in "public affairs and local programming"); PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2006, AN ANNUAL REPORT ON AMERICAN JOURNALISM (Chapter entitled A Day in the Life of the Media), *available at* http://stateofthemedia.org/2006/narrative_online_intro.asp?cat=1&media=4 (last visited Mar. 27, 2007) ("When audiences did encounter the same story in different places, often they heard from a surprisingly small number of sources. . . . More coverage, in other words, does not always mean greater diversity of voices."); *id.* ("The three [network television] evening newscasts were virtually identical to each other" and "really [contained only] 18 minutes" of news coverage).

32. Digital Rights Management systems are now legally protected even without copyright infringement. *See* 17 U.S.C. § 1201 (2000).

had a right of access to the mass media. Mere access is no longer enough. The explosion and digitalization of distribution channels drowns most content in noise.[33] Citizen-listeners need some form of mediation to locate and recognize relevant high-quality content.[34]

Despite the Court's continuing reluctance to burden speakers and authors for the benefit of listeners and readers, several existing doctrines offer possible routes to at least partial solutions. Copyright offers fair use and the uncopyrightability of government works.[35] Free speech offers the concept of government speech.[36] This Article suggests a few of the reform possibilities supported by these doctrines.

III. SOLUTIONS REQUIRING ACTION ONLY BY THE POLITICAL BRANCHES

A. The National Corporation for Public Criticism

If the Supreme Court's approval was the only road-block, the best solution would be an independent federal agency, generously supported by congressionally-appropriated long-term funding, with the sole mission of uncovering and distributing—in attention-catching form—information and opinions skeptical of official policies and pronouncements—a National Corporation for Public Criticism ("NCPC"). The government might be the only target, or the NCPC could scrutinize any entity related to an issue of public concern. Besides a generous budget for investigation and creative programming, NCPC would offer prospective investigative reporters the right to shield

33. *See, e.g.*, Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1392 (2004) ("Today, the scarce resource is attention, not programming."); *see also* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 247-49 (2006) (admitting that not everyone is a highly visible pamphleteer on the Internet, but asserting that Internet does provide broader intake than the mass media).

34. *But see* BENKLER, *supra* note 33, at 239 (arguing that "the observed use of the network exhibits an order that is not too concentrated and not too chaotic, but . . . at least structures a networked public sphere more attractive than the mass-media-dominated public sphere").

35. *See* 17 U.S.C. §§ 105 & 107 (exempting government works and fair use from copyright protection); Banks v. Manchester, 128 U.S. 244, 254 (1888) (rejecting copyright protection of judicial opinions).

36. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553-54, 566-67 (2005) (allowing private parties to be compelled to fund government speech with which they disagree); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 540-41 (2001) (explaining prior case law as allowing viewpoint discrimination within the government's own speech, even if voiced through a proxy).

whistle-blowers.[37] Although funding is required, by government standards this is not an extremely expensive project. Currently, "[t]he government subsidy for public broadcasting in Great Britain [the gold-standard BBC] is $27 per citizen, compared to $1.80 in the U.S."[38] To add perspective, using federal government figures, the direct cost of the Iraq War through October 28, 2006, had been $1,275 for each American.[39] By February 26, 2007, that figure had reached $1,500.[40]

The NCPC should be unassailable under the Court's current doctrine, since "of course Congress can subsidize broadcasters that it thinks provide especially valuable programming."[41] Furthermore, federal funding decisions may be based on amorphous, quality-centered criteria.[42] An entity funded to *criticize* the government should withstand judicial fears that government-supported enterprises "might be pressured into becoming forums devoted solely to programming and views that [are] acceptable to the Federal Government."[43]

The NCPC would also be protected by the government's almost unbounded entitlement to chose its own speech, as limned in *Johanns v. Livestock Marketing Association*.[44] That case upheld forcing industry

37. Compare this to the funding-strapped and less independent Corporation for Public Broadcasting ("CPB"): "The federal government now provides only [fifteen] percent of public television funding." William W. Fisher & William McGeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age* 36 (Berkman Ctr. For Internet & Soc'y Research, Working Paper No. 2006-09, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923465. The CPB was created in 1967 to deal apolitically with government support for public broadcasting. *See* FACT SHEETS ON DEMOCRACY, *supra* note 31, at 22. Corporate support, limited government funds, and political interference, however, have been the norm in public broadcasting since the 1970s. *See id.* at 23.

38. FACT SHEETS ON DEMOCRACY, *supra* note 31, at 23. *But see* Just $6, http://www.just6dollars.org/about (last visited Mar. 27, 2007) (claiming that "Congress would only have to spend $6 per citizen per year to publicly fund each and every election for the House, the Senate and the White House").

39. *See* National Priorities Project, Local Costs of the Iraq War (Feb. 26, 2007), http://www.nationalpriorities.org/Publications/Local-Costs-of-the-Iraq-War.html.

40. *See id.*

41. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part and dissenting in part).

42. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 572-73 (1998) (approving government sponsored program where experts make quality decisions regarding which speech to fund).

43. FCC v. League of Women Voters of Cal., 468 U.S. 364, 386 (1984) (holding unconstitutional a statute barring PBS stations from editorializing). Interestingly, now-Justice Samuel L. Alito argued the case for the government. *See id.* at 365 (listing attorneys). Justice Rehnquist considered the regulation supportable under the spending power. *See id.* at 403 ("I do not believe that anything in the First Amendment to the United States Constitution prevents Congress from choosing to spend public moneys in that manner.") (Rehnquist, J., dissenting).

44. 544 U.S. 550 (2005).

members to pay for television advertisements using the slogan "Beef: It's What's for Dinner," even when their individual business interests were harmed by a campaign treating all beef products as interchangeable. The Court characterized the advertisements as government speech, despite scripts ascribing sponsorship to "America's Beef Producers." The Court brusquely rejected the claim that the right not to fund speech with which one disagrees had any relevance to government levies, even when the charge was assessed on only one small subset of taxpayers and disguised as a check-off for an industry council.[45] Since the Court also discounted the contradictions among various mouthpieces of the government,[46] criticism of government action by a "government speaker" is within Congress' speech power.

The NCPC's problem is congressional will.[47] The Bush administration has shown no inclination to encourage criticism or the public availability of information needed to evaluate executive policy.[48] Most infamously, many challenge the factual basis for starting the still on-going Iraq war.[49] Using the government's own assertions, a large

45. *See id.* at 554, 559. *Cf.* Keller v. State Bar of Cal., 496 U.S. 1, 4 (1990) (holding that the First Amendment prevented state from forcing lawyer to support state bar association's political speech); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977) (holding First Amendment prevented non-member of union from being forced to subsidize union's political speech).

46. *See Johanns*, 544 U.S. at 561 n.5 (responding to criticism by two dissenting opinions).

47. Perhaps the issue is which political party is in power. National Public Radio listenership went up to seventeen percent (from thirteen percent) of the population between 1996 and 2006; however, its listenership has a Democratic Party slant. *See* PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 7, at 14 (providing figures). *Cf.* Darryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329, 2340-41 (2006) (arguing that separation of powers does not work when the same party controls both the White House and Congress, as during the current administration of George W. Bush).

48. *See, e.g.*, Scott Shane, *U.S. Reclassifies Many Documents in Secret Review*, N.Y. TIMES, Feb. 21, 2006, at A1 ("[I]ntelligence agencies have been removing from public access thousands of historical documents that were available for years . . . . [T]he reclassification program is itself shrouded in secrecy . . . ."); Adam Liptak, *In Leak Cases, New Pressure on Journalists*, N.Y. TIMES, Apr. 30, 2006, at A1 ("[T]he Bush administration is exploring . . . the criminal prosecution of reporters under the espionage laws" for reporting leaks, in addition to the more standard methods of pressuring reporters to name sources and firing government officials for leaking classified information to the press.); Editorial, *A Fixation With Secrecy*, N.Y. TIMES, Aug. 28, 2006, at A14 ("[T]he Bush administration . . . has consistently demonstrated an extraordinary mania for secrecy," even reclassifying military data released thirty-five years ago regarding long-outdated figures on military armaments.).

49. The United Nations' International Atomic Energy Agency "revealed that the White House had based some allegations about an Iraqi nuclear program on forged documents." Dafna Linzer, *U.N. Inspectors Dispute Iran Report By House Panel: Paper on Nuclear Aims Called Dishonest*, WASH. POST, Sept. 14, 2006, at A17. That agency is currently labeling parts of a recent House committee report on Iran's nuclear capabilities "outrageous and dishonest." *Id.; see also* Murray Wass & Brian Beutler, *Insulating Bush*, 38 NAT'L J. 36, 36-40 (2006) (discussing recognition inside Bush administration that information about Iraq's military might had not been reliable).

majority of those detained for years at Guantanamo Bay have never attacked the United States.[50] The government has provided canned "news tapes" to television stations for airing without source identification;[51] the government has paid pundits for independent-sounding, pro-administration pronouncements.[52] Consider also, for example, the President's successful effort to silence *New York Times*' reports about NSA activities,[53] the attacks on Representative Murtha for

50. *See* Mark Denbeaux & Joshua Denbeaux, *The Guantanamo Detainees: The Government's Story*, *in* MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2-3, http://www.ssrn.com/abstract=885659 (last visited Feb. 1, 2007) ("Fifty-five percent . . . of the detainees are not determined to have committed any hostile acts against the United States or its coalition allies. . . . [Eighty-six percent] of the detainees were arrested by either Pakistan or the Northern Alliance and . . . were handed over to the United States at a time in which the United States offered large bounties for capture of suspected enemies.").

51. The FCC received "thousands of emails, a petition on behalf of 40,000 people, and letters from Senators John F. Kerry and Daniel Inouye" calling for "investigation of broadcasters who distributed government-sponsored news reports without identifying the source." Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 84 n.6 (2006). *See also* Janel Alania, Note, *The "News" from the Feed Looks like News Indeed: On Video News Releases, the FCC, and the Shortage of Truth in the Truth in Broadcasting Act of 2005*, 24 CARDOZO ARTS & ENT. L.J. 229, 229, 242-44 (2006) (discussing other incidents of government distributed video news releases, contrary opinions of the Office of the Comptroller General and the Office of Legal Counsel over their current legality, and legislation introduced to forbid the practice).

52. The Education Department contracted to pay $241,000 to Armstrong Williams for seemingly independent promotion of the No Child Left Behind Act. *See* Howard Kurtz, *Administration Paid Commentator: Education Dept. Used Williams to Promote 'No Child' Law*, WASH. POST, Jan. 8, 2005, at A1. The FCC received 12,000 complaints about this covert sponsorship. *See* Clay Calvert, *Payload, Pundits, and the Press: Weighing the Pros and Cons of FCC Regulation*, 13 COMMLAW CONSPECTUS 245, 248 (2005). Williams's final penalty was repayment of $34,000 for contract work not completed, with no admission of wrong-doing. *See* Greg Toppo, *Commentator to Pay $34,000 in Propaganda Case*, USA TODAY, Oct. 23, 2006, at 06A.

53. *See* Hagan, *supra* note 8, at 117-20; James Riesen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts: Secret Order to Widen Domestic Monitoring*, N.Y. TIMES, Dec. 16, 2005, at A1 ("The White House asked the New York Times not to publish this article, arguing that it could jeopardize continuing investigations . . . . [T]he newspaper delayed publication for a year . . . ."). The *New York Times* released the story shortly before the publication of a book on the same subject by one of the reporters. *See* JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION (2006). Relatedly, the Republican-controlled House of Representatives passed a resolution "condemning sources and the media outlets . . . who publicized the secret program." John Eggerton, *House to Media: Back Off*, BROADCASTING & CABLE, June 30, 2006, *available at* http://www.broadcastingcable.com/article/CA6348788.html?display=Search+Results&text=back+off (last visited Feb. 1, 2007). Attorney General Gonzalez testified to the Senate Judiciary Committee that "President Bush had personally decided to block the Justice Department ethics unit from examining the role played by government lawyers in approving the National Security Agency's domestic eavesdropping program." Neil A. Lewis, *Bush Blocked Ethics Inquiry, Official Says*, N.Y. TIMES, July 19, 2006, at A14. Representative Peter Hoekstra, Republican of Michigan, Chairman of the House Intelligence Committee, said that the White House "briefed the panel on a 'significant' intelligence program only after a government whistle-blower

rethinking the war in Iraq,[54] the political appointees who tried to silence NASA scientists about global warming,[55] and the Navy's indirect ouster of the military lawyer who successfully defended Salim Abmed Hamdan's right to due process.[56] According to Justice O'Connor's report on the rendition of innocent Canadian engineer Maher Arar, the Bush administration has not been forthcoming, even with the cooperating Canadian police.[57] Senator Barbara Boxer, a Democrat from California, discovered in September 1996, that the Federal Communications

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alerted him to its existence and he pressed President Bush for details." Eric Lichtblau & Scott Shane, *Congressman Says Program Was Disclosed By Informant*, N.Y. TIMES, July 10, 2006, at A11.

54. *See* Letter from John P. Murtha, U.S. Congressman from Pennsylvania, to President George W. Bush (Feb. 1, 2006), *available at* http://www.house.gov/apps/list/press/pa12_murtha/pr_060201b.html ("The war in Iraq is fueling terrorism, not eliminating it;" the United States military should "redeploy outside of" Iraq); The President Needs to Denounce the Swift-Boating of Murtha . . . Now!, (Jan. 16, 2006), http://www.huffingtonpost.com/arianna-huffington/the-president-needs-to-de_b_13928.html (characterizing negative statements about Murtha as "character assassination—cranked out by the GOP attack machine"); Dotty Lynch, *Murtha: Worth His Medals?*, CBS NEWS, Jan. 18, 2006, http://www.cbsnews.com/stories/2006/01/18/opinion/lynch/main1217764.shtml?CMP=ILC-SearchStories (reporting that shortly after Murtha called for withdrawal from Iraq, "the CybercastNewsService.com . . . blasted not his plan, but his bona fides as a war hero").

55. *See* Andrew C. Revkin, *Scientists Commend NASA's Progress on Communications*, N.Y. TIMES, Mar. 14, 2006, at A26 ("[P]olitical appointees altered news releases and Web presentations against the wishes of some NASA scientists and tried to restrict public comments by James E. Hansen, a top NASA climate scientist[, who] has repeatedly said that global warming caused by humans poses an urgent threat, a position at odds with that of the Bush administration;" publicity about this pressure has led to NASA changing its news release policies). Seemingly to save the pocket-books of large power companies, the EPA recently decided not to raise standards for soot pollution, despite recommendations by its own scientists, its Scientific Advisory Council, and the American Medical Association. *See* Editorial, *Science Ignored, Again*, N.Y. TIMES, Oct. 14, 2006, at A12. Additionally, the Bush administration has "blocked release of a report that suggests global warning is contributing to the frequency and strength of hurricanes . . . ." Randolph E. Schmid, *Journal: Agency Blocked Hurricane Report*, Washingtonpost.com, Sept. 26, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/09/27/AR2006092700251.html.

56. The Navy declined to promote Lieutenant Commander Charles Swift. Under the military's up-or-out policy, Swift will have to leave the Navy. *See* Editorial, *The Cost of Doing Your Duty*, N.Y. TIMES, Oct. 11, 2006, at A26 (commenting negatively on story).

57. *See* Ian Austen, *Canadians Fault U.S. For Its Role in Torture Case*, N.Y. TIMES, Sept. 19, 2006, at A1 (quoting released sections of committee report issued by Justice O'Connor, which reported that "[t]he American authorities who handled Mr. Arar's case treated Mr. Arar in a most regrettable fashion . . . . Moreover, they dealt with Canadian officials involved with Mr. Arar's case in a less than forthcoming manner"). Bob Woodward claims that President Bush even refused to share "vital combat intelligence about the Iraq war" with Tony Blair, Prime Minister of the United Kingdom. *See* Sharon Churcher, *Bush "Kept Blair in the Dark Over Iraq,"* DAILY MAIL, Sept. 30, 2006, *available at* http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=407829&in_page_id=1770.

Commission had suppressed two FCC-funded studies which undermined that agency's deregulatory agenda.[58]

If the federal government declines to act, perhaps a group of states could underwrite a States United Corporation for Public Criticism. The legal status of such state—as opposed to federal—action, however, is unclear. First, the Court has never considered whether the states are protected from federal government regulation—or commandeering—of their speech. The issue is complex.[59] Additionally, the Court could decide that such a multiple-state entity requires federal approval under the interstate compact clause.[60]

The extent of the compact clause is unclear. "If the creation of a [multi]state entity does not implicate federal concerns . . . federal consent is not required."[61] "[T]he prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[62] These rules come from *Virginia v. Tennessee*, an

58. *See* Letter from Barbara Boxer, United States Senator from California, to Kevin J. Martin, FCC Chairman (Sept. 18, 2006), *available at* http://www.boxer.senate.gov/news/releases/record.cfm?id=263223 (complaining about suppressed studies); Harry A. Jessell, *Adelstein: Public Deserves to See All Studies*, TVNEWSDAY, Sept. 21, 2006, *available at* http://www.freepress.net/news/print/17811 (reporting FCC Commissioner Jonathan Adelstein's frustration with the FCC's failure to release "studies that might contradict a 'predetermined' policy outcome"); *see also* John Dunbar, *Lawyer Says FCC Ordered Study Destroyed*, HOUSTON CHRONICLE, Sept. 15, 2006 (reporting that the FCC "ordered its staff to destroy all copies of a draft study that suggested greater concentration of media ownership would hurt local TV news coverage").

59. *See, e.g.*, David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1638-40 (2006); Kermit Roosevelt, *States as Speakers*, 14 GOOD SOC'Y 62, 62 (2005).

60. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

61. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 40 n.10 (1994) (citing Virginia v. Tennessee, 148 U.S. 503, 517-21 (1893)). Because PATH was formed with federal approval as an interstate compact, *id.* at 35, the Court did not explain or apply this formulation.

62. *Virginia v. Tennessee*, 148 U.S. at 519. The compact clause does not govern a multi-state "consent decree" which does not "adjust" a boundary between states, but merely "locat[es] precisely this already existing boundary." New Hampshire v. Maine, 426 U.S. 363, 370 (1976). States do not need federal approval for reciprocal legislation allowing collaboration in the management of their respective court systems. New York v. O'Neil, 359 U.S. 1, 3, 11 (1959) (upholding "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings").

> The Constitution of the United States does not preclude resourcefulness of relationships between States on matters as to which there is no grant of power to Congress and as to which the range of authority restricted within an individual State is inadequate. By reciprocal, voluntary legislation the States have invented methods to accomplish fruitful and unprohibited ends.

1893 case enforcing an earlier bistate border agreement, treating it as an interstate compact implicitly approved by Congress.[63] Neither of the *Tennessee* formulations is particularly helpful to our inquiry. Such an entity would decrease the supremacy of the federal government, but would it decrease its "just" supremacy? The federal government's "just sovereignty" does not include stopping private persons from criticizing the government. Unfortunately, speech by *states* may be a distinguishable issue.

Arguments support both sides. The pro-criticism argument is that, if federalism exists so that states may limit federal power, the federal government should not be able to stifle state criticism. The First Amendment, however, "is [not] a Freedom of Information Act"[64] and states may not block the federal government from criminalizing conduct within federal power.[65] Certainly, a state-sponsored Corporation for Public Criticism would be able neither to pry open federal government secrets nor to protect whistle-blowers from the Department of Justice. Worse, if individual states do not have independent speech rights in relationship to the federal government, neither would a group of states.

B. An Internet Right To Comment

1. Hyperlinking from Commercial News Postings to Public Comment Space

Congress might be able to harness new technology and new case law to create an Internet space for public comment.[66] The widespread

Id. at 11. Nor do states need federal consent for similar collaboration in dealing with multi-state tax payers. U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 472 (1978) ("[T]he Multistate Tax Compact contains no provisions that would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States.").

63. *See Virginia v. Tennessee*, 148 U.S. at 522 ("The approval by Congress of the compact entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings.").

64. Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 636 (1975).

65. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 9 (2005) (holding that state medical marijuana statutes could not be used as defenses to the federal Controlled Substances Act because this application of the CSA is within Congress's Commerce Clause power).

66. While the Internet was originally hailed as enabling full democratic discourse, that possibility is limited by the problem of locating the correct source and the (mirror) problem of attracting eyes to posted content. *See, e.g.*, DORIS A. GRABER, MASS MEDIA & AMERICAN POLITICS 363 (7th ed. 2006) ("There is, as yet, no widely available solution to the problem of finding one's way through the Internet's lush jungles of information where search engines like Google and Yahoo provide guidance, but often from perspectives skewed to business interests."). An additional problem is the cost of high quality content, including investigative reporting. *See* ROBERT W. MCCHESNEY, THE PROBLEM OF THE MEDIA: U.S. COMMUNICATION POLITICS IN THE TWENTY-

private ownership of networked computers enables non-market joint production of complex outputs by large groups of persons working with limited organization.[67] This form of production is responsible for discovering and publicizing some major news stories, including the security flaws of Diebold voting machines[68] and Trent Lott's racist remarks at Strom Thurmond's one-hundredth birthday party.[69] Network-organized boycotts also pressured Sinclair Broadcasting out of forcing sixty-two stations into airing *Stolen Honor: The Wounds That Never Heal*, a factually-questionable attack on John Kerry's war record, shortly before the 2004 presidential election.[70] How much more could the networked public accomplish if every interested person could post comments on any news story in a place easily locatable by the least web-savvy reader, who could then pass it on and reply at will?

For such a system to function, reader/commentators must be able to locate and evaluate postings by other reader/commentators. The location problem might be controlled by organizing comments through hyperlinks from government and mass media sources. The evaluation problem—locating which material is of sufficient quality to warrant attention—might be lessened through reader rating systems.[71] The earlier

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FIRST CENTURY 220 (2004) ("Good journalism—and good media generally—requires money and institutional support."). The fragility of net neutrality in the face of oligopoly control over physical elements composing the network poses another obstacle. *See* Press Release, Statement by U.S. Senator Ron Wyden for the Congressional Record (June 28, 2006), *available at* http://wyden.senate.gov/media/2006/06282006_net_neutrality_holds_release.html ("The large interests have made it clear that if this [telecommunications] bill [without net neutrality provisions] moves forward, they will begin to discriminate. A Verizon Communications executive has called for an 'end to Google's "free lunch."' A Bell South executive has said that he wants the Internet to be turned into a 'pay-for-performance marketplace.'"). The final problem is the private ownership of much of the "posting space." *See* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116 (2005) ("[T]he vast majority of speech on the Internet today occurs within private places and spaces that are owned and regulated by private entities such as . . . . 'America Online . . . and Yahoo! . . . ."). Yochai Benkler, however, strongly argues that these criticisms are over-stated. Benkler sees the current condition of the Internet as an improvement on the mass-media system which arose in the twentieth-century. *See* BENKLER, *supra* note 33, at 464-66 (summarizing his positive conclusions).

67. *See* BENKLER, *supra* note 33, at 20-22 ("The important new fact about the networked environment, however, is the efficacy and centrality of individual and collective social action. In most domains, freedom of action for individuals, alone and in loose cooperation with others, can achieve much of the liberal desiderata [the author considers.]"); s*ee also id.* at 59-90 (listing successful projects such as Wikipedia).

68. *See id.* at 225-32.

69. *See id.* at 262-64.

70. *See id.* at 220-25.

71. Web postings hide many of the standard social cues used to assess speakers' reliability. Furthermore, grass-roots backing is often mimicked by monied-interests. *See* Dionne Searcey, *Consumer Groups Tied to Industry*, WALL ST. J., Mar. 28, 2006, at B4 ("A number of lobbying

discussion of government speech is ample support for Congress's power to set up a comment space organized by hyperlinks from government websites. I need to expand, however, on the mass media possibility.

The Supreme Court has recently changed doctrine to be more supportive of government-required Internet comment space. Florida once had a right-of-reply statute forcing print newspapers to give space to criticized politicians. When "Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature,"[72] demanded his statutory rights, the Miami Herald brought the issue to the Supreme Court. In *Miami Herald Publishing Co. v. Tornillo*, the Court saw the newspaper as a speaker being forced by the government to magnify another's message against its editorial will.[73] When litigating on-campus military recruiting, the Forum for Academic and Institutional Rights ("FAIR") relied on *Tornillo*.[74] The Court rebuffed FAIR by narrowing the doctrine, positing that earlier "compelled-speech violation[s]" all "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[75]

Clearly labeled hyperlinks do not affect the messages of the linked-from site. *Tornillo*, therefore, no longer blocks Congress from requiring online news media to add a hyperlink from each story to a public

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groups that claim to represent consumer interests are backed by phone and cable companies promoting their corporate agendas, according to a report from consumer group Common Cause.").

Reader feedback systems have proven valuable in creating trust and are currently used in several different models, as demonstrated by Citysearch, eBay, Elance, Epinions, Google, and Slashdot. *See* Chrysanthos Dellarocas et al., *Designing Reputation Mechanisms*, *in* HANDBOOK OF PROCUREMENT (Nicola Dimitri et al. eds., 2006) (providing chart of the main differences among these systems). Intentional distortion can be addressed by use of feedback rating the ratings. *See* Pei-Yu Chen et al., All Reviews Are Not Created Equal: The Disaggregate Impact of Reviews and Reviewers at Amazon.com 4, 19 (July 2006), *available at* http://papers.ssrn.com/abstract=918083 (explaining empirical support for this conclusion). Money is not irrelevant, but the network is "substantially less corruptible by money" than mass media. BENKLER, *supra* note 33, at 258. "The peer-produced structure of the attention backbone suggests that money is neither necessary nor sufficient to attract attention in the networked public sphere (although nothing suggests that money has become irrelevant to political attention given the continued importance of mass media)." *Id.*

72. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243 n.1 (1974).

73. *Id.* at 243-44, 258. Tornillo's argument was expressly tied to the Barron article commemorated by this conference. *See id.* at 248 n.8.

74. *See* Rumsfeld v. Forum for Academic and Institutional Rights, 126 S. Ct. 1297, 1309 (2006) (listing cases allegedly supporting FAIR's claim).

75. *Id. But see Tornillo*, 418 U.S. at 258 ("Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.").

comment cyberspace.[76] Any added programming cost is far too low to support a takings claim.[77] This system uses the mass media as an indexing system for public comment, facilitating readers' and speakers' ability to locate each other.[78]

Comment space does have costs, as does the blog-like technology needed to run a comment space. Cost might be handled by some combination of three systems. First, donations could be accepted from pro-comment individuals and groups.[79] Going further, a totally neutral

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76. For example, the hyperlink could read: "Click here to *exit* this site and *enter* public comment space." The label defuses any issue regarding apparent sponsorship by the linked-from site. *See Rumsfeld*, 126 S. Ct. at 1310 (rejecting schools' argument "that if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do," on the ground that observers will not view an action as an endorsement of a message, implying that forcing implied endorsement would be problematic).

77. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538-39 (2005) ("Primary among [the factors used to decide if a regulation is a taking] are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'") (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)). The United States Supreme Court has not yet decided whether copyright is "private property" for purposes of the Fifth Amendment Takings Clause. The issue is unclear; analogies point in both directions. *Compare, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1020 (1984) (holding that the Takings Clause covers trade secret misappropriation), *with* Zolteck Corp. v. United States, 442 F.3d 1345, 1353 (Fed. Cir. 2006) ("We reverse the trial court's ruling that Zoltek can allege patent infringement as a Fifth Amendment taking under the Tucker Act. We remand for further proceedings consistent with this opinion."). The *Zoltek* court relied on *Schillinger v. United States*, 155 U.S. 163 (1894), as do scholars. *Compare, e.g.*, Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After* College Savings v. Florida Prepaid, 37 SAN DIEGO L. REV. 637, 679, 688, 691-92 (2000) (noting that "[t]he Supreme Court's takings cases are a muddle," that "[s]tate use of a patented item provides the easiest case for a taking [compared to other types of intellectual property regulation]," and that copyright takings are best handled by asking if the use is more analogous to fair use or to infringement), *with* Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. (forthcoming 2007) (arguing that discussions rest on the "myth[]" that patents were not property under the Takings Clause in the nineteenth century). Note that Shuba Ghosh's approach to copyright "takings" is not helpful if the alleged taking involves tampering with the statutory definition of fair use, as suggested *infra* Part III.B.2.

78. Only twenty-three percent of Americans get news from the Internet on any given day, and even this small number generally use it to supplement other sources. *See* PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 7, at 12. "The online news market is dominated by a few large players," especially "among those who say they regularly get news on the internet." *Id.* at 15. News aggregators (Google News, Yahoo News, and AOL News) are the biggest players, followed by a mix of network and newspaper sites. *Id.* In contrast, "[j]ust 4% of the public—and 8% of online news consumers—say they regularly go to online blogs where people discuss events in the news." *Id.* at 16. Hyperlinks from the major sources to blogs, therefore, have the potential to activate and inform a large number of persons who currently deal with news as passive consumers.

79. Many major projects are currently running on the unused computing cycles of networked, private, personal computers. *See* BENKLER, *supra* note 33, at 81-83 (discussing SETI@home, Folding@home, Fightaids@home).

non-profit could be formed to administer the space or this could be one project of the NCPC.[80] Second, the government might supply funds. Third, media firms posting on the Internet might be required to contribute, just as telephone companies contribute to the universal service fund.[81]

Requiring media to finance the project raises two additional issues: the newspaper tax cases,[82] and the possibility that newspapers would stop posting no-fee-for-access news.[83] The latter turns on business model choices and economic forecasts beyond the scope of this Article. But even if major reporting structures, such as the *New York Times*, continue to provide free online access to today's news, the newspaper tax cases teach us that the First Amendment bars taxes targeting the press, especially when the tax is content-based. "News" is a content-based category.

Funding, however, could be siphoned from online newspapers if the statute were more nuanced. The first possibility is a generally applicable tax. The Supreme Court has approved the extension of a state's generally applicable sales tax to cable television, even though print media are exempt.[84] I would cheerfully help lobby for a tax on all online businesses, with the proceeds used to fund public comment space. Such a statute would not be a special burden choking e-commerce; it would be

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80. In the summer of 2006, a task force recommended that the City of Boston put a non-profit organization in charge of operating a proposed city-wide, low-cost wireless Internet network. *See* Mark Jewell, *Nonprofit May Run Boston Wi-Fi Network*, MSNBC.COM, Aug. 1, 2006, http://www.msnbc.msn.com/id/14132022/.

81. *See* 47 U.S.C. § 254(b)(4) (2000) ("All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.").

82. *See, e.g.*, Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987) (holding that state sales tax which exempted content-defined special interest publications violates the First Amendment); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 593 (1983) (holding a state tax on newspaper ink and paper violates the First Amendment); Grosjean v. Am. Press Co., 297 U.S. 233, 249-51 (1936) (holding that state tax on newspaper advertisements violates the First Amendment).

83. According to the *New York Time*'s owner, the Internet is "killing his bottom line." Hagan, *supra* note 8, at 120. *Cf.* Int'l News Serv. v Associated Press, 248 U.S. 215, 238, 240-41 (1918) (basing newly minted misappropriation doctrine on fear that free-riding would destroy economic ability of newspapers to continue in reporting services). *See* Newspaper Ass'n of Am., *supra* note 6, at 41 ("[C]ompetition from the Internet and other alternative media has taken a considerable toll on the newspaper industry."); *More Media, Less News*, ECONOMIST, Aug. 26, 2006, at 52 (reporting on print newspapers' financial woes and their failure to make the Internet sufficiently profitable). *But see* PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, *supra* note 7, at 19 (finding that online newspaper reading does not have a strong negative effect on purchases of paper newspapers: "[O]n a typical day fully 94% read [the newspaper] in print, while 14% read it on the internet (some do both).").

84. *See* Leathers v. Medlock, 499 U.S. 439, 453 (1991).

the Internet equivalent of ordinances requiring green space and other amenities around large urban buildings. Second, supporting comment space could be a quid pro quo for receipt of a government benefit, provided the link is not within the ill-defined category of unconstitutional conditions.[85] Two analogies support the constitutionality of my proposal: the paid-subscriber rule and the Newspaper Preservation Act.

Since the creation of second-class mail in 1879, only publications able to attract paid subscribers have been granted this government subsidy of postage rates.[86] In 1913, the Court upheld Congress's right to require public distribution of newspaper ownership information in return for second class postage privileges.[87] In 1946, however, the Court made clear that second class rates could not be used to enforce the Post Office's view of the quality or public usefulness of periodicals.[88] In

85. "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that . . . institutions are not obligated to accept." Grove City College v. Bell, 465 U.S. 555, 575 (1984). The Court, however, has not disclaimed the existence of unconstitutional conditions regarding First Amendment rights. *See* Rumsfield v. Forum for Academic and Institutional Rights, 126 S. Ct. 1297, 1307 (2006). The set may be small in light of the Court's recent narrow reading of First Amendment protection for government employees. *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

86. Act of March 3, 1879, ch. 180, 20 Stat. 359; *see* Enter. Inc. v. United States, 833 F.2d 1216, 1219-23 (6th Cir. 1987) (discussing the history of limits on second class postage). The Supreme Court deferentially affirmed Post Office decisions characterizing items as books, and therefore not entitled to second class rates, rather than periodicals. *See* Smith v. Hitchcock, 226 U.S. 53, 59-60 (1912), Houghton v. Payne, 194 U.S. 88, 100 (1904); Bates & Guild Co. v. Payne, 194 U.S. 106, 110 (1904).

87. *See* Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 315-16 (1913). According to the *Lewis* Court:

> While it cannot be questioned that the conferring of the [subsidy of second-class postage] above stated, were at least in form a discrimination against the public generally, beyond doubt, however, in the legislative mind they were deemed not to be of that character because the purpose of their bestowal was to secure to the public the benefits to result from "the wide dissemination of intelligence as to current events." Certain, however, as is this view, it is equally also certain that for the purpose of securing the public benefits which it was conceived would result from the giving of the privilege, it was deemed that the power and duty existed to fix a standard which should be complied with by those who wished to enjoy the privilege . . . .

Id. at 304-05.

88. Hannegan v. Esquire, Inc., 327 U.S. 146, 158-59 (1946). The Court affirmed an injunction barring the Postal Service from canceling Esquire's second-class privileges, holding that "the power to determine whether a periodical (which is mailable) contains information of a public character, literature or art does not include the further power to determine whether the contents meet some standard of the public good or welfare." *Id.* The Court did approve the Postal Service's power to decide if an item was "of a public character." *Id.* at 158.

1987, translating these opinions into modern First Amendment doctrine, the Sixth Circuit upheld the paid-subscriber rule under the three-part test for time, place, and manner restrictions: justification without reference to content, narrow tailoring in service of a compelling government interest, and allowance of ample alternative channels for communication.[89] The Sixth Circuit accepted the Postal Service's claim that paid subscriptions were an objective indication that the receivers valued the information in the publications,[90] implying that this erased any taint of content bias. While I find this logic shaky, the Supreme Court has granted allegedly independent-citizen choice even more power to absolve the government of apparent bias in the school voucher context.[91] The other lynchpin of the Sixth Circuit opinion is the government's right not to fund an individual's exercise of constitutional rights.[92]

My other model, the Newspaper Preservation Act,[93] allows the Attorney General to grant a limited antitrust exemption to certain "joint newspaper operating arrangements"[94] which "effectuate the policy and purpose of this chapter."[95] The only statutory statement of purpose is labeled a "Congressional declaration of policy," and reads in full:

> In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been

89. *See Enterprise*, 833 F.2d at 1223-24 (rejecting First Amendment challenge to paid-subscriber rule).

90. According to both the Postal Service and the Sixth Circuit, "conditioning eligibility for second-class status on the subjective newsworthy qualities of a publication or other equally subjective method of assessing the amount of pure editorial/educative material as opposed to commercial/advertising material would result in an impermissible level of content-based decisionmaking." *Id.* at 1224. The "objective" paid-subscription rule allows the government subsidy to be limited without the government making such subjective, content-based decisions. *See id.*

91. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 653 (2002) ("[W]e have never found a program of true private choice to offend the Establishment Clause.").

92. "The first amendment is not violated merely because a content-neutral regulation raises the cost of one avenue of communication, or prevents the use of one mode of communication where others exist. This is especially true where the cost of the desired mode is artificially reduced through government subsidies." *Enterprise*, 833 F.2d at 1224; *accord, e.g.*, Regan v. Taxation With Representation of Washington, 461 U.S. 540, 546 (1983) (holding that denial of tax exemption for contributions supporting non-profit organization's lobbying efforts does not violate the First Amendment, being merely the denial of a subsidy).

93. 15 U.S.C. §§ 1801-1804 (2000).

94. *Id.* § 1803(a).

95. *Id.* § 1803(b).

> heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.[96]

The definition of "joint newspaper operating arrangements" clarifies the statute's aim. The definition includes expansive options, "[p]rovided, [t]hat there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined."[97] My suggestion would be undercut if conditioning the availability of an antitrust exemption on maintaining separate editorial voices had been held unconstitutional. I have, however, been unable to find any case even suggesting this tie raises a free speech issue.[98]

In sum, both models support the constitutionality of inducing—as opposed to ordering—news organizations to help fund Internet comment space hyperlinked to their news posts. The next question is what carrot would be both effective and suitable. The challenge is finding something the media giants will consider worth the cost but which will not overly damage the public. Lessening filing requirements—with the FCC or other agencies, such as the Securities and Exchange Commission—might not be a big enough carrot. Killing local government Wi-Fi projects[99] or requiring states to offer state-wide cable franchises[100] would

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96. *Id.* § 1801.

97. *Id.* § 1802(2). The Act's provisions are expressly made separable. *See id.* § 1801 note (Separability).

98. The Ninth Circuit has rejected two different First Amendment challenges to the act in holding claims that "the Act is invalid as applied because approval of the [Joint Operating Agreement] would impair the first amendment rights of smaller newspapers in the market" and "that the Act is invalid on its face as an overbroad and vague delegation of power [to the Attorney General] in an area affecting first amendment rights." Comm. for an Indep. P-I v. Hearst Corp., 704 F.2d 467, 482 (9th Cir. 1983) (mentioning similar holdings by two district courts).

99. "Wi-Fi, short for wireless fidelity," is a technology used to enable wireless connections to the Internet. *See* Brian Deagon, *Cities' Wi-Fi Efforts Might Pose Threat to Cable, Telecom*, INVESTOR'S BUS. DAILY, Aug. 1, 2006, at A01. An increasing number of towns are running Broadband Internet access services as public utilities, often for free. For-profit firms recognize this as a major economic threat. *See id.*; *see also, e.g.*, Press Release, Cent. For Digital Democracy, Statement from Jeff Chester, Rendell's Early Xmas Gift to Verizon: Larger Net Monopoly (Dec. 1, 2004), *available at* http://www.democraticmedia.org/news/Rendell.html (asserting that House Bill 30, which bans future not-for-profit local WiFi Internet projects by local governments, is a pay-back for campaign contributions); Press Release, Edward G. Rendell, Governor of Pennsylvania, Governor Rendell Signs House Bill 30 (Nov. 30, 2004), *available at* http://www.etopiamedia.net/emtnn/pdfs/rendell1.pdf (explaining Governor's reasons for signing House Bill 30, including the "Municipal Ban"). *See also* BENKLER, *supra* note 33, at 405-08 (discussing importance of municipal Wi-Fi to continued viability of the currently citizen-empowering network environment).

100. *Compare* Center for Digital Democracy, *Community Cable Cookbook: A Citizen's Guide to Cable Franchise Negotiations*, http://www.democraticmedia.org/ddc/CCCIntro.php (explaining what local benefits a municipal government should request when negotiating with a firm desiring a local cable franchise), *with* SONIA ARRISON & VINCE VASQUEZ, PACIFIC RESEARCH INST.,

be giving away too much. I suggest ties to FCC media ownership rules. These were severely weakened in the last biennial review, despite a massive public outcry against the proposed changes.[101] This evidences Congress's reluctance to buck the political media machine. If the next give-away is inevitable, tying it to funding for public comment space would salvage some public benefit.[102] This, however, is not an attractive choice. Media consolidation has led to less news—especially less local news—and less anti-establishment news.[103] Ideally, the quid pro quo would be less *tightening* of media ownership rules.

REFORMING THE CABLE FRANCHISE SYSTEM: RESPONSE TO THE REQUEST FOR COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING FCC 05-189 (Feb. 10, 2006), http://www.pacificresearch.org/pub/sab/techno/2006/fcc_cable.pdf (arguing for federal limitation of local government power over cable franchising, noting that "[a]ttempts to foster competition and provide consumer protection in the video programming market have been stymied by local governments that hold a vested interest in maintaining the current near-monopolistic system").

101. *See* MCCHESNEY, *supra* note 66, at 252-93 (discussing public outcry in 2003 against proposed FCC rule changes).

102. The Newspaper Association of America is arguing to the FCC that some local newspapers' and broadcasters' provision of Internet space supports ending the cross-ownership ban. *See* Newspaper Ass'n of Am., *supra* note 6, at 57, 59 ("[T]he websites operated by local newspaper publishers and broadcasters often provide additional vehicles for discussion of public affairs. In particular, through blogs or other public forums, many sites offer opportunities for consumer feedback, commentary, and interaction . . . .").

103. The FCC supported weakening of media ownership rules with FCC-commissioned studies which asserted that consolidated media ownership would provide financial incentives for better local news coverage and local public affairs programming. *See* Michael Yan, *Newspaper/Television Cross-Ownership and Local News and Public Affairs Programming on Television Stations: An Empirical Analysis*, *in* BENTON FOUNDATION & SOCIAL SCIENCE RESEARCH COUNCIL, DOES BIGGER MEDIA EQUAL BETTER MEDIA?: FOUR ACADEMIC STUDIES OF MEDIA OWNERSHIP IN THE UNITED STATES 50, 50 (Oct. 2006), *available at* http://www.benton.org/benton_files/MediaOwnershipReportfinal.pdf. Empirical analysis, however, does not support this prediction. Cross-owned televisions stations do not provide more local news, and cross-ownership does not correlate with the quantity of local public affairs programming on television stations. *See id.* at 56. The Media and Democracy Coalition released studies by Dr. Mark Cooper, Director of Research at the Consumers Federation of America, reporting that "more media mergers in our already highly concentrated media markets will reduce already insufficient local news coverage" in California, Texas, Pennsylvania, Michigan, Florida, Ohio, Washington State, Oregon, Arkansas, Virginia, Montana, and Maine. *See* Press Release, Media & Democracy Coalition, New Economic Studies Show that: Bigger Media Hurts Local Communities (Oct. 19, 2006), *available at* http://www.media-democracy.com/site/c.jwKTJ8NYJxF/b.2169337/k.CE7C/New_Research_Bigger_Media_Hurts_Local_Communities.htm. According to another empirical study, "[L]ocal ownership [of television stations] adds almost five and one-half minutes of local news and over three minutes of local on-location news" to the standard thirty-minute news broadcast. *See* FCC, *Do Local Owners Deliver More Localism?: Some Evidence From Local Broadcast News* 15 (June 17, 2004) (unpublished working paper), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267448A1.pdf. *But see* Newspaper Ass'n of Am., *supra* note 6, at 66-79 (alleging that cross-ownership increases local news coverage without decreasing diversity of viewpoints). Interestingly, much of the factual support relied on by the Newspaper Assn. is from an "informal

Hyperlinking from online newspapers addresses only the first component of noise—location. Evaluation, the second noise problem, is more difficult. It might be handled by an audience feedback system, such as those used by eBay[104] and MoveOn's Action Forum.[105] Another alternative is a ranking algorithm, such as that used by Google.[106] Such a system, however, would need careful attention to neutrality. Google's own system is a proprietary trade secret and has been accused of bias in favor of Google's customers.[107] The best evaluator is an expert human reader, but classifying someone as an "expert" requires both criteria and criteria-appliers, factors which heighten the risks of actual and perceived bias. Yochai Benkler argues that accreditation can, and is, performed cooperatively on the Internet. However, his examples of successful systems do not include something as contentious and wide-based as the news system I am suggesting.[108] Wikipedia may be largely accurate and neutral,[109] but in a high number of contentious areas the best it can do is post the "Stop Hand" warning that "[t]he neutrality of this article is disputed."[110] News posts are apt to be overwhelmingly contentious.

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and confidential survey" conducted of its membership in August-September 2006. *See id.* at 65 n.247, Attachment 1.

As for anti-establishment news, the mainstream media's consistent downplaying of important stories which trample on corporate or political toes has been chronicled for years by Professor Carl Jensen's "Project Censored." *See* Sarah Phelan, *Censored Stories*, TUCSON WKLY., Sept. 14, 2006, *available at* http://www.tucsonweekly.com/gbase/Currents/Content?oid=86394. Recent buried stories include a district court decision against warrantless National Security Agency wiretapping, Net Neutrality, Halliburton's being charged with selling nuclear technology to Iran, danger to the oceans, increases in hunger and homelessness in the United States, and the systematic refusal to act of the federal group created to protect whistle-blowers. *Id.* Instead, the mainstream media focus on the "ephemeral." *See* PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 31.

104. *See* Ebay, Feedback Forum, http://pages.ebay.com/services/forum/feedback.html (last visited July 20, 2007).

105. *See* ActionForum, www.actionforum.com (last visited July 20, 2007).

106. For Google's carefully non-specific explanation of its search technology, see Google Corporate Information: Technology Overview, http://www.google.com/corporate/tech.html.

107. *See* Kinderstart.com LLC v. Google, Inc., No. C 06-2057 JF (RS), 2006 WL 3246596, at *1 (N.D. Cal. 2006) (unpublished opinion granting Google's motion to dismiss with leave to amend a lawsuit asking relief for Google's alleged use of search result ranking to penalize websites that left Google advertisement program).

108. *See* BENKLER, *supra* note 33, at 75-81 (discussing peer-production of accreditation on the Internet).

109. *See id.* at 70-74 (discussing Wikipedia and its accuracy); *see also* CASS SUNSTEIN, INFOTOPIA 149-56 (2006).

110. *See* SUNSTEIN, *supra* note 109, at 155 (discussing use and prevalence of Wikipedia's Stop Hand symbol*); see also* Brian Bergstein, *Microsoft in Hot Water for Offer to Pay for Wikipedia Edits*, SEATTLE TIMES, Jan. 23, 2007, http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=webmsnwiki23&date=20070123 (discussing Microsoft's attempt to pay an "independent" expert to evaluate and update a Wikipedia entry and calling it a

Dual-level feedback systems—those where users rate both the items and others' comments on the items—point toward possible solutions.[111]

2. Copyright Safe-Harbor for Internet Comments

If Congress lacks the will to implement the link-from alternative, it could make privately organized Internet comment space more fruitful by providing a copyright exemption, legislatively overruling *Los Angeles Times v. Free Republic*.[112] In that case, defendants ran an online bulletin board where members posted all or parts of news stories from various sources, including the *Los Angeles Times*. The postings could then be commented on by bulletin board members, and these comments could be read by the general public. The *Los Angeles Times* sued the bulletin board for copyright infringement. The trial court granted summary judgment against the defendants' claim of fair use, largely because newspaper stories were copied verbatim and usually in full.[113] While I dislike this outcome, it is not remarkable under the current text of the fair use provision and the related case law.[114]

Fair use, however, is a creature of statute. Congress can and should expand it. The needed language is simple:

> 107(b) Fair Use On-Line Comments
> Notwithstanding any other language in Title 17 U.S.C., it shall not be copyright infringement to post any news story(ies) on an Internet service which does not charge for access. Provided that such service
> (i) allows the public to post comments about such news story(ies) without limiting the points of view presented by these comments; and
> (ii) includes a request that persons posting news stories indicate the original source of the posted stories.
>
> For purposes of this section:
> "To post any news story(ies)" includes posting verbatim copies of material otherwise protected by copyright, posting edited copies of material otherwise protected by copyright, and posting material which incorporates the selection and arrangement of material otherwise protected by copyright.
> "An Internet service which does not charge for access" includes a

"no-no" because it presents a conflict of interest and might compromise the accuracy of the information).

111. *See* discussion *supra* note 71.

112. No. CV 98-7840-MM (AJWx), 1999 WL 33644483, at *1, *22 (C.D. Cal. 1999), *enforced*, 2000 WL 1863566 (C.D. Cal. 2000) (entering permanent injunction).

113. *Id.* at *22-23.

114. *See* 17 U.S.C. § 107 (2000) (defining the fair use defense).

> service which requires registration as a pre-requisite to posting comments, provided that (i) such registration requires neither payment of a fee nor receipt of otherwise unsolicited emails, and (ii) registration is not required for reading posted comments.

This is a very partial solution.[115] This legislation would protect comment space from some copyright claims, but does not address noise problems.

C. Thumbnail Sketches of Additional Possibilities

1. Uncopyrightable Government Works

Not all government speech is free of copyright fences. Copyright is a potent weapon against public discussion, especially low-cost public discussion.[116] The need to rewrite before quoting prevents faster cut-paste-and-comment critique.[117] The uncertainty of the fair use defense chills risk-averse adversaries.[118] Therefore, any addition—especially any publicly visible addition—to the public domain has public debate rewards. Since government is a key target of public scrutiny, expanding the government issued material available for cut-and-paste-comment is a worthwhile goal.

By statute, "[c]opyright protection . . . is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."[119] By case law, copyright may not be used to fence the public out of state or federal judicial opinions and enacted statutes.[120]

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115. Some copyright holders would presumably challenge the statutory change as a taking. *But see* Mugler v. Kansas, 123 U.S. 623, 669 (1887) (upholding state law banning liquor manufacturing from takings clause attack by owner of a brewery on the ground that the state did not have to pay compensation for barring "a noxious use" of real property).

116. *See, e.g.*, New Era Publ'ns Int'l v. Henry Holt & Co., Inc., 873 F.2d 576, 583-85 (2d Cir. 1989) (affirming that an unauthorized biography of Church of Scientology founder L. Ron Hubbard infringed copyrights in Hubbard's unpublished papers).

117. *See supra* notes 112-14 and accompanying text.

118. *See, e.g.*, Marshall Leaffer, *The Uncertain Future of Fair Use in Global Information Marketplace*, 62 OHIO ST. L.J. 849, 856 (2001) ("No matter what position one takes, most would agree that fair use remains, perhaps more than ever, the most troublesome doctrine in copyright law.").

119. 17 U.S.C. § 105 (2000).

120. *See, e.g.*, Banks v. Manchester, 128 U.S. 244, 253-54 (1888) (holding opinions of state courts may not be basis of copyright infringement suits); Davidson v. Wheelock 27 F. 61, 62 (D. Minn. 1866) (state statutes may not be basis of copyright infringement suits); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 619-24 (1834) (holding that opinions of United States courts may not be basis of

Governments, however, issue many publications which are covered by copyright: federal materials written by non-employee agents and most state materials. Since marking protected materials is no longer required,[121] users cannot easily separate the protected elements from the unprotected elements.

Congress could expand debate somewhat by expressly abandoning copyright claims, including no-copyright-suit clauses in contracts with non-government authors, and influencing the states to take similar actions. At a minimum, if Congress does create public Internet comment space organized by hyperlinks from government websites,[122] all texts posted by the government on such websites should be outside copyright, with the copyright exclusion clearly indicated.

2. Employment Policies

The Supreme Court writes as if the federal and each state government was one unified "speaker." I believe that government does not have independent free speech rights.[123] It has no personality, hence no autonomy or self-development claims. It is a creature of citizens, not a citizen entitled to vote, so it has no democratic-process claim. The state has no independent "will" and should be considered a mere tool controlled by natural persons. Natural persons, however, staff government positions.

Government employees are in the best position to warn the public about government actions. Whistle-blowers, unfortunately, must brave potential job penalties and criminal prosecution.[124] Congress would

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copyright infringement suits). Copyright, however, can be used to protect private authorship of information commonly published with opinions and statutes, such as West's headnotes. *See* Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 674, 677 (2d Cir. 1998).

121. *See, e.g.*, 17 U.S.C. § 401 (2000) (allowing, but not requiring, copyright notice).

122. *See supra* Part III.B.1.

123. *But see* Greene, *supra* note 11, at 1683-84 (listing positive governmental goals served by government speech). *Cf.* J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2266 (2005) (arguing in favor of government agencies lobbying each other because "[t]he empirical results highlight the surprisingly important role interagency lobbying can play in an agency's decision-making process. Federal and state agencies not only participated in relatively large numbers in [the Federal Energy Regulatory Commission's ("FERC")] relicensing hearings, but also had the largest empirical impact on FERC's decision-making of all the factors we considered").

124. The United States Office of Special Counsel is supposed to protect the employment rights of government whistleblowers, as explained on the Office's website. *See* http://www.osc.gov/wbdisc.htm. However, "[OSC] Special Counsel Scott Bloch, who was appointed by Bush in 2004, is overseeing the systematic elimination of whistle blower rights." Phelen, *supra* note 103. Additionally, a pro-whistleblower amendment in the Senate was removed in conference from an appropriations bill in September 2006 after the "Department of Justice (DOJ)

improve public debate if it aggressively supported whistle-blowers, thus functionally defanging the Court's anthropomorphisation of "government."

For example, Congress could enact a federal reporter shield law allowing reporters to keep informants' identities secret.[125] It could also limit use of secrecy contracts[126] and hobble the executive's desire to prosecute naysayers, public disputers, and publicizers of alleged government misdeeds by withholding funds from such prosecutions. It could create a support network for government employees who push their managers towards a broader view of the public good. It could even legislate free speech protection for federal employees, overruling the Supreme Court's recent holding "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[127] Unfortunately, Congress cannot legislate the same protection for the employees of state governments,[128] but individual states can.

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made eliminating [it a] top priority." GOVERNMENT ACCOUNTABILITY PROJECT, *eNews: Stronger Whistleblower Laws Left Out by Conference Committee*, Oct. 4, 2006, http://www.whistleblower.org/content/press_detail.cfm?press_id=624. Furthermore, an unpublished letter opinion from the Office of Legal Counsel has advised the Department of Labor that the language of the Clean Water Act is not sufficiently clear to constitute a waiver of federal sovereign immunity as to claims of retaliation against whistle-blowers. *See* Letter from Steven G. Bradbury, Acting Assistant Attorney General, to Howard M. Radzely, Solicitor, Dep't of Labor 7 (Sept. 23. (2005), *available at* http://www.peer.org/docs/dol/06_31_8_ag_opinion.pdf ("[I]t cannot be maintained that the phrase [in the CWA] unequivocally includes whistleblower claims.").

125. *Accord, e.g.*, Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 39 (2005) ("A strong and effective journalist-source privilege is essential to a robust and independent press and to a well-functioning democratic society."). *But see* Branzburg v. Hayes, 408 U.S. 665, 667 (1972) ("[R]equiring newsmen to appear and testify before state or federal grand juries" does not "abridge[] the freedom of speech and press guaranteed by the First Amendment."). *See also* The Free Flow of Information Act of 2007, S. 1267, 110th Cong. (1st Sess. 2007); The Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (1st Sess. 2007). The Free Flow of Information Act of 2007 was introduced into both houses of Congress on May 2, 2007 and sent to their respective Committees on the Judiciary. On August 1, 2007, the House committee ordered the bill (as amended) to be reported. No further action had been taken as of August 3, 2007. THOMAS, The Library of Congress, http://thomas.loc.gov/ (last visited Aug. 3 , 2007).

126. *But see* Snepp v. United States, 444 U.S. 507, 507-08, 510, 516 (1980) (enforcing pre-publication review clause between CIA and former-employee).

127. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006).

128. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (rejecting Congress's power to define or expand constitutional protections of individuals which the Fourteenth Amendment allows Congress to impose on states: "The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.").

3. Pseudonymity and Anonymity in "Government" Speech

The Supreme Court has long recognized the importance of allowing skittish speakers the option of speaking without providing their everyday names to all listeners.[129] Recently the Court allowed similar latitude to the United States government, using the government speech doctrine for advertisements purporting to issue from "America's Beef Producers."[130] The federal executive branch spends "huge amounts on advertising and public relations contracts to counter a hostile media environment."[131] In 2005, the *Washington Post* reported high payments by the Department of Education for seemingly independent endorsements of its policy.[132] In 2006, the *New York Times* reported that some of the "hundreds of video news releases" produced by the federal government had been "broadcast without a disclaimer of the government's role."[133]

Government response was minimal. The FCC reminded broadcasters of the FCC rule requiring "clear[] disclos[ure] to members of their audiences [of] the nature, source and sponsorship of the material that they are viewing," and warned that "appropriate enforcement action" would be taken against non-compliant entities.[134] Senator Frank R. Lautenberg, a Democrat from New Jersey, along with nine co-sponsors, including John Kerry, introduced the grandly named Truth in Broadcasting Act of 2005.[135] The bill merely requires prepackaged news stories "produced by or on behalf of a Federal agency" to "conspicuously identif[y] the United States Government as the source for the prepackaged news story" when the item is aired by a broadcaster located within the United States.[136] The bill's proposed remedy is

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129. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (relying on *Talley v. California*, 362 U.S. 60, 64 (1960), for First Amendment protection of a speaker's decision to remain anonymous).

130. *See* Johanns v. Livestock Mktg. Assoc., 544 U.S. 550, 555 (2005).

131. *Bush Spends Heavily to Get Message Out*, INSIGHT, Mar. 27, 2006, http://www.insightmag.com/Media/MediaManager/message2.htm (reporting over $1.62 billion during two and one-half years; an "unprecedented and disturbing" outlay according to Representative George Miller (D-Ca.)).

132. *See* Kurtz, *supra* note 52.

133. David Barstow, *Report Faults Video Reports Shown as News*, N.Y. TIMES, Apr. 6, 2006, at A19.

134. *See* Public Notice, Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators, 20 F.C.C.R. 8593, 8594, (Public Notice Apr. 13, 2005). The FCC also opened Docket MB 05-171 on the issue. *See id.* at 8602. As of June 8, 2007, a search of the FCC docket tracking website, http://gullfoss2.fcc.gov/prod/ecfs/condhist_v2.cgi, yields no report of subsequent releases.

135. S. 967, 109th Cong. (2005) (introduced Apr. 28, 2005).

136. *Id.* § 2 (2005).

inadequate, and the bill applies only to "complete, ready-to-use audio or video news segment[s] designed to be indistinguishable from a news segment produced by an independent news organization."[137] The bill was never voted on and, therefore, died at the end of the 109th Congress.[138]

Even pro-government commentators in the recent spate of government-speech literature see a problem with unlabeled and mislabeled government speech.[139] Besides targeted responses to specific executive misrepresentations, such as S. 967, Congress should enact a statute rejecting "government speech" protection for unbranded and misbranded domestic missives from federal actors. Since one Congress cannot bind later sessions, the statute should include a clear statement that any Congress wishing to opt out of this general rule must expressly do so as to each specific exception and by pointedly referring to the anti-anonymity/pseudonymity statute.[140] Each state legislature should enact a similar statute regarding the speech of its respective state government.

IV. CONCLUSION

The United States Supreme Court still makes the analytical error recognized by Professor Barron forty years ago. That error is reinforced by a similar misstep in copyright theory. Nevertheless, with creativity, some media reform is possible if the political branches have the will. This Article has made a few suggestions, including:

1. A National Corporation for Public Criticism;
2. An online public comment space hyperlinked to online news and government websites with a two-layer reader feedback system;
3. Expansive fair use for comments on news stories;
4. Limits on copyright protection of government materials;
5. Protections for government-employed whistle-blowers; and

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137. The definition is identical in both versions of the bill. S. 967, 109th Cong. § 2 (2005); S. REP. NO. 109-210, at 9 (2005).

138. THOMAS, The Library of Congress, http://thomas.loc.gov/ (last visited July 20, 2007).

139. *See, e.g.*, Greene, *supra* note 11, at 1684 (supporting government's independent right to speak, but agreeing that "ventriloquism" is a problem).

140. For example, Congress might include a provision like this:

Notwithstanding any other provision of law, no provision of title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of [the Department of Medicine and Surgery Statute] shall be considered to supersede, override, or otherwise modify such provision of this subchapter except to the extent that such provision of title 5 or of such other law specifically provides, by specific reference to a provision of this subchapter, for such provision to be superseded, overridden, or otherwise modified. 38 U.S.C. § 4119 (1988), *repealed by* Pub. L. 102-40, title IV § 401(a)(3), 105 Stat. 210.

6. Elimination of the "government speech" doctrine for materials not clearly labeled as originating from the government.