OF BLOGS, EBOOKS, AND BROADBAND: ACCESS TO DIGITAL MEDIA AS A FIRST AMENDMENT RIGHT

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I. INTRODUCTION: DIGITAL MEDIA AND THE FIRST AMENDMENT

A politics of Internet freedom has recently achieved cultural prominence. Legal theorists have described this new Internet politics as a form of digital libertarianism, cultural environmentalism, or identity politics uploaded from the offline world.[1] This politics is critical of attempts to censor bloggers or the Web, shut down promising new "speech-enabling" technologies like peer-to-peer ("p2p") file sharing or

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1. For a telling account of digital libertarianism as a system of thought combining Enlightenment values with an awareness of the Internet's ability to evade government censorship and official monopolies, see James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 177-80, 182-83 (1997). For influential discussions of cyberspace law and politics as a replay of debates that the environmental movement emphasized concerning tendencies toward unlimited exploitation of private property and resulting injuries to the commons and to the quality of life of all, see James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 95-97, 108-12 (1997); *see also* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 69-71 (2003). For a more recent treatment of this theme, see YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 383-459 (2006), *available at* http://www.congo-education.net/wealth-of-networks/ch-11.htm. For persuasive critiques of intellectual property as a threat to autonomous formation of individual and group identities in postmodern, globalizing societies, see ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW 30-31, 55, 88-129 (1998); Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. 257, 265-66, 276-280, 303, 307-09, 318-25 (2006).

search engines for books, or repeal laws ensuring that the Internet operates based on principles of nondiscrimination, interoperability, and open access to information.[2]

Digital media accessible over the Internet are more First Amendment-friendly than traditional print and broadcast media, for several mutually reinforcing and interrelated reasons. First, like the pamphleteering and epistolary discourse of the eighteenth century, digital media avoid the strategic bottleneck power exercised by owners of printing presses or television infrastructure.[3] Second, they are more often open to ownership and control by women, young people, the politically unpopular, members of minority ethnic or religious groups, and those lacking official credentials or renowned expertise in a specific subject area.[4] Third, they disseminate more diverse and truthful speech

2. *See, e.g.*, *Net Neutrality: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. 7-9 (2006) (statement of Vinton G. Cerf, Vice President and Chief Internet Evangelist, Google, Inc.), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:30115.pdf; WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 92-133 (2004); MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 4-5, 8 (2005); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 62-79 (2004), *available at* http://www.ibiblio.org/ebooks/Lessig/Free_Culture/Free%20Culture.htm#p62; LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FUTURE OF THE COMMONS IN A CONNECTED WORLD 177-205, 215-17 (2001); Matthew Fagin, Frank Pasquale & Kim Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 506 (2002); Paul Ganley & Ben Allgrove, *Net Neutrality: A User's Guide*, 22 COMP. L. & SEC. REP. 454, 455, 458, 460 (2006); Justin Hughes, *Size Matters (Or Should) In Copyright Law*, 74 FORDHAM L. REV. 575, 636-37 (2005); Alfred E. Kahn, *Telecommunications: The Transition from Regulation to Antitrust*, 5 J. TELECOMM. & HIGH TECH. L. 159, 184-88 (2006); Christian Coalition & MoveOn.org, Advertisement (On Net Neutrality), N.Y. TIMES, June 9, 2006, at A17; Lawrence Lessig, Comment, *Congress Must Keep Broadband Competition Alive*, FIN. TIMES, Oct. 19, 2006, at 17, *available at* http://www.ft.com/cms/s/a27bdb16-5ecd-11db-afac-0000779e2340,_i_rssPage=73adc504-2ffa-11da-ba9f-00000e2511c8.html; Lawrence Lessig & Robert W. McChesney, Op-Ed., *No Tolls on the Internet*, WASH. POST, June 8, 2006, at A23.

3. *See* Reno v. ACLU, 521 U.S. 844, 868-70 (1997); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 512 U.S. 622, 626, 637-39 (1994); Lorain Journal Co. v. United States, 342 U.S. 143, 146, 149, 155-56 (1951); Byars v. Bluff City News Co., 609 F.2d 843, 846-48, 855-58 (6th Cir. 1979). Digital media supplant traditional media's communications model of "one to many" with the Internet's model of "many to many," which allows every reader to become an author, direct distribution to replace intermediary censorship and editorial control, and public-interested publication to challenge commercial dictates. *See* MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 9 (1998); Margaret Chon, *Erasing Race?: A Critical Race Feminist View of Internet Identity-Shifting*, 3 J. GENDER RACE & JUST. 439, 446 (2000); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 256-59 (1996); Sunder, *supra* note 1, at 276-77.

4. *See, e.g.*, DEBORAH FALLOWS, PEW INTERNET & AMERICAN LIFE PROJECT, HOW WOMEN AND MEN USE THE INTERNET 2, 11, 20, 38 (2005), http://www.pewinternet.org/pdfs/PIP_Women_and_Men_online.pdf (66% of American women are online, 8% have their own

faster than the traditional media, which too often operate as a sounding board for government officials.[5] Finally, at their best they evade the

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blogs, and 11% have their own Web sites); AMANDA LENHART & SUSANNAH FOX, PEW INTERNET & AMERICAN LIFE PROJECT, BLOGGERS ii (2006), http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf ("The blogging population is young, evenly split between women and men, and racially diverse. . . . [11% of bloggers] are African-American, 19% are English-speaking Hispanic and 10% identify as some other race."). Assuming that there are 12 million American blogs, that means about 6 million American women, 1.3 million African-Americans, 2.3 million Latinos/Latinas, and 1.2 million Asian-Americans, Native Americans, and others have a voice in digital media. Television news sources, talk show hosts and guests, as well as newspaper editors, by contrast, are overwhelmingly male, European-American, and (for television but not newspapers) Republican. *See* Carole Ashkinaze, *A Matter of Opinion: Female Pundits Are Still Missing from the Media*, MS. MAG., Summer 2005, at 17, *available at* http://www.msmagazine.com/summer2005/opinion.asp; Steve Rendall & Tara Broughel, *Amplifying Officials, Squelching Dissent*, EXTRA!, May/June 2003, *available at* http://www.fair.org/index.php?page=1145; Kay Semion, *Who We Are and What We Do: An Internet-researched Update*, MASTHEAD, Autumn 2006, at 12-13, *available at* http://www.findarticles.com/p/articles/mi_qa3771/is_200610/ai_n16756010; MEDIA MATTERS FOR AMERICA, IF IT'S SUNDAY, IT'S CONSERVATIVE: AN ANALYSIS OF THE SUNDAY TALK SHOW GUESTS ON ABC, CBS, AND NBC, 1997-2005 1 (2006), *available at* http://mediamatters.org/static/pdf/MMFA_Sunday_Show_Report.pdf; Press Release, Fairness & Accuracy in Reporting ("FAIR"), CommonDreams.org, Who's On the News?: Study Shows Network News Sources Skew White, Male & Elite (May 21, 2002), http://www.commondreams.org/news2002/0521-03.htm. The ideal of cyberspace, utopian and overly romantic though it may be, has been described as "a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. . . . a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity." John Perry Barlow, *A Declaration of the Independence of Cyberspace* (Feb. 8, 1996), http://homes.eff.org/~barlow/Declaration-Final.html. Notably, over forty percent of relatively low-income Americans have posted information to the Internet, surely many more than have been published by the traditional media. *See* Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1563 (2005).

5. In the twentieth century, American newspapers, broadcast networks, and movie studios apparently reached an understanding with politicians in Washington to the effect that the government's perspective on important issues would be amplified in the public press, while dissenters would be denied effective access to the media. *See* Rendall & Broughel, *supra* note 4 ("Since the invasion of Iraq began in March, official voices have dominated U.S. network newscasts, while opponents of the war have been notably underrepresented, according to a study . . . . [V]iewers were more than six times as likely to see a pro-war source as one who was anti-war; with U.S. guests alone, the ratio increases to 25 to 1."); Jon Whiten, *If News From Iraq Is Bad, It's Coming From U.S. Officials*, EXTRA!, Feb. 2004, *available at* http://www.fair.org/index.php?page=1167 (stating that seventy-six percent of "on-camera sources appearing in stories about Iraq on the nightly network newscasts—ABC World News Tonight, CBS Evening News and NBC Nightly News—in the month of October 2003 . . . were current or former government or military officials . . . . By allowing U.S. officials and appointees to make up 73 percent of total sources, the networks clearly promoted the official line on the war and minimized dissenting views . . . . Seventy-nine percent of the [sources who were] current U.S. civilian officials were Republicans . . . ."); James Q. Wilson, Editorial, *The Press at War*, WALL ST. J. ONLINE, Nov. 6, 2006, http://www.opinionjournal.com/federation/feature/?id=110009203; (noting that "television accounts between 1962 and 1968 were not critical of the American effort in Vietnam," only shifting after the Tet Offensive in January 1968 indicated a "stalemate"); Angela Woodall, *Survey: U.S.*

bureaucratic permission and clearance culture of the traditional media, which stifle creativity by censoring and raising the cost of speech.[6]

Despite their superior capacity to fulfill First Amendment values, digital media are undergoing widespread censorship as the Supreme Court increasingly construes the First Amendment as a privilege of large corporations to influence politicians and advertise dangerous products, rather than a right of unpopular citizens to criticize public officials.[7]

Media Censors Iraq Reporting, UNITED PRESS INTERNATIONAL, Apr. 5, 2005, http://www.upi.com/InternationalIntelligence/Survey_US_media/censors_Iraq_reporting/20050401-033245-1212r/ ("The news media are self-censoring reports about Iraq because of concern for public reaction to graphic images and details about death and torture, according to a survey of 210 U.S. and international journalists . . . . There is an 'unspoken rule' against publishing images of what would be horrifying, such as [dead bodies] . . . .").

6. The verb "censor" in this context refers to deterring potential speakers from making particular statements by threatening them with subsequent legal penalties, and not simply to the verb's original meaning—pre-publication review of a work by an official for compliance with the ideological aims of the state. *Compare, e.g.*, Reno v. ACLU, 521 U.S. 844, 874 (1997) (using broader definition of "censor"), *with* Marcus v. Search Warrants, 367 U.S. 717, 724-25 (1961) (using narrower definition of the term). For depictions of how traditional media undergo censorship, thus defined, as a result of an intellectual property clearance culture, *see* KEMBREW MCLEOD, FREEDOM OF EXPRESSION®: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 62-113, 133-58 (2005) (focusing on how music sampling clearances censor and raise costs of musicians' artistry); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 388, 401, 406, 408-11 (1999) (describing how companies that own many copyrights exercise bureaucratic control over creation of books and their distribution to the public); Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026, 1058-71 (2006) (focusing on films and classroom teaching); PATRICIA AUFDERHEIDE & PETER JASZI, CENTER FOR SOCIAL MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 4 (2004), http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf (focusing on documentary films).

7. *Compare, e.g.*, Randall v. Sorrell, 126 S. Ct. 2479, 2485-86, 2500 (2006) (holding that a statute limiting corporate payments to public officials that could influence their positions and public acts was unconstitutional under the First Amendment), Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 533, 553-71, 586-90, 599 (2001) (extending First Amendment protections to corporate advertising of tobacco that threatened to cause children to become addicted), Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 558-59, 571-72 (1980) (extending First Amendment protections to corporate advertising that threatened to increase consumers' electricity bills), E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-40 (1961) (declaring that the First Amendment protects "corporate aggrandizement" via lobbying for monopolies), *and* Meredith Corp. v. FCC, 809 F.2d 863, 874 (D.C. Cir. 1987) (remanding for determination by FCC whether federal limits on corporate broadcasters' ability to censor political speech violated corporations' First Amendment rights), *with* Beard v. Banks, 126 S. Ct. 2572, 2575-76 (2006) (contending that the First Amendment did not prohibit prison officials from censoring individual prisoner's access to newspapers and magazines), Garcetti v. Ceballos, 126 S. Ct. 1951, 1955, 1962 (2006) (explaining that the First Amendment did not prohibit firing public employee for exposing unconstitutional government action), Milkovich v. Lorain Journal Co., 497 U.S. 1, 3 (1990) (holding that the First Amendment did not necessarily protect an individual author against defamation suit brought by public official and premised upon author's expressions of opinion about a local controversy in a newspaper), *id.* at 34-36 (Brennan, J., joined by Marshall, J., dissenting)

Since the Supreme Court's admonition in 2003 that the First Amendment is no license to reproduce excerpts of copyrighted work, copyright owners have sent out millions of demand letters to Internet Service Providers ("ISP"), demanding that digital content be deleted from the Internet without judicial oversight or jury trial.[8] Since the United States Department of Commerce and Internet Corporation for Assigned Names and Numbers ("ICANN") made compulsory private arbitration of

(criticizing majority for striking at "heart" of First Amendment's protections for political debate by individuals), Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263, 266 (1988) (upholding school's censorship of articles dealing with pregnancy and divorce), Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542 (1985) (censoring political magazine's exposé of President Harold Ford's bombing of Cambodia and pardon of Richard Nixon), City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 791-92, 817 (1984) (upholding ordinance prohibiting posting of political signs on utility poles), Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 39, 55 (1983) (upholding censorship of public school teachers' communications with one another on union matters), Connick v. Myers, 461 U.S. 138, 140-41, 154 (1983) (upholding termination of assistant district attorney for "insubordination" in the form of questioning politicization of legal obligations), Greer v. Spock, 424 U.S. 828, 831, 840 (1976) (upholding censorship of political speeches, demonstrations, and literature in a military context), *and* United States v. O'Brien, 391 U.S. 367, 369, 386 (1968) (upholding prosecution of individual for expressing opposition to Vietnam War by burning a draft card).

8. For statements of the dubious proposition that the First Amendment confers no license to reproduce excerpts of copyrighted work, see *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (no First Amendment license to infringe copyrights where "Congress has not altered the traditional contours of copyright protection"); *In re* Capital Cities/ABC, Inc., 918 F.2d 140, 143 (11th Cir. 1990) ("With respect to copyright protection, the first amendment is not a license to trammel on legally recognized rights in intellectual property.") (citations and internal quotation marks omitted). A study of demand letters sent to Google and other digital media firms found that such letters pose a "serious problem for Internet speech" because nearly a third insist on the deletion of content that likely does not violate any copyright. *Internet Study Finds Questionable Use of Cease-and-Desist Notices*, FACULTY FOOTNOTES (USC Gould School of Law, Los Angeles, Cal.), Fall 2006, at 2, *available at* http://law.usc.edu/assets/docs/FINAL-footnotes06.pdf; *see* JENNIFER M. URBAN & LAURA QUILTER, EFFICIENT PROCESS OR 'CHILLING EFFECTS'? TAKEDOWN NOTICES UNDER SECTION 512 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 2-3 (2005), http://static.chillingeffects.org/Urban-Quilter-512-summary.pdf. One online intellectual property protection company boasted about sending out one million "automated" demands for deletion of allegedly infringing content *every month*. *See* BayTSP Corp., *Fighting Online Software Piracy—What Works in 2005* (2005), http://web.archive.org/web/20050305165944/http://www.baytsp.com/downloads2/SW_white_2005.pdf; BAYTSP CORP., TRENDS RELATING TO USE OF P2P FILE-SHARING SYSTEMS (2004), http://www.ftc.gov/bcp/workshops/filesharing/presentations/ishikawa.pdf. Another firm offers to "automatically create a Take-Down Campaign" for "thousands of files" of content identified in advance by a copyright owner, which it says will result in demands for deletion being automatically sent to thousands of Web sites, p2p software providers, etc. GLOBAL FILE REGISTRY, TECHNICAL WHITE PAPER 9, 19 (May 26, 2006), http://www.globalfileregistry.com/assets/Global_File_Registry_White_Paper.pdf. These take-down demand letters, even if not automated, are subject to erroneous charges and deterrence of lawful speech. *See* Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297, 368 (2003); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1380 (2004); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 661-62 (2005).

Internet trademark disputes into a precondition of obtaining an Internet address, thousands of Web pages have been deleted from cyberspace by arbitration panels that systematically disfavor free speech defenses.[9] And since the Federal Communications Commission ("FCC") and the courts cast aside warnings that deregulated oligopolistic control of high-speed Internet infrastructure threatened universal access to information, the digital divide has widened between rich and poor, suburban and rural, and majority and minority ethnic groups.[10] Commentators blame the absence of ubiquitous city-supported high-speed Internet networks and open access rules for the fact that broadband access in the United States lags far behind access in nations in East Asia and northern Europe, which have many municipal networks and open access rules.[11]

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9. World Intellectual Property Organization ("WIPO") arbitrators have found for the complainant in eighty-four percent of over 7,000 distinct arbitrations that have been filed seeking deletion of a Web site associated with an allegedly infringing domain name, a percentage that would be truly remarkable in ordinary civil litigation. *See* Press Release, World Intellectual Property Organization, WIPO Handles Its 25,000th Domain Name Case (Oct. 16, 2006), http://www.wipo.int/edocs/prdocs/en/2006/wipo_pr_2006_464.html. Another arbitration provider has administered over 7200 domain name arbitrations. *See* National Arbitration Forum, *National Arbitration Forum Issues Three Decisions on Internet Trademark Domain Name Disputes*, Nov. 21, 2006, http://www.adrforum.com/newsroom.aspx?&itemID=1111&news=3. A single arbitration may challenge many domain names. *See, e.g.*, Sallie Mae, Inc. v. Sansone, Case No. D2005-0368 (WIPO Arb. & Mediation Ctr., July 11, 2005), *available at* http://arbiter.wipo.int/domains/decisions/html/2005/d2005-0368.html (twenty-three domain names); Wachovia Corp. v. Flanders, Case No. D2003-0596 (WIPO Arb. & Mediation Ctr., Sept. 19, 2003), *available at* http://www.wipo.int/amc/en/domains/decisions/html/2003/d2003-0596.html (three domain names). For articles describing the enactment and perceived unfairness of the domain name arbitration system, including the high percentage of cases decided by default, see, for example, Jessica Litman, *Electronic Commerce and Free Speech*, *in* THE COMMODIFICATION OF INFORMATION 37-42 (Niva Elkin-Koren & Neil Weinstock Netanel eds., 2002); Jacqueline D. Lipton, *Beyond Cybersquatting: Taking Domain Name Disputes Past Trademark Policy*, 40 WAKE FOREST L. REV. 1361, 1371-77, 1397-1404 (2005); Hannibal Travis, *The Battle for Mindshare: The Emerging Consensus that the First Amendment Protects Corporate Criticism and Parody on the Internet*, 10 VA. J.L. & TECH. 3, 30-36 (2005); MILTON MUELLER, CONVERGENCE CTR., SUCCESS BY DEFAULT: A NEW PROFILE OF DOMAIN NAME TRADEMARK DISPUTES UNDER ICANN'S UDRP 1-2 (2002), http://dcc.syr.edu/markle/markle-report-final.pdf; Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP* 1-3 (Aug. 2001), *available at* http://aix1.uottawa.ca/~geist/geistudrp.pdf. *But See, e.g.*, INTA INTERNET COMM., THE UDRP BY ALL ACCOUNTS WORKS EFFECTIVELY—REBUTTAL TO ANALYSIS AND CONCLUSIONS OF PROFESSOR MICHAEL GEIST IN 'FAIR.COM?' AND 'FUNDAMENTALLY FAIR.COM?' 1-3 (May 6, 2002), *available at* http://www.inta.org/downloads/tap_udrp_2paper2002.pdf.

10. *See* Hannibal Travis, *Wi-Fi Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy*, 55 AM. U. L. REV. 1697, 1728-36, 1751-59, 1777-78 (2006).

11. *See* Jesse Drucker, *For U.S. Consumers, Broadband Service Is Slow and Expensive*, WALL. ST. J., Nov. 16, 2005, at B1; Robert McChesney & John Podesta, *Let There Be Wi-Fi*, WASH. MONTHLY, Jan./Feb. 2006, at 15, *available at* http://www.washingtonmonthly.com/features/2006/0601.podesta.html; FLORIDA MUN. ELEC. ASS'N ("FMEA"), THE CASE FOR

It has been well known for some time that First Amendment rights may be implicated by overbroad copyright and trademark laws, or concentrated private power over information infrastructure. For several decades, judges and scholars have been criticizing developments in intellectual property and antitrust law that threaten the public's ability to contribute and enjoy access to political and cultural discourse of an uninhibited, multicultural, dynamic, and evolutionary character.[12]

MUNICIPAL BROADBAND IN FLORIDA 9 (2005), http://www.baller.com/pdfs/fmea_white_paper.pdf.

12. Judicial opinions in this tradition include: San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 569 (1987) (Brennan, J., dissenting) (citing Cohen v. California, 403 U.S. 15, 26 (1971)); Harper & Row, Publishers, Inc., 471 U.S. at 590-98 (Brennan, J., dissenting); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576-82 (1977); Associated Press v. United States, 326 U.S. 1, 20 (1945); Lamparello v. Falwell, 420 F.3d 309, 313 (4th Cir. 2005); Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1017 (9th Cir. 2004); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 803, 806 (9th Cir. 2003); Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 901 (9th Cir. 2002) (citing Rogers v. Gramaldi, 875 F.2d 994, 999 (2d. Cir. 1989)); Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166, *substituted opinion at* 268 F.3d 1257, 1277 (11th Cir. 2001); Wendt v. Host Int'l, Inc., 197 F.3d 1284, 1288-89 (9th Cir. 1999) (Kozinski, J., dissenting); White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513-14 (9th Cir. 1993) (Kozinski, J., dissenting); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 29 (1st Cir. 1987); Bus. Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 646, 653-55 (D.C. Cir. 1971); Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 309 (2d Cir. 1966); Hawaii v. Gannett Pac. Corp., 99 F. Supp. 2d 1241, 1250 (D. Haw. 1999); Writers Guild of Am., West, Inc. v. FCC, 423 F. Supp. 1064, 1144-52 (C.D. Cal. 1976). For scholarship in this tradition, see, for example, Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protections of Expression*, 67 CAL. L. REV. 283 (1979); Charles C. Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39 (1980); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987). Since the late 1980s in particular, scholars have been much more willing to take the First Amendment harms inflicted by intellectual property law seriously. *See, e.g.*, LESSIG, THE FUTURE OF IDEAS, *supra* note 2, at 187-90, 196-99; Floyd Abrams, *First Amendment and Copyright*, 35 J. COPYRIGHT SOC'Y 1, 11 (1987); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 893, 900, 908 (2002); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS. & ENT. L.J. 1 (1998); Dorean M. Koenig, *Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademark-Protected Icons*, 11 T.M. COOLEY L. REV. 803 (1994); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006); David Lange, *Copyright and the Constitution in the Age of Intellectual Property*, 1 J. INTELL. PROP. L. 119, 133-34 (1993); Arlen W. Langvardt, *Trademark Rights and First Amendment Wrongs: Protecting the Former Without Committing the Latter*, 83 TRADEMARK REP. 633, 651-52 (1993); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 169-70 (2003); Robert J. Shaughnessy, Note, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079, 1079-81 (1986); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 EMORY L.J. 393, 432-33 (1989); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 681 (1992) [hereinafter Zimmerman, *Information as Speech*]; Diane Leenheer

I hope to advance the scholarship in this area, but not by basing a First Amendment right of access to digital media on an ad hoc balancing test or variant of intermediate scrutiny derived from *United States v. O'Brien*,[13] as have other scholars.[14] Instead, I aim to show that the rubric of originalism provides the most persuasive, consistent, and principled basis on which to establish First Amendment limits to efforts by private entities to censor digital media using government-issued monopolies.

My argument takes its inspiration from three lines of scholarship. First, I rely on a rich tradition of discourse explaining how digital media represent a fulfillment of the libertarian and radically democratic vision of the First Amendment.[15] Intellectual property scholarship evoking eighteenth century freedoms against twentieth century regulation and management of speech and the press also inspires my defense of digital

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Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 348-49 (2004) [hereinafter Zimmerman, *Is There a Right*].

13. 391 U.S. 367 (1968); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 635, 662, 664-65 (1994); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984) (developing intermediate scrutiny standard based on *O'Brien* precedent).

14. The studies that I have learned the most from about how copyright and other intellectual property rights might be subjected to First Amendment balancing and "intermediate scrutiny" under *O'Brien* and its progeny include Benkler, *supra* note 6, at 372, 372 n.83, 413 n.230 (conducting First Amendment analysis of copyright and other intellectual property laws using test articulated in *O'Brien*, 391 U.S. at 377, and applied in *Turner Broad.*, 512 U.S. at 665); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 178-80 (2003); Justin Hughes, *How Extra-Copyright Protection of Databases Can Be Constitutional*, 28 U. DAYTON L. REV. 159, 200-02 (2002) (providing a similar analysis of legislation granting copyright-like protections to databases of facts or other information); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 4, 42-43, 63-78 (2000); *see also* Brief of Petitioners at 39, Eldred v. Ashcroft, No. 01-618 (U.S. Sup. Ct. filed May 20, 2002), *available at* htty://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/opening-brief.pdf; Opening Brief of Appellants at 17, 33, Eldred v. Reno, No. 99-5430 (D.C. Cir. May 22, 2000), *available at* http://cyber.law.harvard.edu/openlaw/eldredvreno/appealbrief.html.

15. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 122-86 (1999); LESSIG, THE FUTURE OF IDEAS, *supra* note 2, at 120-41, 177-217, 249-59 (discussing the freedom-enhancing characteristics of cyberspace, and the consequent government efforts at control over digital content, and arguing against "perfect control"); C. Edwin Baker, *First Amendment and the Internet: Will Free Speech Principles Applied to the Media Apply Here?*, 11 ST. JOHN'S J. LEGAL COMMENT. 713, 715-16 (1996); James Boyle, *The First Amendment and Cyberspace: The Clinton Years*, 63 LAW & CONTEMP. PROBS. 337, 341, 349, 351 (2000); Elkin-Koren, *supra* note 3, at 218-19, 235-67; Fraser, *supra* note 12, at 36; Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 124, 135, 137, 170 (2001); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 33 (2002); Solveig Singleton, *Reviving a First Amendment Absolutism for the Internet*, 3 TEX. REV. L. & POL. 279, 282-83, 321 (1999); Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1761, 1789-91 (1995).

media against censorship.[16] Second, I draw on the insight by prominent jurists and scholars that originalist applications of the Constitution and Bill of Rights are frequently more protective of liberty and democracy than either ad hoc balancing or judicial findings of "reasonableness."[17]

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16. *See, e.g.*, LESSIG, CODE, *supra* note 15, at 139 (calling for balanced intellectual property laws that "re-create the original space for liberty" that early American law guaranteed); Boyle, *supra* note 1, at 55-56 (urging revival of "anti-monopolistic" tradition of "free-trade skepticism about intellectual property" in eighteenth and nineteenth century, which stressed overbroad monopolies' censorious "control over our collective culture" and concomitant "harm to the fabric of the republic caused by great concentrations of wealth and power," and as represented by James Madison, Thomas Jefferson, Thomas Babington Macaulay, and Adam Smith); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 150-58 (1998) (analyzing eighteenth and nineteenth century copyright law to assess whether injunctions in intellectual property cases violate First Amendment); L. Ray Patterson, *Presentation at the University of Dayton Law Review Symposium: Copyright Protection for Computer Databases, CD-ROMS and Factual Compilations*, *in* 17 U. DAYTON L. REV. 413, 413 (1992) (criticizing "overextension" of copyright due to the departure from eighteenth century understanding that copyright was a statutory monopoly, not an absolute property right).

17. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 141-44 (1959) (Black, J., dissenting) (rejecting the notion that "laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process"). Justice Black further explained:

> [The majority of the Court believes that] neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is *reasonable* to do so. Not only does this violate the genius of our *written* Constitution, but it runs expressly counter to the injunction to Court and Congress made by Madison when he introduced the Bill of Rights. "If [the Bill of Rights is] incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against *every* assumption of power in the Legislative or Executive; they will be naturally led to resist *every* encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."

Id. at 143 (quoting 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789)); *see also* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 130-31 (2d ed. 1997) (stating that reasonableness tests and balancing are inconsistent with the "philosophy of Thomas Jefferson," who opposed "those who believe in restricting and shackling the human intellect"); Melville B. Nimmer, *The Right to Speak From* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 939-41 (1968); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1137 (2005) (criticizing ad hoc balancing in First Amendment context as an "unexamined, un-self-conscious intuitive inquiry [that] can easily be influenced by factors that judges ought not consider, such as the ideology of the speaker or the perceived merits of the political movement to which he belongs").

I find the following books and articles to be exemplary of the fruitfulness of criticizing existing constitutional doctrine and engaging in originalist expositions of the Bill of Rights. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1996); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221 (2002); Akhil Amar & Vikram Amar, *Guns and the Constitution: Telling the Right Second Amendment Story*, FINDLAW'S WRIT, Nov. 2, 2001, http://writ.news.findlaw.com/amar/20011102.html; Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (And for Conservatives and Moderates, Too)*, SLATE, Sept. 21, 2005, http://www.slate.com/id/2126680/;

Justice William J. Brennan in particular proved the advantage of a careful attention to the intent and historical context of the First Amendment over either ad hoc or "definitional" balancing. He introduced the review of legislation for its chilling effect on protected speech due to overbreadth and vagueness, rather than simply asking whether the First Amendment allowed regulation of the category of speech affected.[18]

Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Akhil Reed Amar, Comment, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992); Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights,"* 17 CARDOZO L. REV. 2225 (1996); Akhil Reed Amar, Foreword, *The Supreme Court, 1999 Term: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) [hereinafter Amar, *The Supreme Court*]; *see also* Scott v. Sandford, 60 U.S. 393, 564-633 (1856) (Curtis, J., dissenting) (*superseded by* U.S. Const. amend. XIII, §§ 1-2); JOHN NICHOLS, THE GENIUS OF IMPEACHMENT: THE FOUNDERS' CURE FOR ROYALISM (2006); Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 110-12, 125-28 (1984); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007).

18. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270, 272, 275, 279-80 (1964) (holding that although libel and defamation may be legitimate subjects of state regulation, such regulation needs to be limited in cases involving public officials to false statements made with "actual malice," so that "'the field of free debate'" will have "'breathing space'" and remain "uninhibited, robust, and wide-open." The court noted that "free public discussion of the stewardship of public officials was . . . , in Madison's view, a fundamental principle of the American form of government."); *see also* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (although inciting violent acts may not be worthy of protection in itself, regulation of such incitement needs to be restricted by First Amendment to cases involving advocacy intended to and likely to cause "imminent lawless action," or it might "sweep[] within its condemnation speech which our Constitution has immunized from governmental control"); Freedman v. Maryland, 380 U.S. 51, 59-60 (1965) (invalidating law prohibiting exhibition of films not approved by state licensing boards, which might deter exhibitors from showing films containing protected expression); NAACP v. Button, 371 U.S. 415, 433 (1963) (explaining that although a law might be addressed to a form of speech or conduct subject to reasonable regulation, the law's overbreadth and vagueness may be "objectionable" because the "threat of sanctions may deter the[] exercise" of the freedom of speech, which is "delicate and vulnerable, as well as supremely precious in our society," and "need[s] breathing space to survive"); Smith v. California, 361 U.S. 147, 154-55 (1959) (overturning law criminalizing the possession of obscene books that might deter booksellers from carrying lawful books); Speiser v. Randall, 357 U.S. 513, 526, 528-29 (1958) (invalidating a loyalty oath aimed at violent sedition whose overbreadth and vagueness would deter legitimate speech as well); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 34-37, 68-73 (1998) (explaining that Justice Brennan recognized broad First Amendment protections in areas that other Justices regarded as being beyond the reach of the First Amendment by definition or as a result of a balancing of state and individual interests, including treason and sedition, unlawful associations, obscenity, and defamation); ROBERT D. RICHARDS, UNINHIBITED, ROBUST, AND WIDE OPEN: MR. JUSTICE BRENNAN'S LEGACY TO THE FIRST AMENDMENT 19-25, 47-68, 98-100, 110-12 (1994) (stating that Justice Brennan defended against government censorship of previously unprotected acts such as publishing classified information, exhibiting motion pictures without a license, inciting violence, lewd and obscene speech, and defamation); Brennan Center for Justice, Memorials: Resolution Adopted by the Bar of the Supreme Court of the United States to Record Our Deep Respect and Affection for Justice William J. Brennan, Jr.,

Finally, I take my cue from recent Bill of Rights precedents guaranteeing, as a minimum standard, the rights and freedoms that the framers and ratifiers of our Constitution would expect it to preserve in light of the common law. These precedents utilize the statements of the framers, and the contours of the common law at the time of ratification of the Bill of Rights in 1791, to preserve trial by jury at least as extensively as it was available at that time, ban punishments then considered cruel or unusual at common law or otherwise, guarantee a "wall of separation" between sectarianism and state power, find searches and seizures to be "unreasonable" if they were so regarded at the time of the founding, and defend the privilege against self-incrimination against recent innovations.[19] Of course, the Bill of Rights may still need translation and updating for changed facts,[20] but the rights they

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http://www.brennancenter.org/article.asp?key=375 (last visited June 24, 2007) (indicating that Justice Brennan vindicated free speech rights against traditional restrictions on publishing classified information, engaging in indecent speech, defamation, and broadcasting in violation of licensing requirements).

19. *See, e.g.*, Portuondo v. Agard, 529 U.S. 61, 65 (2000) (explaining that the privilege against self-incrimination depends on its scope and "historical foundation . . . in 1791, when the Bill of Rights was adopted, [and] in 1868 when, according to our jurisprudence, the Fourteenth Amendment extended . . . [it] to the States"); Wyoming v. Houghton, 526 U.S. 295, 299 (1999) ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347-48 (1998) ("The Seventh Amendment provides that '[i]n Suits at common law, . . . the right of trial by jury shall be preserved. . . .' [It] applies . . . to [all] 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'"); Lee v. Weisman, 505 U.S. 577, 600-02 (1992) (Blackmun, J., concurring); Ford v. Wainwright, 477 U.S. 399, 405 (1986) (holding that the Eighth Amendment proscribes at a minimum "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted"); Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 16-18 (1947) (declaring that First Amendment's "'wall of separation'" between sectarianism and government would be violated by government funding of religious schools) (citation omitted); Boyd v. United States, 116 U.S. 616, 630 (1886) (articulating as "the true doctrine on the subject of searches and seizures, and . . . the true criteria of the reasonable and 'unreasonable' character of such seizures," principles of common law that prevailed "when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted"); *see also* United States v. Booker, 543 U.S. 220, 238 (2005) (based on "constitutional tradition assimilated from the common law," under federal law any "particular fact [that] must be proved in order to sentence a defendant within a particular range" must be proved to a jury under Sixth Amendment); Crawford v. Washington, 541 U.S. 36, 54 (2004) (holding that the opportunity to cross-examine witnesses extends at least as far as under common law in 1791); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (stating that based on practice at common law, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

20. *See, e.g.*, STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005) (suggesting that jurists should, in applying the Constitution, "project the purposes which inspired it" onto "contemporary conditions, social, industrial and political, of the

guaranteed at the time of ratification constitute an irreducible minimum standard.

II. PARODY BLOGS AND ACCESS TO DIGITAL AUDIENCES

A. Censorship by Trademark Law in the Blogosphere

A cynical Internet dictionary defines an "author" as a "writer with connections in the publishing industry."[21] A blogger, by contrast, has been defined as a writer who, presumably lacking such connections, leverages Internet technology to "publish[] his or her thoughts each day for the entire online world to read."[22] Despite an Internet joke that blogging dates to ancient Rome, the first blog was a "What's New" update published on the Web by HTML creator Tim Berners-Lee in 1992,[23] or the first Web-based diaries in the 1980s or 1990s.[24] Blogging has grown exponentially, with an estimated half million blogs by early 2002, two million by late 2002, four million by 2003, thirty million by 2005, and more than fifty million by 2006.[25] The public discourse about the Iraq war spurred the growth and visibility of blogs as an alternative

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community to be affected"); Amar, *The Supreme Court*, *supra* note 17, at 78-80 (suggesting that Supreme Court precedent has valuable role to play in filling in gaps in the Bill of Rights, interpreting ambiguous terms, accounting for actual practice and empirical fact, and ensuring workability); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171 n.32 (1993) (collecting a long list of scholars who acknowledge need to translate Bill of Rights to account for changed circumstances, new facts or technologies, differing society and culture, etc.).

21. RICK BAYAN, THE CYNIC'S DICTIONARY 25 (1994), *available at* http://www.cs.wisc.edu/~ncb/funnies/cynics.

22. Jim Calloway, *Of Blogs, Bloggers and Blawgs*, LAW PRACTICE TODAY, Apr. 2003, http://www.abanet.org/lpm/lpt/articles/mtk0423031.html.

23. *See* Posting of Dave Winer to UserLand.com: The History of Weblogs, http://www.userland.com/theHistoryOfWeblogs (Sept. 9, 2001, 12:21p.m.).

24. *See, e.g.*, Paul S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 145 (2003) ("Simply put, the first blogs listed websites visited by the writer in chronological order and occasionally included a line or two of commentary about those sites."); Reyhan Harmanci, *Time to Get a Life—Pioneer Blogger Justin Hall Bows Out at 31*, S.F. CHRON., Feb. 20, 2005, at A1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/02/20/MNGBKBEJO01.DTL (explaining that "pioneer" blog began as online diary in 1994).

25. *See* Gutman, *supra* note 24, at 146 n.10, 165 n.127; Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process is Effected*, 2006 DUKE L. & TECH. REV. 2, ¶ 6; Francine Brevetti, *Software Firm Turns Blogs Into Business Tools*, OAKLAND TRIB., Jan. 9, 2003, *available at* http://www.nl.newsbank.com/nl-search/we/Archives; Paul Lima, *Good Riddance To Stuffing Envelopes*, GLOBE & MAIL (CANADA), Nov. 27, 2006, at 10, *available at* http://www.theglobeandmail.com/servlet/story/RTGAM.20061128.tq-lima28/BNStory/GlobeTQ/home.

form of news and commentary.[26] Blogging evolved into *podcasting*, a form of audio blogging named after Apple's iPod, and video blogging, often calling *vlogging* or *vidcasting*.[27] Sites like YouTube, Google Video, MySpace Video, blinkx, and VlogMap allow Internet users to share their opinions, memories, and experiences in audio and video form with millions of other users.[28]

The blogosphere, or the universe of all blogs, has been the terrain for many collisions between intellectual property and the First Amendment.[29] Thus, blogging is serving as a test case for the emergence of new forms of legally-risky digital media distributed over the Internet. One such form, which could be described as "blogsquatting," involves writing a parody blog that pretends to be the ruminations of a celebrity or government official.[30]

The sheer number and obscurity of many blogs means that only those blogs that discuss prominent public officials, celebrities, controversial issues, or pop culture conventions get any attention.[31] This hard fact has contributed to the development of a new and some would say more insidious form of blogsquatting. At Blogspot.com, an impish

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26. *See* Calloway, *supra* note 22.

27. *See* Lima, *supra* note 25, at 10.

28. *The New Networks*, WIRED, May 2006, http://www.wired.com/wired/archive/14.05/networks.html; *see also A Guide to the Online Video Explosion*, WIRED, May 2006, http://www.wired.com/wired/archive/14.05/guide.html; Posting of Leander Kahney & Pete Mortensen to WIRED BLOG: Cult of Mac, http://blog.wired.com/cultofmac/2005/10/video_podcastin_1.html (Oct. 21, 2005, 6:40 a.m.); Posting of J.D. Lasica to New Media Musings, http://www.newmediamusings.com/blog/2006/05/video_sites_the.html (May 30, 2006, 4:23 p.m.).

29. Steven Levy, *Will the Blogs Kill Old Media?*, NEWSWEEK, May 20, 2002, at 52.

30. Blogsquatting could also mean annoying everyone by commenting too frequently or at excessive length in someone else's blog. In its most positive connotation, it is just sitting in on a blog with the consent of its owner. More ominously, the term has been used to refer to what unscrupulous website promoters do when they spam a blog's comments section. *See* Search.com, Blogjacking Information, http://www.search.com/reference/Blogjacking (last visited Mar. 27, 2007).

31. With about fifty million Internet users who visit blogs, there are about as many blog readers as bloggers, for an average number of readers per blog that approaches zero. *See* COMSCORE, BEHAVIORS OF THE BLOGOSPHERE: UNDERSTANDING THE SCALE, COMPOSITION AND ACTIVITIES OF WEBLOG AUDIENCES 2 (2005), http://www.comscore.com/blogreport/comScoreBlogReport.pdf. Those blogs that reach millions of readers, such as Boing Boing or the Daily Kos, tend to focus heavily on prominent politicians or brand names. *See* Marvin Ammori, *A Shadow Government: Private Regulation, Free Speech, and Lessons from the Sinclair Blogstorm*, 12 MICH. TELECOMM. & TECH. L. REV. 1, 9 (2005) (opining that the Daily Kos, a blog by a young technology lawyer that focuses on Democratic Party politicians, "was one of the blogosphere's most highly trafficked and linked sites"); Susan Stellin, *Bad News for Old News: And Seven More Things to Look Forward to in 2007*, MEDIA MAG., Dec. 2006, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=51695 (noting that Boing Boing is "a blog about technology and culture that reaches 2 million readers").

individual created a parody blog in the name of White House counsel Harriet Miers, who was nominated to take Sandra Day O'Connor's seat as an Associate Justice of the United States Supreme Court, but ultimately withdrew. The first posting: "OMG I CAN'T BELIEVE I'M THE NOMINEE!!!"[32] As might be expected from this curious start, the blog is a parody of the nominee's sometimes-gushing praise for her boss (having called him the most "brilliant" man she'd ever met), and of her alleged judicial inexperience and unpreparedness for a seat on the Court.[33] (One of the last posts was, "Does anyone have any good recommendations of general books on Constitutional Law, history of the Supreme Court, etc? THANX!!!").[34]

Such flagrant abuses of names and identities on the Internet have become common. In the 1990s, "cybersquatting" became a major issue, with Congress and the United States Commerce Department taking strong steps to ban online appropriation of a company's brand names or a celebrity's identity.[35] Soon the Republican and Democratic National Committees ("RNC" and "DNC," respectively) demanded protection against "political cyberpiracy," especially fake candidate and party websites. Letters from the RNC and DNC to the Department of Commerce demanded that the Anticybersquatting Consumer Protection Act of 1999 and ICANN mandatory domain name arbitration scheme be applied to prohibit the use of Internet addresses that include the personal names of government officials or political candidates in a manner that may disseminate inaccurate or unreliable information about them.[36] The

32. Posting of Harriet Miers to Harriet Miers's Blog!, http://harrietmiers.blogspot.com/2005/10/omg-i-cant-believe-im-nominee.html (Oct. 3, 2005, 11:21 a.m.).

33. Posting of Harriet Miers to Harriet Miers's Blog!, http://harrietmiers.blogspot.com/2005/10/as-hire-as-and-bush-hired-me.html (Oct. 3, 2005, 1:33 p.m.).

34. Posting of Harriet Miers to Harriet Miers's Blog!, http://harrietmiers.blogspot.com/2005/10/just-thought-of-something.html (Oct. 5, 2005, 12:28 a.m.).

35. *See* Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, § 3002, 113 Stat. 1501, 1537 (1999) (amending 15 U.S.C. § 1125); ICANN, Uniform Domain Name Dispute Resolution Policy, http://www.icann.org/udrp/udrp-policy-24oct99.htm (as adopted on Aug. 26, 1999 and approved by ICANN on Oct. 24, 1999); A. Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. ILL. L. REV. 1, 27-29 (2003) (describing drafting history of ICANN cybersquatting arbitration policy, or UDRP).

36. *See* Letter from Republican National Committee to Department of Commerce (Mar. 30, 2000), *available at* http://www.uspto.gov/web/offices/dcom/olia/tmcybpiracy/section2.pdf (responding to Notice and Request for Public Comments on Dispute Resolution Issues Relating to Section 3002(b) of the Anticybersquatting Consumer Protection Act, 65 Fed. Reg. 10,763); Letter from Democratic National Committee to Department of Commerce (Apr. 21, 2000), *available at* http://www.uspto.gov/web/offices/dcom/olia/domainnamerep.html (responding to Notice and Request for Public Comments on Dispute Resolution Issues Relating to Section 3002(b) of the Anticybersquatting Consumer Protection Act, 65 Fed. Reg. 10,763).

RNC argued that the First Amendment's protection of political parody is "not absolute" and "courts have been willing to restrict such rights," so that a "federal right of publicity on behalf of candidates for public office" should be used to "enjoin cybersquatters from further use of a candidate's name."[37]

The Bush campaign for the presidency in 2000 was the target of a site that some have described as a form of cybersquatting, run by Zack Exley at gwbush.com.[38] Despite a threatening letter from campaign counsel Benjamin Ginsburg, Mr. Exley kept the site up for years.[39] He and Mr. Ginsburg sparred online once again during the 2004 election, the former as Director of Online Communications for the Kerry-Edwards campaign, and the latter as an advisor to the Swift Boat Veterans for Truth.[40]

Alleged blogsquatters are threatened not simply by trademark and cybersquatting law, but copyright claims, compulsory ICANN arbitration, and numerous state law claims arising under right of publicity statutes and common law causes of action against libel, appropriation of likenesses, and invasion of privacy.[41] Some state courts

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37. *See* Letter from Republican National Committee to Department of Commerce, *supra* note 36, at 8-11.

38. *See* Alan Connor, *e-Election Column: Week I*, BBC NEWS, Apr. 12, 2005, http://news.bbc.co.uk/1/hi/uk_politics/vote_2005/frontpage/4435677.stm (describing gwbush.com as a form of "cybersquatting"); Terry M. Neal, *Satirical Web Site Poses Political Test: Facing Legal Action From Bush, Creator Cites U.S. Tradition of Parody*, WASH. POST, Nov. 29, 1999, at A2 (describing legal wrangling over gwbush.com); Clive Thompson, *Anti-Bush Website Shows the Power of Parody*, NEWSDAY, Jan. 23, 2000, at B15 (describing gwbush.com and its impact on public discourse surrounding the election); Posting of Chris Camire to New Statesman: New Media Awards 2005 Weblog, http://www.newstatesman.co.uk/nma/nma2005/dispatches/archive/2005/04/18/domain-games/ (Apr. 18, 2005, 1:57 p.m.).

39. *See* Hannibal Travis, Comment, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 BERKELEY TECH. L.J. 777, 858 (2000) ("George W. Bush's campaign sent a cease and desist letter to Zack Exley, the creator of <gwbush.com>, . . . threatening legal action for Exley's infringing 'graft' of 'inappropriate' material 'onto the words, look and feel of the Exploratory Committee's site.'") (citations omitted); Chilling Effects Clearinghouse, http://www.chillingeffects.org/notice.cgi?NoticeID=265 (reproducing letter charging Mr. Exley with copyright infringement, but strangely not with cybersquatting).

40. *See* Steve Friess, *As Candidates Mull '08, Web Sites Are Already Running*, N.Y. TIMES, Nov. 18, 2006, at A15 (describing gwbush.com as still in operation and selling political bumper stickers).

41. *See id.* (explaining that the ICANN arbitration panel ruled that Hillary Clinton "had a common law right to the trademark of her own name because of her public activities, even though she had never filed for a trademark. The arbitrator also found that [an Italian] woman had registered the domain [hillaryclinton.com] in bad faith with the intent to use Mrs. Clinton's fame to direct traffic to unrelated matters."); *see also* Faegre & Benson, LLP v. Purdy, 367 F. Supp. 2d 1238, 1240-41 (D. Minn. 2005) (describing a request for injunction sought against owner of Web page on common-law appropriation theory for using a famous blogger's name to criticize his alleged stance

have also come down squarely on the side of the free speech rights of bloggers, however. Recently, the Delaware Supreme Court ruled that the First Amendment protects bloggers' "right to speak anonymously."[42] The court ordered the dismissal of a defamation lawsuit brought by a town councilman who objected to allegations that he suffered from poor "leadership skills, energy and enthusiasm," as well as "character flaws," "an obvious mental deterioration," and paranoia.[43]

Government officials and celebrities may have their best luck appealing to the providers of bloggers' Web hosting space, or Internet service, to intervene.[44] For example, Blogspot, now a division of Google, asserts the right to remove any blogs that "impersonate any person" or are "abusive, harassing, tortious, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable."[45] As blogsquatting evolves into a ubiquitous phenomenon, just like spam, spyware, and misleading Web sites, and as the blogosphere grows in size and influence, demand letters sent to Internet companies complaining about parody blogs may help define the outer boundaries of free speech.[46] It may fall to Google and the other free

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on abortion); Doe v. Cahill, 884 A.2d 451, 454 (Del. 2005) (noting that a public official sued individuals who posted comments to blog pseudonymously for defamation and invasion of privacy); La Societe Metro Cash v. Time Warner Cable, No. CV030197400S, 2003 Conn. Super. LEXIS 3302, at *1 (Conn. Super. Ct. Dec. 2, 2003) (explaining that a litigation was filed over email sent pseudonymously to plaintiffs' employees charging deceptive financial statements); Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 310-11 (2001) (describing a lawsuit filed on common-law appropriation theory challenging use of sports celebrities' names on Internet); Roberts v. Boyd, WIPO Case No. D2000-0210, at 1-2 (WIPO Arb. & Med. Ctr., May 29, 2000), http://arbiter.wipo.int/domains/decisions/word/2000/d2000-0210.doc (arbitration filed over use of domain name identical to alleged common law trademark owned by celebrity Julia Roberts); America Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 379-80 (Va. 2001) (noting that a publicly traded company sued five individuals over anonymous Internet postings; the lawsuit itself was filed anonymously).

42. *See Cahill*, 884 A.2d at 454, 457, 468.

43. *See id.* at 454 (emphasis omitted); *see also* Doe v. 2themart.com Inc., 140 F. Supp. 2d 1088, 1097 (W.D. Wash. 2001) ("[T]he constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.").

44. *See* Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923, 938-39 (N.D. Cal. 1996) (explaining that a provider of communications service may be held liable for trademark infringement based on its knowledge of subscribers' use of plaintiff's trademark); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1561 (M.D. Fla. 1993).

45. Blogger.com, Terms of Service, http://www.blogger.com/terms.g (last visited June 30, 2007).

46. *See* Travis, *supra* note 9, at 37 ("The private censorship enforced by ISPs in the shadow of vague standards for trademark infringement or dilution can be pervasive. For example, Dow Chemical was able, merely by complaining of trademark violations to an ISP, to shut down a Web site critical of Dow's alleged responsibility for a gas leak at a Union Carbide plant in Bhopal, India that killed thousands of innocent Indian civilians.").

blog hosts to separate legitimate parody from supposedly "objectionable" impersonation.

B. A Free Speech Approach to the "Unnatural Expansion" of Trademark Law

The Supreme Court propelled what many scholars have called the "unnatural" expansion of trademark rights by cavalierly dismissing a First Amendment challenge to trademark rights used to censor expression on matters of public concern.[47] More recent cases, however, have strongly defended Internet users' First Amendment rights to parody and criticize famous people and corporations. In cases featuring websites such as nissan.com and falwell.com, courts have found that "commercial use" of renowned names or trademarks to sell products may be prohibited, but that the First Amendment shields noncommercial criticism and parody of politicians and corporations from censorship; these principles would also protect gwbush.com and the "Miers" blog.[48] These cases hold that criticism and commentary about a trademark owner, whether it is a corporation with a registered mark or a politician claiming common-law trademark or privacy rights, "do not merely

47. *See* San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 563-69, 567 n.30 (1987) (Brennan, J., dissenting) (arguing that the law cannot "forbid particular words without also running a substantial risk of suppressing ideas in the process," and criticizing majority for upholding trademark-like rights intrusions against "political advocacy" and other "noncommercial, nonconfusing, and merely descriptive" uses, and for assuming that access to alternative methods of communication was adequate recourse for persons censored in their speech by trademark or similar laws); Coca-Cola Co. v. Purdy, 382 F.3d 774, 787 (8th Cir. 2004) ("The use of trademarks has not been protected where it is likely to create confusion as to the source or sponsorship of the speech or goods in question. . . . Just because an opponent of the war in Iraq might assert an expressive purpose in creating a website with the name lockheedmartincorp.com, for example, the First Amendment would not grant him the right to use a domain name confusingly similar to Lockheed's mark.") (citing, *inter alia*, *San Francisco Arts*, 483 U.S. at 541); Te-Ta-Ma Truth Found. v. World Church of the Creator, 297 F.3d 662, 664, 667 (7th Cir. 2002) (holding that First Amendment was no defense to trademark suit by religious group to exclude a racist group from using the name "Church of the Creator") (citing, *inter alia*, *San Francisco Arts*, 483 U.S. 522). The phrase "unnatural" expansion is a reference to Kenneth L. Port, *The "Unnatural" Expansion of Trademark Rights: Is a Federal Dilution Statute Necessary?*, 85 TRADEMARK REP. 525, 526 (1995).

48. *See* Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1018 (9th Cir. 2004); (holding that using a corporation's trademark as an Internet address for a Web page communicating "disparaging" information about that corporation is protected by First Amendment); Lamparello v. Falwell, 420 F.3d 309, 313-14 (4th Cir. 2005) (reasoning that the First Amendment would be offended by issuance of trademark or cybersquatting injunction against operator of Web site critical of famous celebrity and political figure); Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 900-01 (9th Cir. 2002) (opining that courts should not allow trademark rights to "encroach upon the zone protected by the First Amendment").

propose a commercial transaction, so they are non-commercial speech that are guaranteed full First Amendment protection."[49]

My view is that while the distinction between commercial speech and noncommercial speech may help resolve many collisions between trademark law and the First Amendment, a still more principled resolution of these disputes is possible. Not all commercial speech may be prohibited under the First Amendment, so simply because speech is "commercial" does not resolve the First Amendment problem in such cases.[50] The view that the First Amendment protects at least some commercial speech from censorship is consistent with the expectations of the framers of that amendment, to whom advertising, like ribald and licentious content, was inseparable from the remainder of the "press."[51] The first American newspaper had over half of its columns filled with advertising.[52] The first newspaper in New York was called the *Daily Advertiser*.[53] Benjamin Franklin and other Americans had written stirring defenses of the press, specifically including advertising, because they believed that "when Men differ in Opinion, both Sides ought equally to

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49. Travis, *supra* note 9, at 42.

50. *Compare, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("We are equally clear that the Constitution imposes no [First Amendment] restraint on government as respects purely commercial advertising."), *with* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553 (2001) ("For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment."), Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) (stating that although "speech proposing a commercial transaction" is "an area traditionally subject to government regulation," regulation thereof is not always consistent with First Amendment), *and* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) ("[S]peech that does 'no more than propose a commercial transaction'" may still be protected by the First Amendment) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

51. *See* Brief for American Advertising Federation et al. as Amici Curiae Supporting Petitioners at 13, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (No. 94-1140), *reprinted in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 278 (Gerald Gunther & Gerhard Casper eds., 1996). *Cf.* United States v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 132-33 (1973) (Douglas, J., joined by Brennan, J., dissenting). Justice Douglas argued:

> The First Amendment was the product of a robust, not a prudish, age. . . . In England, Harris' List of Covent Garden Ladies, a catalog used by prostitutes to advertise their trade, enjoyed open circulation. . . . Bibliographies of pornographic literature list countless erotic works which were published in this time. . . . It was in this milieu that Madison admonished against any "distinction between the freedom and licentiousness of the press." . . . Victorian hypocrisy—the predecessor[] of our present obscenity laws—had yet to come upon the stage.

Id. (citations omitted).

52. *See* Brief for American Advertising Federation et al. as Amici Curiae Supporting Petitioners, *supra* note 51, at 15.

53. *See id.*

have the Advantage of being heard by the Publick," and "'a free press is the channel of communication to *mercantile* and public affairs. . . .'"[54] Independence-minded colonists advocated "'the ennobling idea that to think what they please, and to speak, write and publish their sentiments with decency and independency on *every*, subject, constitutes the dignified character of Americans.'"[55]

James Madison, known as the "father" and principal framer of the Constitution and Bill of Rights,[56] counseled on several occasions that these supreme laws must be construed to protect, at a minimum, what they were "'understood [to protect] *by the nation* at the time of [their] ratification.'"[57] In defending the First Amendment against the assault of the Sedition Act, Madison wrote that the "arguments now employed in behalf of the Sedition Act are at variance with the reasoning which then justified the Constitution, and invited its ratification."[58] The Constitution as "originally" intended, he added, conferred "no power whatever over the press," and the First Amendment "was intended as a positive and absolute reservation of [press freedom]."[59]

Madison's view was that the intentions of the framers and ratifiers of the Constitution and Bill of Rights, even if not publicly expressed, could be used to interpret and supplement, but not contradict, the obvious literal meaning of a constitutional provision.[60] For example, in the national debate about whether Congress had the power to grant corporate charters, Madison argued that "he well recollected that a power to grant charters of incorporation had been proposed in the

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54. *See id.* at 14, 17 (citations omitted).

55. *Id*. at 14 (citation omitted).

56. *See* Gonzales v. Raich, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting); United States v. Washington Post Co., 446 F.2d 1322, 1325 (D.C. Cir. 1971) (Wright, J., dissenting); ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 8 (1997); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 68 (1996).

57. Brief for American Advertising Federation et al. as Amici Curiae Supporting Petitioners, *supra* note 51, at 13 (quoting Letter from James Madison to John G. Jackson (Dec. 21, 1821), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 70, 74 (Gaillard Hunt ed., 1910)).

58. James Madison, Report on the Alien and Sedition Act (Jan. 17, 1800), *in* JAMES MADISON: WRITINGS 608, 648-49 (Jack N. Rakove ed., 1999).

59. *Id*. at 649.

60. *See* Louis J. Sirico, Jr., *Original Intent in the First Congress*, 71 MO. L. REV. 687, 690 (2006).

> Where a meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences. [But] [i]n controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide. Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.

Id. (citation omitted).

[constitutional] convention and been rejected."[61] The intention of the drafters was central to the construction of ambiguous or controverted statutes, treaties, and ordinary contracts under the rules that prevailed in Madison's time.[62]

Given Madison's emphasis on interpreting the First Amendment and the Constitution generally as "understood" at the time of ratification, what is needed is an inquiry into what the founders could have meant by stipulating that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[63] A diligent inquiry into this question reveals that they likely intended Congress to pass only those laws that did not "abridge[e]" press freedom any further than the common law of Britain and the American colonies did in 1791. Madison, for example, justified the Copyright Clause of the Constitution, notwithstanding its restrictions on the trade in ideas, on the basis that copyright was acknowledged at common law in Britain.[64] Jefferson, similarly, who

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61. *Id.* at 711-12 (citation omitted); *see also id*. at 718-19.

62. *See id*. at 688 (speaking in Congress, Madison quoted British judge and jurist William Blackstone as observing "'[t]hat the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most probable, and these signs are either the words, the context, the subject matter, the effect and consequences, or the spirit and reason of the law'") (citations omitted); Ware v. Hylton, 3 U.S. 199, 239 (1796) ("The intention of the framers of the treaty, must be collected from a view of the *whole* instrument, and from the *words* made use of by them to express their intention, or from *probable* or *rational conjectures*.") It also appears that in the eighteenth century, contracts between private parties could be interpreted with the aid of extrinsic evidence of the parties' intent so long as it did not "controvert[] or var[y]" a written agreement. *See* Kevin M. Teeven, *A History of Legislative Reform of the Common Law of Contract*, 26 U. TOL. L. REV. 35, 57-58 (1994). For contract cases looking to the true intention of the parties to vary or supplement the words, see Bache v. Proctor, [1780] 99 Eng. Rep. 247, 247 (K.B.); Lessee of Thomson v. White, 1 Dall. 424, 426-27 (Pa. 1789); Ross v. Norvell, 1 Va. (1 Wash.) 14, 16-18 (1791); *accord* The Brutus, 4 F. Cas. 490, 494 (C.C.D. Mass. 1814) (No. 2,060) ("To construe the language [of an agreement] by the technical rules of literal interpretation would be to defeat the manifest intention of the parties."); WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL 149 (photo. reprint 1972) (1844) ("[W]henever such intent [of the parties to a contract] can be distinctly ascertained, it will prevail, not only in cases where it is not fully and clearly expressed, but also, even where it contradicts the actual terms of the agreement."); *see also* Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267 (1997).

63. U.S. CONST. amend. I.

64. *See* THE FEDERALIST NO. 43, at 271-72 (James Madison) (Clinton Rossiter ed., 1961) ("The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals."); *see also* Wheaton v. Peters, 33 U.S. 591, 602 (1834). The argument for the appellants stated:

> Chief Justice Marshall (12 Wheat. 653, 654) lays great stress on the framers of the constitution having been acquainted with the principles of the common law, and acting in reference to them. Most of them were able lawyers; and certainly able lawyers drew up, and revised the instrument. . . . There is the strongest reason to believe, from the

pleaded for an explicit Bill of Rights protecting basic freedoms when other founders such as Alexander Hamilton dismissed the idea,[65] similarly admitted that the common-law offense of libel could continue to be heard in the courts, which would restrict the right of the press to publish "false facts" injurious to the lives, property, or reputation of others.[66] Finally, when Hamilton contended that the Constitution granted Congress "no power . . . by which restrictions [on the liberty of the press] may be imposed," surely he meant none beyond those applicable at common law.[67]

What, then, did the common law provide as to the abridgement of press freedom by trademark law, currently a threat posed to many Web sites and blogs? At common law, it was lawful to imitate trademarks outside of the context of defrauding consumers by using such marks to sell competing products to the detriment of the trademark owner.[68] Traditionally, "the law of trade marks and tradenames was an attempt to protect the consumer against the 'passing off' of inferior goods under

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> language, [that the Copyright Clause] was adopted for the purpose of preserving [common law copyright], and to reserve from congress any power over it. This probability arises, almost irresistibly, from the language used; and under the circumstances that it was used.

Id.

65. *See* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 440 (Julian P. Boyd ed., 1955), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch14s30.html ("I do not like . . . the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury . . . ."); Letter from Thomas Jefferson to President George Washington (Sept. 9, 1792), *in* GEORGE TUCKER, THE LIFE OF THOMAS JEFFERSON, THIRD PRESIDENT OF THE UNITED STATES 390-91 (1837) ("[M]y objection to the constitution was the want of a bill of rights—Colonel Hamilton's, that it wanted a king and house of lords. The sense of America has approved my objection, and added the bill of rights, and not the king and lords.").

66. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 367 (Julian P. Boyd ed., 1958), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs15.html; *see also* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 159 (William Peden ed., 1982) (1789), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions40.html ("The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.").

67. THE FEDERALIST NO. 84, at 513-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961), *available at* http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss7.html ("[A bill of rights] would contain various exceptions to powers which are not granted . . . . Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?").

68. *See* Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U.S. 118, 140 (1905) ("The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another; and if defendant so conducts its business as not to palm off its goods as those of the [plaintiff], the action fails.").

misleading labels."[69] Even as to commercial competitors, the common law recognized no remedy, absent fraud, for using similar signage or markings to those of a competitor.[70] Early British and American cases arising under state law also required a showing of fraud upon consumers before relief would be granted.[71] The first American case granting injunctive relief based on abuse of a distinctive trademark was not decided until 1844, and emphasized that the defendant used the mark on its commercial goods for the "purpose of defrauding the public."[72]

Since the adoption of the federal Lanham Act in 1946, trademark law has proscribed unauthorized uses "in commerce" of federally registered trademarks that are "likely to cause confusion, or to cause mistake, or to deceive . . . ."[73] As has occurred in copyright law, the Supreme Court has interpreted away many of the limitations of trademark law to cases of actual consumer deception by identical marks, in favor of a broader concept of trademark rights as valuable "property" that arises from "'the expenditure of labor, skill, and money' by an entity."[74] Congress has accelerated this process by creating a new cause

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69. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 814 (1935).

70. *See* Travis, *supra* 9, at 6. *See, e.g.*, Blanchard v. Hill, [1742] 26 Eng. Rep. 692, 694 (holding that there was no remedy, absent fraud, against a competitor's use of merely similar stamps on competing playing cards, any more than there would be to "one innkeeper, setting up the same sign with another"); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 n.3 (1890) ("As late as 1742, Lord Hardwicke refused to treat a trade-mark as property for infringement upon which an injunction could be granted."); Mark A. Thurmon, *Ending the Seventh Amendment Confusion: A Critical Analysis of the Right to a Jury Trial in Trademark Cases*, 11 TEX. INTELL. PROP. L.J. 1, 64 (2002) ("*Hogg v. Kirby* is the earliest reported case in which equity assumed jurisdiction over a claim of trademark infringement and granted an injunction. . . . the case was heard in 1803 . . . .").

71. *See* William W. Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*, *in* EIGENTUM IM INTERNATIONALEN VERGLEICH 272 n.33 (1999) (citing Thomson v. Winchester, 36 Mass. (19 Pick.) 214 (1837)); 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 1.01[1] (1999) (discussing proof of fraud in Southern v. How, [1618] 79 Eng. Rep. 1243, and J.G. v. Samford, Entries, BL MS. Hargrave 123, fo. 168 (1584)); Thurmon, *supra* note 70, at 59 n.303, 61 n.315.

72. Taylor v. Carpenter, 23 F. Cas. 742, 744 (C.C.D. Mass. 1844) (No. 13,784); New Kids on the Block v. News Am. Publ'g, 971 F.2d 302, 305 (9th Cir. 1992). *Taylor* was the first case granting relief to an American trademark owner. *See* Travis, *supra* note 9, at 6.

73. 15 U.S.C. § 1114(1)(a) (2000). The Lanham Act also protects against imitation of unregistered marks, unfair competition, false designations of origin, and false advertising. *See* 15 U.S.C. § 1125(a) (2000).

74. San Francisco Arts & Athl., Inc. v. U.S. Olympic Comm., 483 U.S. 522, 532 (1987) (quoting Int'l News Service v. Associated Press, 248 U.S. 215, 239 (1918)); *See, e.g.*, Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 162-63 (1995) (construing the Lanham Act to allow the registration of a color as a trademark "where that color has attained 'secondary meaning' and therefore identifies and distinguishes a particular brand . . . ."); Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942) (explaining that a competitor could be restrained

of action, for trademark "dilution" or interference in a non-competitive way with the selling power or positive feelings associated with a trademark, even though the consumer fraud or other harm inflicted by trademark dilution is nearly impossible to explain, prove, or quantify.[75]

Other federal courts have, at times, seemingly abandoned any limiting principle that might constrain the ability of trademark law to censor cultural and political speech. Several courts have enjoined noncommercial, nonconfusing Web sites and blogs that reference

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from attempt to "poach[] upon the commercial magnetism of the symbol [the plaintiff] has created"); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 531-32 (1935) (broadening state law trademark rights by analogy to trespass to real property and because it is wrong to misappropriate "what equitably belongs to a competitor"); *Int'l News Serv.*, 248 U.S. at 235, 241-42 (recognizing cause of action under state law in the absence of an "attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar . . . cases of unfair competition . . . ." where defendant's conduct amounted "to a false representation to [its customers] and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field," whereas in fact it was plaintiff's "valuable property"); Saxlehner v. Eisner & Mendelson Co., 179 U.S. 19, 33 (1900) (deciding, under state law, that it "is not necessary to constitute an infringement that every word of a trade-mark should be appropriated" because actions "have been sustained for the infringement of one of several words of a trade-mark"); McLean v. Fleming, 96 U.S. 245, 255 (1878) (deciding, under state law, that "exact similarity [between trademarks] is not required, as that requirement would always enable the wrong-doer to evade responsibility for his wrongful acts"); *see also* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 898-99 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)).

75. *See* Ringling Bros.—Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 451, 456 (4th Cir. 1999) (opining that trademark dilution is an "elusive" concept that plaintiff's purported survey evidence tended to show the "absence of"); Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp., 71 U.S.P.Q.2d (BNA) 1507, 1510, 1514-15 (S.D.N.Y. 2004) (noting that survey evidence discovered "negligible" dilution of trademark, even though both parties sold same product, handbags); Christine Haight Farley, *Why We Are Confused About the Trademark Dilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1175, 1176-78, 1184, 1186-87 (2006) (pointing out that courts and litigants in leading cases remain unable to provide useful definitions of trademark dilution, which seems to be a "remedy without a supportable theorization [or proof] of the harm"); Jonathan E. Moskin, *Dilution or Delusion: The Rational Limits of Trademark Protection*, 83 TRADEMARK REP. 122, 123 (1993) (dilution is a concept that lacks "meaningful empirical proof"); Alexander F. Simonson, *How and When Do Trademarks Dilute: A Behavioral Framework to Judge "Likelihood" of Dilution*, 83 TRADEMARK REP. 149, 150 (1993) ("[D]ilution has [thus far] been explored almost solely by reference to intuition."). By contrast, the movement toward reforming torts other than trademark law is denying remedies to plaintiffs who have suffered grievous and indisputable harms. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 865 (2000) (denying remedy to plaintiff seriously injured due to alleged negligence); *id.* at 894 (Stevens, J., dissenting) (criticizing majority for "us[ing] federal law as a means of imposing their own ideas of tort reform on the States"); *see generally* Boyle v. United Techs. Corp., 487 U.S. 500, 502, 513-14 (1988) (denying remedy to family of individual killed due to defendants' negligence); *id.* at 515-16 (Brennan, J., dissenting) (criticizing majority for having "unabashedly . . . legislate[d] a rule denying Lt. Boyle's family the compensation that state law assures them").

trademarks or celebrity names.[76] Others have adopted the view that trademark and unfair competition law have "progressed far beyond the old concept of fraudulent passing off, to encompass any form of competition or selling which contravenes society's current concepts of 'fairness' . . . ."[77] The overbreadth of these rules force even large corporations to argue for strict limitations on trademarks, as they

76. *See, e.g.*, Faegre & Benson, LLP v. Purdy, 367 F. Supp. 2d 1238, 1250 (D. Minn. 2005), *injunction and partial summary judgment granted*, 447 F. Supp. 2d 1008, 1017-19 (D. Minn. 2006) (issuing injunction against Web site on common-law appropriation theory for using a famous blogger's name to criticize his alleged stance on abortion); Coca-Cola Co. v. Purdy, No. 02-1782, 2002 U.S. Dist. LEXIS 17117, at *4-5 (D. Minn. Sept. 5, 2002), *aff'd*, 382 F.3d 774 (8th Cir. 2004) (enjoining Web site that defendant used to criticize plaintiffs' alleged support of abortion, but only after being sued); Taubman Co. v. Webfeats, No. 01-CV-72987 (E.D. Mich. 2001) (enjoining Web site because it used plaintiff's trademark to criticize the plaintiff), *rev'd*, 319 F.3d 770 (6th Cir. 2003); OBH, Inc. v. Spotlight Magazine, Inc., 86 F. Supp. 2d 176, 182-83, 198 (W.D.N.Y. 2000) (enjoining Web site because it used plaintiff's trademark to criticize plaintiff's practices and act as a "forum for discussion" by those desiring to "gripe" and exercise their "first amendment rights"); People for the Ethical Treatment of Animals, Inc. v. Doughney, 113 F. Supp. 2d 915, 918, 921 (E.D. Va. 2000), *aff'd*, 263 F.3d 359 (4th Cir. 2001) (enjoining Web site precisely because it promoted organizations and products that were opposed to plaintiffs' views); Jews for Jesus v. Brodsky, 993 F. Supp. 282, 308 (D. N.J. 1998), *aff'd*, 159 F.3d 1351 (3d Cir. 1998) (censoring Web site critical of plaintiffs precisely because it was designed to harm their credibility in the marketplace of ideas); Planned Parenthood Fed'n of Am., Inc. v. Bucci, 42 U.S.P.Q.2d (BNA) 1430, 1432-33 (S.D.N.Y. 1997), *aff'd*, 152 F.3d 920 (2d Cir.), *cert. denied*, 525 U.S. 834 (1998) (censoring Web site critical of plaintiffs precisely because it might be effective in achieving site's objective of fostering public disagreement with plaintiffs' policies and practices); Bellsouth v. Internet Classifieds of Ohio, No. 1:96-CV-0769-CC, 1997 WL 33107251, at *7 (N.D. Ga. Nov. 12, 1997) (enjoining Web site because it used plaintiff's trademark to criticize plaintiff's practices); Sarah Mayhew Schlosser, Note, *The High Price of (Criticizing) Coffee: The Chilling Effect of the Federal Trademark Dilution Act on Corporate Parody*, 43 ARIZ. L. REV. 931, 931 (2001) (court enjoined Web site that parodied Starbucks brand because it might dilute the selling power and goodwill of the plaintiff's trademark); *see also* Purdy v. Burlington N. Santa Fe Corp., 21 Fed. Appx. 518, 520 (8th Cir. 2001); Mayflower Transit, LLC v. Prince, 314 F. Supp. 2d 362 (D. N.J. 2004); Flow Control Indus., Inc. v. AMHI, Inc., 278 F. Supp. 2d 1193, 1195-96, 1200-01 (W.D. Wash. 2003); PGC Prop., LLC v. Wainscott/Sagaponack Prop. Owners, Inc., 250 F. Supp. 2d 136 (E.D.N.Y. 2003); Toronto-Dominion Bank v. Karpachev, 188 F. Supp. 2d 110 (D. Mass. 2002); Bihari v. Gross, 119 F. Supp. 2d 309 (S.D.N.Y. 2000); Lucent Techs., Inc. v. Lucentsucks.com, 95 F. Supp. 2d 528 (E.D. Va. 2000); Northland Ins. Cos. v. Blaylock, 115 F. Supp. 2d 1108 (D. Minn. 2000); Koninklijke Philips Elecs. v. Kang, Case No. D2001-0163 (WIPO Arb. & Med. Ctr., Mar. 27, 2003), *available at* http://arbiter.wipo.int/domains/decisions/
html/2001/d2001-0163.html; Louis Vuitton Malletier v. Prade, Case No. D2000-1115 (WIPO Arb. & Med. Ctr., Oct. 13, 2000), http://arbiter.wipo.int/domains/decisions/html/2000/d2000-1115.html (louisvuitton.com); Nortel Networks Ltd. v. Grenier, Claim No. FA0201000104104 (National Arb. Forum, Mar. 15, 2002), *available at* http://www.arb-forum.com/domains/decisions/104104.htm; Vivendi Universal v. Sallen, No. D2001-1121 (WIPO Arb. & Med. Ctr., Nov. 7, 2001), *available at* http://arbiter.wipo.int/domains/decisions/html/2001/d2001-1121.html (vivendiuniversalsucks.com).

77. *See* Qualitex Co. v. Jacobson Prods. Co., 13 F.3d 1297, 1303 (9th Cir. 1994) (quoting J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 25:1 (2006)), *rev'd on other grounds*, 514 U.S. 159.

increasingly find themselves on the wrong side of the right to capture the full economic value associated with a word or phrase.[78]

Courts should look to the common law of trademarks at the time that the First Amendment was ratified to rein in these overbroad assertions of "fairness," which threaten to impede the free flow of information and ideas via digital media. The courts have heretofore looked to commercial speech doctrine to resolve disputes between the exercise of free speech in digital media and the expansive rights of famous brands. This is inadequate, both because not all commercial speech may be prohibited, and because the framers would not have anticipated that trademark dilution or "unfair" competition short of consumer fraud could have been restrained by federal courts in free speech cases. Instead, the First Amendment should protect all uses of and references to trademarks on a matter of public concern that do not present a serious likelihood of consumer fraud.[79] Otherwise, the detachment of trademark doctrines from their roots as an "extension of common law misrepresentation principles"[80] will unconstitutionally abridge the freedom of citizens to engage in both political and cultural speech, which lies at the heart of the First Amendment.

III. EMBATTLED EBOOKS AND THE ELECTRONIC PRESS

A. Copyright as Digital Enclosure: From Limited Monopoly to Absolute Property

The eBook is a technology for the global distribution of extended works of fact, fiction, criticism, theology, philosophy, law, and basically

78. Hence, Microsoft was forced into contending that Internet Explorer, the name of its heavily marketed browser that another firm had a prior claim to, was an unprotectable trademark, "merely a couple of English words describing a common computer function." Associated Press, *Microsoft Says 'Internet Explorer' a Generic Term*, THE DENVER POST, July 1, 1998, at C-02. Dreamworks SKG, a media company formed by "the three hottest names in Hollywood," was likewise obliged to argue for "relatively narrow protection" for a trademark. Dreamwerks Prod. Group, Inc. v. SKG Studio, 142 F.3d 1127, 1128, 1130 n.4 (9th Cir. 1998).

79. *Cf.* Arlen W. Langvardt, *supra* note 12, at 651-52 (advocating stronger First Amendment limits to efforts by trademark owners to censor noncommercial and informational speakers); Robert J. Shaughnessy, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079, 1079-81 (1986) (opining that when trademark infringement involves "creative form of expression," it is deserving of First Amendment protection).

80. ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 531 (3d ed. 2003).

any art or science.[81] An eBook is defined as "any full-text electronic resource"; some would distinguish eBooks from Web content by defining eBooks as being specially adapted for reading by using applications other than Web browsers or in formats other than hypertext.[82] Intended for personal computers and portable digital assistants, eBooks and eBook software applications are often designed to improve the aesthetic experience of reading an electronic substitute for paper by imitating paper publishers' fonts and "layout conventions."[83] Sources of eBooks on the Internet include subscription-based digital libraries like netLibrary, which provides access to over 100,000 eBooks;[84] self-publishing operations;[85] and p2p networks, because in excess of "7,300 paper editions of popular books have been scanned and made available on the internet using [p2p technology such as] Napster clones."[86]

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81. *See* Nancy B. Vermeylen, *Book Publishing in the Age of the e-Book*, 4 VAND. J. ENT. L. & PRAC. 190, 193 (2002) (discussing the development of the eBook).

82. *See* Matthew Gibson & Christine Ruotolo, *Beyond the Web: TEI, the Digital Library, and the Ebook Revolution*, 37 COMPUTERS AND THE HUMANITIES 57, 58 (2003).

83. *Id.*

84. *See* Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPPERDINE L. REV. 761, 784 (2006); Walt Crawford, *Tracking the eBook Players Today.(disContent)*, 29.6 ECONTENT 43, July/Aug. 2006, *available at* http://www.econtentmag.com/Articles/ArticleReader.aspx?ArticleID=16838&ContextSubtypeID=11; Lynn Silipigni Connaway, Comment, *Librarians, Producers, and Vendors: The netLibrary Experience*, *in* PROCEEDINGS OF THE BICENTENNIAL CONFERENCE ON BIBLIOGRAPHIC CONTROL FOR THE NEW MILLENNIUM: CONFRONTING THE CHALLENGES OF NETWORKED RESOURCES AND THE WEB 429-30 (Ann M. Sandberg-Fox ed., 2001), *available at* http://www.loc.gov/catdir/bibcontrol/connaway_paper.html (explaining that services like netLibrary use digital rights management (DRM) software to restrict users' ability to save, print, modify, and reuse information contained in eBooks); Press Release, NetLibrary, December eBook of the Month Offers a New Account of Wagner Based on the Acclaimed *New Grove Dictionary of Opera* (Nov. 24, 2006), http://www.netlibrary.com/Librarian/Home/PressReleases/20061201.htm (noting that access to netLibrary is available to over 14,000 subscribing libraries and their patrons).

85. In addition to the independent publishing of one's own eBook on the Web, as Professors Benkler and Lessig have done, there are operations like AuthorHouse and Lulu.com that have helped thousands of authors release eBooks to the public over the Web. *See* Crawford, *supra* note 84, at 43; AuthorHouse Book Publishing Co., E-Book Downloading Instructions, http://www.authorhouse.com/BookStore/CustomerSupport/ebookhelp.asp (last visited July 14, 2007) (describing how to make an eBook order for any book in AuthorHouse's catalogue); Lulu.com, E-books, http://www.lulu.com/products/digital/ebook.php (last visited July 17, 2007) (describing how authors can publish their eBooks over the Web).

86. Mark Hoorebeek, *eBooks, Libraries and Peer-to-Peer File-Sharing*, AUSTRALIAN LIB. J., May 2003, 163, 163-65 (describing 2001 survey by a British digital rights management firm, and indicating that parsimonious release of authorized eBooks of bestsellers onto the Internet has contributed to the scope of the unauthorized previewing of eBooks on p2p networks, just as the delay and restricted selections of legal music downloads did). An estimated eighty-one such p2p Napster "clones" were online as of 2003.

Perhaps the most popular repositories of eBooks to date are those restricted by copyright law to offering public domain texts. Since being founded at the University of Illinois in 1971, Project Gutenberg has posted over 10,000 public domain works, which are downloaded from the Internet at a rate of about one million eBooks per month; its selection includes several times as many copies of classical literature and philosophy as the average small town public library.[87] In addition, the University of Virginia's Electronic Text Center has, since 2000, made 2,000 free eBooks available to over 8.5 million visitors.[88]

Although American copyright law began as a strictly limited statutory monopoly, after that initial generation it began to be reformulated as a property right with few limits.[89] This process culminated with the Copyright Term Extension Act of 1998,[90] which a key supporter described as a prelude toward legislation enacting a

87. *See* Crawford, *supra* note 84, at 43.

88. *See* Travis, *supra* note 84, at 771 n.70.

89. *Compare, e.g.*, Wheaton v. Peters, 33 U.S. 591, 595-96 (1834) (rejecting theory that Copyright Act of 1790 merely confirmed perpetual common-law copyright, or that an American author was "entitled, at common law, to a perpetual property in the copy of his works, and in the profits of their publication"), Stowe v. Thomas, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514) (opining that "the great case of *Millar v. Taylor*" settled that an author has no "property in his original conceptions, [or right] that he alone can use them in the composition of a new work, or clothe them in a different dress by translation . . . , or to make a new work out of his old materials," because "neither the common law nor the statute give him such a monopoly, even of his own creations"), *and* Millar v. Taylor, [1769] 98 Eng. Rep. 201 (K.B.) (holding that copyright is a limited monopoly consisting in the "sole right of printing, publishing and selling" a book, not an absolute property right to prevent a new work based on an abridgement, improvement, imitation, translation, or appropriation of the conceptions thereof), *with* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557, 559 (1985) (justifying denial of fair use defense to political magazine that copied very small percentage of plaintiffs' work as necessary to ensure plaintiffs' are not "deprive[d] . . . of their right in the property precisely when they encounter those users who could afford to pay for it," or of "just compensation for their investment"), Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936) ("[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate."), Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901) ("The entirety of copyright is the property of the author; and it is no defense, that another person has appropriated a part, and not the whole, of any property."), *and* The Senate Report on the Copyright Act of 1976, Report to Accompany S. 22, Copyright Law Revision (Nov. 18, 1975), at 92, *available at* http://ipmall.info/hosted_resources/lipa/copyrights/The%20Senate%20Report%20on%20the%20Copyright%20Act%20of%201976.pdf (reasoning that the copyright term of "life-plus-50 years is no more than a fair recompense for the loss of . . . [an author's] perpetual, unlimited exclusive common law rights in their unpublished works").

90. Copyright Term Extension Act of 1998, Pub. L. No. 105-298, §§ 101, 102, 112 Stat. 2827 (1998).

proposal by large corporations for a copyright term that would "last forever less one day."[91]

Copyright law as presently construed and applied is pervasively restricting the public's access to countless works of political argument, social history, and cultural discourse.[92] This has the effect of suppressing access to many "interesting, well-researched, provocative stud[ies] of [public] figure[s] who . . . wield[] enormous influence over millions of people,"[93] arguably in violation of the First Amendment. In 2002, Project Gutenberg and the Internet Archive, another major eBook site, joined a First Amendment suit filed by a smaller site, the Eldritch Press, against the extension of copyright terms to well over the lifespan of the average American.[94] The eBook providers argued:

> In the year 1930, 10,027 books were published in the United States. In 2001, all but 174 of these titles are out of print. While a copy or two may exist in a library or a used bookstore, the copyright holders cannot or do not make these titles available to the public. But for the [1998 copyright extension], digital archives could inexpensively make the other 9,853 books published in 1930 available to the reading public

91. 144 CONG. REC. H9946, H9951-52 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono); *see also* Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 303 (1998) (describing 1998 copyright extension as "down payment on perpetual copyright"); Editorial, *The Coming of Copyright Perpetuity*, N.Y. TIMES, Jan. 16, 2003, at A28 (opining that Supreme Court's upholding of 1998 copyright term extension may signal "the birth of copyright perpetuity"); Editorial, *Copyright Craziness*, WASH. POST, Aug. 17, 2001, at A22 (describing 1998 copyright extension as ensuring that "[v]ast quantities of creative material [will] be perpetually owned privately," and as having "shredded any meaningful limit" to copyright terms).

92. *See* Frank Pasquale, *Copyright in an Era of Information Overload: Toward the Privileging of Categorizers*, 60 VAND. L. REV. 135, 137 (2007) ("Claiming absolute rights over the content they own, many copyright holders appear to demand nothing less than perfect control over any fragment or sample of their works."); *The Coming of Copyright Perpetuity*, *supra* note 91, at A28 (describing negative effects of overlong copyrights on production of new works that draw on existing knowledge); Yochai Benkler, The Free Republic Problem: Markets in Information Goods vs. The Marketplace of Ideas (Apr. 1999) (unpublished manuscript), *available at* http://www.freerepublic.com/forum/a3a2f6be079fd.htm ("[E]nforcing property rights in information goods requires government to prevent its citizens from using information that they want to use in ways that they want to use it.").

93. New Era Publ'ns Int'l, APS v. Henry Holt & Co., 695 F. Supp. 1493, 1525 (S.D.N.Y. 1988).

94. *See* Brief for Internet Archive et al. as Amici Curiae Supporting Petitioners at 1-4, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), *available at* http://www.law.berkeley.edu/clinics/samuelson/papers/briefs/Eldred_Amicus_052002.pdf. The Internet Archive specialized in digital archives of film and audio content at the time the brief was filed, but had ambitious plans to arrange for the scanning of up to 50,000 books held by the Bibliotheca Alexandrina in Egypt for distribution via libraries over the Internet. *See id*. at 13 n.21; Bibliotheca Alexandrina, Million Book, http://www.bibalex.org/isis/ProjectDetails.aspx?Status=ongoing&id=11 (last visited July 17, 2007).

> starting in 2005. Yet because of the [term extension] . . ., we must continue to wait, perhaps eternally, while works disappear . . . .[95]

The copyright extension that the eBook providers challenged operated prospectively for new works and retrospectively for existing works, despite the impossibility of encouraging, and likelihood of inhibiting, any further creativity respecting existing works.[96]

Public domain texts, subscription-based Internet libraries, self-publishing of eBooks on the Web, and the unauthorized p2p trading of copyrighted eBooks do not exhaust the universe of eBooks—far from it. Independent Web publishing of fan fiction is one of the most popular genres of eBook writing.[97] This is unsurprising in that courts and literary critics have recognized for generations, if not centuries, that few books are strictly new and original, and all inevitably borrow heavily from other books.[98] Shakespeare and Milton, regarded as perhaps the

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95. Brief for Internet Archive, *supra* note 94, at 12-13. *Accord* Brief for American Association Law Libraries et al. as Amici Curiae Supporting Petitioners at 21-22, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), *available at* http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/amici/libraries.pdf (indicating that between 96.5% and 99% of books published between 1920 and 1950 are still in print). *Amici* further explained that:

> [Few] books published between 1920 and 1950 . . . are now in print. According to *Books In Print*, the number of books in print for the past three years exceeds 600,000, while all titles for the decades of 1920-1950 number less than 6,000. The paucity of republished works exists despite Congress' extending the terms for such works from 56 to 75 years in 1978.

Id. (footnotes omitted).

96. *See* Brief for Internet Archive, *supra* note 94, at 3; Brief for American Association Law Libraries, *supra* note 95, at 3-4.

97. Fan fiction is the crafting of stories about characters or scenarios that already exist in the popular culture, from *Star Trek* to Barbie to *Dungeons & Dragons*. *See* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 653, 655 (1997). For descriptions of the popularity and legal troubles of fan fiction, see Christina Z. Ranon, Note, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 422 (2006); Tushnet, *supra*, at 652-60, 668, 672-74; Amy Harmon, *'Star Wars' Fan Films Come Tumbling Back to Earth*, N.Y. TIMES, Apr. 28, 2002, at 28; Allan Hoffman, *Fan Fiction Is Running Wild on the Web*, STAR-LEDGER, Apr. 11, 2004, at 8.

98. *See, e.g.*, Berkic v. Crichton, 761 F.2d 1289, 1294 (9th Cir. 1985) ("[I]n Hollywood, as in the life of men generally, there is only rarely anything new under the sun."); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) ("With so many sources before them [authors] might quite honestly forget what they took; nobody knows the origin of his inventions . . . ."); Emerson v. Davies, 8 F. Cas. 615, 618-19 (C.C.D. Mass. 1845) (No. 4,436) ("In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. . . . If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times."); ROLAND BARTHES, IMAGE—MUSIC—TEXT 146 (1977) (defining a book as "a multi-dimensional space in which a variety of writings, none of them original, blend and clash . . . . a tissue of quotations drawn from the innumerable centres of culture"); JOHN LORD CAMPBELL, THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE

"brightest originals" of English literature, had arguably borrowed even more extensively from others, copying not just characters but entire plots.[99]

Efforts to create new works out of old ones, the traditional manner in which creativity operates, have sparked an outpouring of novel-length eBooks on the Internet, such as *Dynasty*, a reimagining of *Star Wars* with Luke Skywalker falling captive in the Death Star and being trained as a Sith Lord on Coruscant.[100] Supreme Court precedent restricting fair use and the ability of authors to mimic one another's' creations has hobbled Internet users' ability to distribute such works, however. Most notably, the Court has forced authors quoting, imitating, criticizing, or parodying existing work to somehow prove a negative that takes into account not only their own work but all similar works that might be released in the future, so that to defeat fair use a corporation "need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'"[101] So

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GREAT SEAL OF ENGLAND 247 (Third London ed. 1851) ("[I]f there be any thing in the world common to all mankind, science and literature are in their nature *publici juris* [of public right], and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow-creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species?"); TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 138 (1983) ("There is no such thing as literary 'originality', no such thing as the 'first' literary work: all literature is 'intertextual.'"); James Boyle, Op-Ed., *Sold Out*, N.Y. TIMES, Mar. 31, 1996, at 15 ("'Poetry can only be made out of other poems; novels out of other novels,' as the critic Northrop Frye famously put it."); Wendy J. Gordon, *Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship*, 57 U. CHI. L. REV. 1009, 1030 (1990) (noting that Yale literary critic "Harold Bloom . . . suggests that all art is a creative misreading of one's predecessors, a Freudian rebellion against what came before; seen this way, all works are potentially derivative. . . . '[A]ll poems can be read as rewritings of other poems . . . .'") (footnotes omitted). Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L.J. 785, 815 (2004) ("Even leading copyright advocate Mark Twain acknowledged that 'we are all thieves.'").

99. *See Emerson*, 8 F. Cas. at 619 (explaining that these authors "gathered much from the abundant stores of current knowledge and classical studies in their days"); JAMES PRENDEVILLE, MILTON'S PARADISE LOST, AND A MEMOIR OF THE LIFE OF MILTON 362, 400, 412 (1841) (mentioning that Milton copied plot of *Paradise Lost* from the Bible); Nadel, *supra* note 98, at 815 (revealing that "many of Shakespeare's plots were originated by others").

100. *See* VALERIE VANCOTTI & REBECCA THOMPSON, DYNASTY (2005), *available at* http://www.geocities.com/valeriev84/dynasty.html. The author has apparently published a dozen or more stories based on the Star Wars characters in several "fanzines." *See* Valerie Vancotti, Dark vs. Light: Fan Fiction, http://www.geocities.com/valeriev84/fanfiction.html (last visited July 18, 2007).

101. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 429, 451, 484, 484 n.36 (1984)); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (remanding case involving parody of a prominent copyrighted work for determination in courts below as to whether parodist could prove an *absence* of harm to the plaintiff's potential market for licensing similar parodies: "Since fair use

applied, copyrights threaten greatly to impede forms of digital media that imitate existing works of authorship in order to articulate the dreams, political ideals, cultural commitments, and social identities of these works' observers, fans, or critics.[102]

Last but not least, Google is rolling out a system for the rapid search and retrieval of relevant passages from millions of books contained in university and city library systems.[103] Google is scanning the full contents of both copyrighted and public domain books contained in the University of Michigan and the University of California library systems, as well as antique and public domain works from Oxford, Harvard, Stanford, and the New York Public Library.[104] For copyrighted books, Google will only provide short previews of a few lines each, which its automated system prepares. Google has given this "snippet" treatment not only to copyrighted books, but also to works that should be in the public domain because they were authored by the United States government, such as the report of the hearings on the Pearl Harbor attack that prompted the United States to declare war on Japan.[105]

Now, Google is facing a joint action by several publishers and a putative class action of tens of thousands of authors challenging the scanning and previewing of their works by Google as a copyright infringement.[106] Google acknowledges that it digitally scans copyrighted books from participating libraries and "makes available to the libraries one scan of the books for their use in compliance with copyright law,"

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is an affirmative defense, its proponent would . . . [need to offer] favorable evidence about relevant markets.") (footnote omitted).

102. *See* COOMBE, *supra* note 1, at 30-31, 55, 88-129; Rosemary J. Coombe, *Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463, 470 (1998); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1855 (1991); Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We Be Paying Rent? Deconstructing the Lanham Act and Rights of Publicity*, 20 COLUM.—VLA J.L. & ARTS 123, 136-37 (1996); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1729-30 (1999); Sunder, *supra* note 1, at 307; Rebecca Tushnet, Essay, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 580-81 & n.208 (2004); Tushnet, *supra* note 97, at 656.

103. *See* Siva Vaidhyanathan, *Copyright Jungle*, COLUM. JOURNALISM REV., Sept./Oct. 2006, at 42, *available at* http://www.cjr.org/issues/2006/5/Vaidhyanathan.asp.

104. *See id.* at 42-43, 47-48.

105. *See* Google Inc., Google Book Search, http://books.google.com/books?vid=OCLC61120486&id=vNk9ZH7A9ewC&dq=intitle:pearl+date:1945-1955&q=intitle:pearl%20date:1945-1955&pgis=1 (last visited July 18, 2007). The report of these hearings was a public document and therefore uncopyrightable even prior to the enactment of section 105 of the Copyright Act of 1976. *See* Eggers v. Sun Sales Corp., 263 F. 373, 374 (2d Cir. 1920).

106. *See* Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 33 MIAMI L. REV. 601, 626, 627 (2006).

but maintains that the First Amendment bars plaintiffs from obtaining an injunction or damages against it under copyright law.[107]

B. A Free Speech Approach to the Impending "Copyright Cage"

As it did in trademark law, the Supreme Court has developed several wholly unsatisfactory doctrines to explain away, defer, and disregard the conflict between copyright and the First Amendment. In assessing digital libraries' First Amendment challenge to legislation frustrating the public's access to eBook versions of historical and political books from the middle of the last century, the Supreme Court held that when Congress retrospectively extends copyright terms to "protect[] authors' original expression from unrestricted exploitation," it "does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas."[108] First Amendment rights are adequately preserved, in the Court's view, so long as Congress leaves available some means of expressing the same idea using different words or expression.[109]

The Court's ruling in *Eldred* represented the culmination of an unfortunate series of decisions establishing a "definitional balance" of copyright claims against First Amendment interests, under which Congress has nearly unlimited discretion "to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the [Copyright] Clause."[110] The Court also reiterated its

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107. *See* Answer, Jury Demand, and Affirmative Defenses of Defendant Google, Inc. at 5, McGraw-Hill v. Google, Inc., No. 05-CV-8881 (S.D.N.Y. Nov. 8, 2005), *available at* http://isites.harvard.edu/fs/docs/icb.topic87591.files/McGraw-Hill_v._Google_Answer.pdf (describing "Google Library Project" starting in December 2004, which "will make available for searching online an index of words found in many books in several of the world's leading libraries"); *id*. at 8 (listing defendant's third affirmative defense as: "Plaintiffs' claims and/or the remedies sought are barred by the First Amendment to the United States Constitution."); *see also* Answer, Jury Demand, and Affirmative Defenses of Defendant Google, Inc. at 6, Author's Guild v. Google Inc., No. 05-CV-8136 (S.D.N.Y. Nov. 30, 2005), *available at* http://www.unc.edu/courses/2006spring/law/357c/001/projects/jsieman/AGanswer.pdf.

108. Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

109. *See id.* at 219 (stating that the fact that "idea, theory, and fact in a copyrighted work" is not protected by copyright means that the Copyright Act "'strikes a definitional balance . . . by permitting free communication of facts while still protecting an author's expression'") (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985)).

110. *Id*. at 222. For earlier decisions in this tradition, see *San Francisco Arts & Athl, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 539 (1987) ("Congress reasonably could conclude that . . . unauthorized uses, even if not confusing, nevertheless may harm the [trademark owner] by lessening the distinctiveness and thus the commercial value of the marks."); *Harper & Row*, 471 U.S. at 569 (rejecting First Amendment limits on copyright because "Congress has not designed . . . a 'compulsory license' permitting unfettered access to the unpublished copyrighted

rudimentary Chicago School economics[111] of the First Amendment, whereby there would be no "economic incentive to create and disseminate ideas" without terms extending past the life span of the average American and achieved by retrospective term extensions.[112] The

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expression of public figures"); Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 6 (1966) (explaining that although Congress may not remove existing knowledge from the public domain by granting patents on existing technology, it may otherwise "implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim"); McClurg v. Kingsland, 42 U.S. 202, 206, 211 (1843) (holding that the Copyright and Patent Clause grants plenary power to Congress to extend the terms of an existing patent).

111. The "Chicago School" tradition of law and economics too often proceeds by ignoring the insights of structuralist economists and the "Silicon Valley school" of economics that anti-competitive predation by monopolists and oligopolists against smaller competitors is a reality, and that "unrestricted trade between and among competitors or buyers and sellers—is the optimal way to maximize consumer welfare." Eliot G. Disner, *Antitrust Law: The Chicago School Meets the Real World*, L.A. LAW., Mar. 2002, at 14-15, 17; *see also* JONATHAN L. RUBIN, AM. ANTITRUST INST., RESPONSE TO PUBLIC CONSULTATION ON THE EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES 8 (Mar. 31, 2006), *available at* http://www.antitrustinstitute.org/recent2/491.pdf (arguing that a "Chicago school perspective . . . assumes away most of the elements of the [monopolization] dynamic" by assuming "that buyers are free to choose to deal with whomever they wish or that rivals are already present or poised to enter"); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 301, 304-05 (2002) (arguing that the Chicago School "economics of the brick-and-mortar world" ignores the actual economics and market structure of "digital content distribution" because the "structure and economics of cyberspace promise to end the free rider problem and the market failure associated with distributing content using the technologies of Gutenberg and the industrial revolution").

112. *Eldred*, 537 U.S. at 219. The *Eldred* court reasoned:

> Calibrating rational economic incentives . . . is a task primarily for Congress, not the courts. Congress heard testimony from a number of prominent artists; each expressed the belief that the copyright system's assurance of fair compensation for themselves and their heirs was an incentive to create.

Id. at 207 n.15. For critiques of this conclusory account of economic incentives, see *id.* at 254-55 (Breyer, J., dissenting). Justice Breyer opined:

> No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter. After all, if, after 55 to 75 years, only 2% of all copyrights retain commercial value, the percentage surviving after 75 years or more (a typical pre-extension copyright term)—must be far smaller. . . . And any remaining monetary incentive is diminished dramatically by the fact that the relevant royalties will not arrive until 75 years or more into the future, when, not the author, but distant heirs, or shareholders in a successor corporation, will receive them. Using assumptions about the time value of money provided us by a group of economists (including five Nobel prize winners), . . . it seems fair to say that, for example, a 1% likelihood of earning $100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today. . . .
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> What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum? What monetarily motivated Melville would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account?

Id.; *see also* THOMAS BABINGTON MACAULAY, 8 THE WORKS OF LORD MACAULAY 198-202

Court based these conclusions primarily upon a previous decision opining that no writers will produce anything "worth reading" if traditional fair use rights survived.[113] The previous decision, *Harper & Row Publishers v. Nation Enterprises*, declared that the "'social value [of dissemination]'" of information should be disregarded in copyright cases even when it "'outweighs any detriment to the artist,'" because courts should only "depriv[e] copyright owners of their right in the property" where no "fully functioning market" exists to "encourage[] the creation and dissemination of [the views] of public figures."[114] Unlike more sophisticated accounts, the economic analyses of the Supreme Court in these cases did not reckon with the potential costs and unintended consequences of extended copyright duration and scope (such costs include raising the cost of inputs for creative work, reducing overall output, imposing administrative costs, etc.).[115]

The Court's resolution of the First Amendment issue in *Eldred* is problematic for several reasons. First, its alleged "definitional balance" must have some limit, or it would be a categorical copyright exception to the First Amendment, rather than a "balance."[116] To hold that the fair use

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(Trevelyan ed., 1879) (extending copyright terms past life of the author imposes a quantifiable "tax on readers" that cannot be justified by a speculative "bounty to writers" that "is to be enjoyed more than half a century after [they] are dead . . . perhaps by somebody unborn").

113. *See Eldred*, 537 U.S. at 219.

114. *Harper & Row*, 471 U.S. at 559-68, 66 n.9 (collecting authorities on economic analysis of fair use).

115. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 318-19 (1970); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1668-72 (1988); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421, 430-31 (1966); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 655 (1996); Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 167-71 (1934).

116. *See* Lemley & Volokh, *supra* note 16, at 182-83 ("Free speech guarantees can't be avoided simply by characterizing a speech restriction as an 'intellectual property law.' After all, one could plausibly view libel law as protecting a person's property interest in his reputation, or a company's property interest in its product's reputation—some courts have indeed done so.") (footnotes omitted); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROB. 147, 169-70 (2003) (criticizing courts for behaving as if there is an "intellectual property exception to the First Amendment" that does not exist); Reply Brief of Appellant, Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001) (No. 99-5430), *reprinted in The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 670 (2000) ("[T]he statute that grants the copyright obviously remains subject to ordinary First Amendment analysis. As we pointed out before, a statute that granted copyrights to 'decent' works only, *cf. Reno v. ACLU*, 521 U.S. 844 (1997), . . . would . . . raise a First Amendment issue that was not exhausted by the claim that the copyright protected expression only."). As Lemley & Volokh explain:

doctrine as presently construed represents the outer boundary of the First Amendment right to comment on or transform existing speech is to constrain and abandon the expansive right of free speech that existed in 1791 with respect to copyrighted works.[117]

Second, the ability to express the same ideas is an insufficient "balance," because as described below, copyright law at the time of the founding allowed speakers and writers to use the expression of others, and not simply their ideas, in new works. The Supreme Court has similarly concluded that it is insufficient under the First Amendment to permit a newspaper to express its contributors' ideas without libeling a public official,[118] or a protester or picketer to protest somewhere else than on private property or in public buildings,[119] or an antiwar activist to express his views without using profanity or anti-draft rhetoric,[120] or a newspaper to describe the world or reveal government deception without publishing stolen government documents or endangering national security.[121]

> The Copyright and Patent Clause grants power to Congress, but the point of the Bill of Rights is to restrain the federal government in the exercise of its enumerated powers. In exercising its other powers, Congress is subject to First Amendment constraints: For instance, the government has the enumerated power to run the post office, but this doesn't mean it can refuse to carry communist propaganda . . . .

Lemley & Volokh, *supra* note 16, at 190.

117. *See infra* notes 147-48 and accompanying text (describing expansive right of using excerpts from old books in new ones that existed in eighteenth century).

118. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-50 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 282-83 (1964) (rejecting argument that newspaper could be held liable for publishing false facts without adverse effect on expression of political ideas); *see also* Beauharnais v. Illinois, 343 U.S. 250, 254-57 (1952) (declaring that "libelous" and "insulting" words "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

119. *See* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20, 323 (1968) (rejecting argument that picketing elsewhere than on private property was adequate alternative under First Amendment); Marsh v. Alabama, 326 U.S. 501, 509 (1946) (holding that states could not, consistent with the First Amendment, allow a corporation to utilize its property rights to "restrict [citizens'] fundamental liberties").

120. *See* Cohen v. California, 403 U.S. 15, 15-16, 26 (1971) (rejecting idea that censoring words "Fuck the Draft" on a t-shirt could occur without a risk of suppressing the expression of an antiwar message).

121. *See* United States v. New York Times Co., 328 F. Supp. 324, 326 (S.D.N.Y. 1971) (discussing various allegations by United States that *New York Times* acquired and threatened to publish classified study on Vietnam War in violation of Espionage Act and other laws), *rev'd*, 444 F.2d 544 (2d Cir. 1971) (remanding for potential issuance of preliminary injunction), *rev'd*, New York Times Co. v. United States, 403 U.S. 713, 726-27 (1971) (holding that a preliminary injunction would be an unconstitutional prior restraint on free speech).

Third, overbroad copyrights are objectionable for precisely the same reasons that other overbroad regulations of speech for well-meaning purposes can be: they chill "'debate[s] on public issues [that] should be uninhibited, robust, and wide-open.'"[122] Moreover, such copyrights unnecessarily restrict distribution of works that shed light on controversial public issues.[123]

Fourth, copyright laws represent content-based regulations favoring some forms of expression and disfavoring others (unauthorized sequels, parodies, or extensive criticisms or commentaries on others' works).[124] Copyright law is a system of regulation that restricts the speaking or

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122. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 582 (1985) (Brennan, J., dissenting) (quoting *Sullivan*, 376 U.S. at 270); *see also id*. at 582, 605 (stating that each "important extension of property rights" amounts to "a corresponding curtailment in the free use of knowledge and of ideas," and to an interference with the "broad dissemination of principles, ideas, and factual information [that] is crucial to the robust public debate and informed citizenry that are 'the essence of self-government.'") (citation omitted).

123. *See* Eldred v. Ashcroft, 537 U.S. 186, 249 (2003) (Breyer, J., dissenting).

> [T]he likely amounts of extra royalty payments are large enough to suggest that unnecessarily high prices will unnecessarily restrict distribution of classic works (or lead to disobedience of the law)—not just in theory but in practice. . . . "[N]ew, cheaper editions can be expected when works come out of copyright" . . . . One year after [the] expiration of copyright on Willa Cather's *My Antonia*, seven new editions appeared at prices ranging from $2 to $24 . . . .

Id.; *see also* Rosemont Enters. v. Random House Inc., 366 F.2d 303, 309 (2d Cir. 1966) (holding that copyright law "must be tempered by a countervailing privilege that the public have [in obtaining] some information concerning important public figures"); *id*. at 311 (Lumbard, C.J., concurring) ("The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate [the use of the copyright statute as an] attempted interference with the public's right to be informed regarding matters of general interest . . . ."); Shaffer Van Houweling, *supra* note 4 *passim*; Nadel, *supra* note 98, at 789.

124. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) ("[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based."); *id.* at 677-78 (O'Connor, J., joined by Ginsburg, J., Scalia, J., and Thomas, J., concurring in part and dissenting in part) ("The First Amendment does more than just bar government from intentionally suppressing speech of which it disapproves. It also generally prohibits the government from excepting certain kinds of speech from regulation because it thinks the speech is especially valuable."); San Francisco Arts & Athl., Inc. v. U.S. Olympic Comm., 483 U.S. 522, 561 (1987) (Brennan, J., dissenting) (opining that exclusive right in a word "restricts speech in a way that is not content neutral"); Baker, *supra* note 12, at 923 (arguing that copyright law is "facially based on content" because its "'application of which turns on the content of the speech,'" and "'enforcement authorities must necessarily examine the content of the message'") (quoting Boos v. Barry, 485 U.S. 312, 335-36 (1988) (Brennan, J., concurring in the judgment), and FCC v. League of Women Voters, 468 U.S. 364, 383 (1984)); *id*. (arguing that copyright also has a "content-based purpose," namely the assumption "that society is left with less valuable media content without the law"); *id*. at 930 (maintaining that copyright is content-based because it "'describe[s] permissible [speech] in terms of its subject matter'") (quoting Police Dep't of Chicago v. Moseley, 408 U.S. 92, 95 (1972)); Lemley & Volokh, *supra* note 16, at 186 ("Copyright liability turns on the content of what is published.").

writing of "already-said" speech, or "speech that relies on another's labor," based explicitly and in detail upon the content of such speech.[125]

Finally, copyright unconstitutionally prohibits some citizens from exercising their liberties of speech and the press to express themselves. The authors of fan fiction, for example, have a First Amendment interest in telling new stories that comment on or criticize other authors' well-known stories or characters.[126] Google's project directors, likewise, have

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125. *See* Baker, *supra* note 12, at 906 (stating that copyright laws are "content-based limitations on speech" because they impose "legal restriction[s] that [that] directly and specifically aim[] at controlling speech," specifically "already-said speech"); Zimmerman, *Information as Speech*, *supra* note 12, at 731 (copyright law restricts "right to engage in speech that relies on another's labor" without "obtaining a license" that may "be withheld at will," and therefore subordinates free speech "to permission and to the pocketbook as preconditions of a speaker's exercise of her own expressive capacity"). From the speaker's perspective, copyright is content-based because copyright liability is determined by reference to the content of a work, *see* Lemley & Volokh, *supra* note 16, at 186, and because a speaker must "refrain from making fair uses of [specific] *content* out of fear of litigation." Nadel, *supra* note 98, at 806 n.88 (emphasis added) (citing LESSIG, FREE CULTURE, *supra* note 2, at 95-99, 184-88, 304-06). A speaker may even be held liable under copyright law precisely for her "clear expression or other affirmative steps taken to foster infringement." *See* MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2770 (2005); *see also id*. at 2774 (finding liability based on "express promotion [and] marketing" of defendant's software).

126. *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166 (11th Cir. 2001) *substituted opinion at* 268 F.3d 1257, 1276-77 (11th Cir. 2001) (holding that First Amendment rights of an author to use existing characters to express new message would be violated by injunction based on copyright in the characters); LESSIG, THE FUTURE OF IDEAS, *supra* note 2, at 187-90, 196-99 (stating that overbroad copyrights, and extensions of term of existing copyrights, suppress free speech in violation of First Amendment); Abrams, *supra* note 12, at 11 (reasoning that First Amendment may be offended by injunctions in copyright cases); Baker, *supra* note 12, at 893, 900, 908 (explaining that First Amendment should condemn as unconstitutional any effort by "one private party to limit another's speech"); Cohen, *supra* note 12, at 1018-19 (opining that copyright owners' efforts to monitor readers of their work and prevent them from copying or printing it out for incorporation into new works are objectionable from the standpoint of First Amendment); Koenig, *supra* note 12, at 837-38 (arguing that overbroad trademark rights threaten free speech); Lange, *supra* note 12, at 133-34 (urging a revival of First Amendment's role in curtailing ability of intellectual property laws to censor creativity); Yen, *supra* note 12, at 432-33 (maintaining that First Amendment values have vital role to play in preserving "basic rights of expression" against chilling effect of overbroad copyrights); Zimmerman, *Information as Speech*, *supra* note 12, at 681 (noting that the expansion of intellectual property doctrines has threatened First Amendment values by encroaching upon public domain or linguistic "common"); Zimmerman, *Is There a Right*, *supra* note 12, at 348-349 (reasoning that judges should use First Amendment to prevent copyrights from censoring thought and communication among citizens and friends). *Cf*. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 579-82 (1977) (Powell, J., joined by Brennan, J., and Marshall, J., dissenting) (declaring that First Amendment should protect news broadcasts from certain state law intellectual property claims); Wendt v. Host Int'l, Inc., 197 F.3d 1284, 1288-89 (9th Cir. 1999) (Kozinski, J., dissenting) (criticizing use of intellectual property laws to "snuff out creativity" in form of "literary work," which is "worthy of the highest First Amendment protection from intrusive state laws . . . ."); White v. Samsung Elec. Am., Inc., 989 F.2d 1512, 1513-14 (9th Cir. 1993) (Kozinski, J., dissenting) (overprotecting intellectual property amounts to unconstitutional interference with freedom of speech); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 29 (1st

a free speech interest in expressing the idea of universal access to human knowledge by providing a system for searching through our written tradition for important facts or opinions.[127]

Eldred and other First Amendment skeptics also argue that the same Constitution that contains the First Amendment also embraces copyright law, and consequently that copyright should be immune from external First Amendment limitations.[128] This reverses the order of analysis, for an amendment modifies and limits the underlying power, not vice versa.[129] Madison intended the "freedom of the press" under the First Amendment to be at least as unrestrained as the press in the American colonies, "which has not been confined to the strict limits of the common law," but extended to "*unrestrained* animadversions" on the character and conduct of public officials.[130] He affirmed that the First Amendment would not leave the press to the whim of Congress:

Cir. 1987) (holding that the First Amendment forbids use of trademarks to "quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view") (citation omitted).

127. *Cf. Turner Broad.*, 512 U.S. at 636 ("Through 'original programming *or by exercising editorial discretion over which stations or programs to include* in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'") (emphasis added) (quoting Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986)).

128. *See Eldred*, 537 U.S. at 219 ("The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."); *Suntrust*, 268 F.3d at 1263 n.12 ("While the First Amendment disallows laws that abridge the freedom of speech, the Copyright Clause calls specifically for such a law."); *cf.* 4-19E NIMMER ON COPYRIGHT § 19E.03[B] (2007) (opposing "evaluating copyright injunctions directly under the Constitution" because, among other reasons, first Copyright Act was enacted in 1790, while "the First Amendment . . . became effective in 1791").

129. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (explaining that legislation otherwise within the constitutional power of the legislator may fall "within a specific prohibition of the Constitution, such as those of the first ten amendments"); s*ee also* Amar, *The Supreme Court*, *supra* note 17, at 29-30 ("Indeed, because the People have chosen to affix amendments to the end of the document rather than directly rewrite old clauses, a reader can never simply look to an old clause and be done with it. Rather, she must always scour later amendments to see if they explicitly or implicitly modify the clause at hand."); Delgado, *supra* note 17, at 129 n.192 ("In cases of direct conflict, the first amendment, coming later as it did, should supervene any clause in that original [Constitution]."); Howard M. Wasserman, Bartnicki *as* Lochner: *Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 426 (2006) ("First Amendment doctrine is the product of constitutionalized . . . common law judicial lawmaking that trumps popular legislative enactments."); *cf.* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996) (noting that "Article I cannot be used to circumvent" an amendment to the Constitution, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area").

130. Madison, *supra* note 58, at 647 (emphasis added).

> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be *inviolable*. . . .
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> The right of freedom of speech is secured; the liberty of the press is expressly declared to be *beyond the reach of this Government* . . . .[131]

Madison stated clearly that "the freedom of the press" means the right to be "exempt . . . not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also; [and] . . . from the subsequent penalty of laws."[132]

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131. James Madison, *House Debate, June 8, 1789*, *in* 1 ANNALS OF CONGRESS 440, 451 (1794), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs14.html (emphasis added). He also stated that: "'In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . .'" New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) (quoting JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 570 (1799-1800) (Burt Franklin ed., 1888), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field (DOCID+@lit(ed00499))).

132. 4 ELLIOT, *supra* note 131, at 569-70. Thus, the "standard of [press] freedom in the United States" was intended to go at least as far as the common law's protection of the press, as supplemented by the actual practice of press freedom in Britain, where "public opinion" and fear of "impeachment" persuaded legislators to give much more leeway. *Id*. at 570. Jefferson also rejected the notion that freedom of the press meant simply the absence of pre-publication censorship. Madison and Jefferson roundly condemned the Sedition Act of 1798, even though it was a subsequent punishment arguably within the enumerated powers of Congress over national security, and even though it still contained protections from truthful or unintentionally false speech or publications from subsequent punishment. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS xi, 13, 128-29, 201-03, 297, 303 (1985). Leonard Levy famously argued that Madison and Jefferson endorsed the Blackstonian definition of "freedom of the press" as a freedom against prior restraint, not subsequent punishment. *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY ix-xii (1964); Leonard Levy, *Liberty and the First Amendment: 1790-1800*, 68 AM. HIST. REV. 22, 25-27, 36-37 (1962). This account, however, cannot explain Madison's express references to "subsequent penalty" as prohibited by the First Amendment, or to the legislative discretion of the British Parliament to regulate post-publication speech as being inconsistent with popular sovereignty in the United States, or to the importance of "*unrestrained*" speech that is "*beyond the reach of government*." James Madison, *House Debate, June 8, 1789*, *in* 1 ANNALS OF CONGRESS 440, 451 (1794), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs14.html. Levy's account is also internally inconsistent in that he concedes that the Framers intended that Congress be prohibited from making any law establishing penalties for speech after it has been published, but in doing so Congress used the very phrase "freedom of the press" that he claims means only freedom from prior restraint of the press. *See* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 501-06 (1983).

The nature of an experiment in self-government prompted broader formulations of freedom of the press than had prevailed in England, where, from Milton to Blackstone, it was construed to prohibit only licensing, and to permit all manner of civil and criminal liability allowable at common law.[133] Madison noted with concern "the parochial, self-interested popular majorities whom [legislators] represented."[134] His "premise" was that "absolute sovereignty" resided in the people to change their legislators, not in the legislators to change the people.[135] Popular sovereignty required an even greater, not lesser, "degree of freedom in the use of the press" than in England.[136] Similarly, Jefferson favored a near-absolute prohibition on Congress regulating speech and the press.[137] He advocated to Madison that the Bill of Rights be amended to include a provision that: "The people shall not be deprived or abridged of their right to speak, to write, or *otherwise* to publish anything but false facts affecting injuriously the life, liberty, property or reputation of others, or affecting the peace of the confederacy with foreign nations."[138] Thus, Jefferson "den[ied] the power of Congress 'to controul the freedom of the press.'"[139] For these reasons, one of the earliest

133. *See In re* Fries, 9 F. Cas. 826, 839-41 (C.C.D. Pa. 1799) (No. 5,126). The court explained:

> What might be deemed the freedom of the press, if it had been a new subject, and never before in discussion, might indeed admit of some controversy. . . . We derive our principles of law originally from England. . . . The definition of it is, in my opinion, no where more happily or justly expressed than by the great author of the commentaries on the laws of England, . . . [whose] views of the subject could scarcely be unknown to those who framed the amendments to the constitution . . . . His explanation is as follows: 'The liberty of the press is indeed essential to the nature of a free state. And this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.

Id. (quoting 4 WILLIAM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 151 (1765-69)).

134. JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 108 (1998).

135. *See Sullivan*, 376 U.S. at 274.

136. *Id*. at 275-76 (quoting 4 ELLIOT, *supra* note 131, at 570).

137. *See* 8 THE WORKS OF THOMAS JEFFERSON 464-65 (Paul Leicester Ford ed., 1904) ("[L]ibels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals"), *quoted in* Alan J. Koshner, *The Founding Fathers and Political Speech: The First Amendment, the Press and the Sedition Act of 1798*, 6 ST. LOUIS U. PUB. L. REV. 395, 398 n.13 (1987).

138. Letter from Thomas Jefferson to James Madison (1789), *in* 7 THE WRITINGS OF THOMAS JEFFERSON 450 (Library ed. 1903).

139. *Sullivan*, 376 U.S. at 277 (quoting Letter from Thomas Jefferson to Abigail Adams (1804), *quoted in* Dennis v. United States, 341 U.S. 494, 522-23 n.4 (1951) (Frankfurter, J., concurring)). Thus, both Jefferson and Madison opposed the Alien and Sedition Acts of 1798, 1

authoritative treatises on the Constitution and American law concluded that the First Amendment conferred an "*unlimited* right to [comment on public issues], either by speaking, writing, printing, or by any other mode of publishing," and that "the smallest infringement of the rights guaranteed by this article, must threaten the total subversion of the government."[140]

Fortunately, the *Eldred* opinion itself left open a path toward a more principled and defensible First Amendment analysis. The Court held that: "the standard for First Amendment review that should apply in the context of copyright statutes" is that "laws that do not change the 'traditional contours' of copyright protection are not subject to First Amendment scrutiny, leaving the implication that laws that change those

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Stat. 566, 570, 596, which prohibited intentionally making false statements as part of a combination to impede execution of U.S. law. *See also Sullivan*, 376 U.S. at 274 ("The [Sedition] Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison."). Madison led an effort in the Virginia legislature to condemn the Sedition Act as claiming "'a power . . . expressly and positively forbidden by [the First Amendment]—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.'" *Id*. at 274 (quoting 4 ELLIOT, *supra* note 131, at 553-54). "Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines. . . ." *Id.*; *see also* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 156-57 (1973) (Douglas, J., concurring) (noting that Jefferson believed Sedition Act to be "plainly unconstitutional"). Although Jefferson goes on in the passage from his Letter to Abigail Adams quoted in *Sullivan* to concede the right of states to "controul" the press as at common law, it is not clear to what extent Madison agreed with that interpretation. As one scholar puts it, Congress "was the Framers' primary target" but not necessarily "their sole target." Anderson, *supra* note 132, at 502. Most courts and commentators have agreed that the First Amendment was also "intended to limit the federal executive and judiciary," even though the purposeful use of the word "Congress" in the First Amendment and by Jefferson would permit federal executive censorship as much as censorship based on state laws. *Id.*; *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 718-19 (1971). In any event, the adoption of the Fourteenth Amendment and the incorporation of First Amendment rights as fundamental rights protected against intrusion by the states extended the freedom of speech and the press before Congress to the states. *Cf.* Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 721-22 (1981) (Rehnquist, J., dissenting) ("[T]he decision by this Court that the First Amendment was 'incorporated' into the Fourteenth Amendment and thereby made applicable against the States, *Stromberg v. California*, 283 U.S. 359, 368-69 (1931); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), . . . greatly expanded the number of statutes which would be subject to challenge under the First Amendment.").

140. ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES 297 (1803) (emphasis added). *See also* Zimmerman, *Information as Speech*, *supra* note 12, at 680-81 ("'[C]onstitutional liberty of speech and of the press . . . implies a right to freely utter and publish whatever the citizen may please.'") (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 422 (Da Capo Press ed. 1972) (1868)).

'traditional contours' do get First Amendment scrutiny."[141] This is probably insufficient to fully vindicate the First Amendment, being that the contours of a later-adopted amendment should modify the earlier-adopted delegation of constitutional power, but it is a place to start.[142]

What, then, are the "traditional contours" of copyright? This returns us to my argument regarding the original intent of the First Amendment. Its framers were accustomed to a very focused, speech-protective form of copyright. They would be dismayed to witness the extent to which intellectual property law is currently being deployed as a tactic to censor historical treatises, legal tracts, novels, documentary films, television news, and other works. James Madison and the other framers of the Bill of Rights could never have anticipated that an article in a political magazine about a former President (and potential candidate for another term as President) would be censored because it quoted an "infinitesimal" proportion of that former President's memoirs, thereby allowing "the statutory monopoly [of copyright to] choke off multifarious indirect uses and consequent broad dissemination of information and ideas."[143] Nor could they have imagined a pervasive "clearance culture" that demands detailed licensing and pre-publication censorship of political news and opinion for compliance with unforgiving copyright rules.[144]

The founding generation rarely, if ever, countenanced an injunction against a political book on copyright grounds.[145] In the *Federalist Papers*, Madison anticipated only that the "traditional view" of copyright law contained in the case of *Millar v. Taylor* and other British "common

141. Lawrence Lessig, *Creative Economies*, 2006 MICH. ST. L. REV. 33, 41.

142. *See supra* note 129 and accompanying text.

143. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 590, 598 (1985) (Brennan, J., dissenting).

144. *See* AUFDERHEIDE & JASZI, *supra* note 6, at 22-24.

145. *See* Wheaton v. Peters, 29 F. Cas. 862, 867, 872 (C.C.E.D. Pa. 1832) (No. 17,486) (injunction denied), *rev'd on other grounds*, 33 U.S. 591 (1834); Clayton v. Stone, 5 F. Cas. 999, 1001 n.2 (C.C.S.D.N.Y. 1829) (No. 2,872) (injunction denied); Blunt v. Patten, 3 F. Cas. 763, 765-67 (C.C.S.D.N.Y. 1828) (No. 1,580) (preliminary injunction denied, but injunction granted after trial against a map/chart of the North American coast); Lemley & Volokh, *supra* note 16, at 154-57, 154 n.25-26, 155 n.27 ("Despite the fact that United States copyright law was based largely on the English model, early U.S. courts showed some reluctance to grant preliminary relief to copyright plaintiffs. Of the reported copyright cases in the first fifty years of the republic, most refused to grant preliminary injunctive relief, and on several occasions courts and commentators noted that the American rule seemed less favorable to plaintiffs than the English case law.") (citing Ewer v. Coxe, 8 F. Cas. 917, 920 (C.C.E.D. Pa. 1824) (No. 4,584)); Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 20-21, 21 n.70 (1994) (explaining that in colonial America and early years of United States, copyright law was basically ignored).

law" precedents would be mimicked, as the first American copyright statute closely tracked the first British copyright (as opposed to press licensing) statute.[146] The opinions of the justices in *Millar v. Taylor*, including that of Lord Mansfield, a renowned champion of common-law copyright, concluded that excerpting a work in an abridgment, translation, imitation, or adaptation into verse was a lawful form of speech.[147] Courts viewed extensive quotations or "abridgements" of one work in another as exercises of intelligence and judgment that deserved independent protection, not censorship.[148]

Madison and the other framers of the Constitution made such broad statements as they did endorsing unlimited freedom to speak and publish because they could not anticipate that copyright law could someday be used to undermine an author's right to use a telling comparison, quotation, or turn of phrase.[149] The statutory and common law of

146. Reply Brief of Appellant, *supra* note 116, at 696, 696 n.100-03 (citing Millar v. Taylor, [1769] 98 Eng. Rep. 201 (K.B.), and THE FEDERALIST NO. 43, at 309 (James Madison) (Jacob E. Cooke ed., 1961)); *see also Wheaton v. Peters*, 33 U.S. at 602 (argument for appellants) ("The case of Donaldson v. Beckett was decided in the house of lords in 1774. This case, and all the law on this subject, discussed and decided by it, must have been known to the [Framers]. The opinion of the judges in the case of Miller v. Taylor, must also have been familiar to them."); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 3 (1968) (explaining that *Millar v. Taylor* was the "first major English decision on copyright," decided under "English copyright act of 1709," the "model" for Copyright Act of 1790).

147. *See* Stowe v. Thomas, 23 F. Cas. 201, 207 (C.C.E.D. Pa. 1853) (No. 13,514) ("'Certainly, bona fide imitations, translations and abridgments are different, and in respect of property, may be considered new works. . . . [The public] may improve [a work], imitate it, translate it, oppose [it]; but [has] no right to publish the identical work.'") (citing Millar v. Taylor, [1769] 98 Eng. Rep. 201, 225-26 (K.B.) (explaining that copyright is a limited monopoly consisting in the "sole right of printing and publishing" a book, not an absolute property right to prevent a new work based on an abridgement, improvement, imitation, translation, or appropriation of the conceptions thereof)).

148. *See* Story v. Holcombe, 23 F. Cas. 171, 173-74 (C.C.D. Ohio 1847) (No. 13,497) ("A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment. . . . All the authorities agree that to abridge requires the exercise of the mind, and that it is not copying.") (citing Strahan v. Newberry, [1773] 98 Eng. Rep. 775 (Ch.), and Gyles v. Wilcox, [1740] 26 Eng. Rep. 489, 490 (Ch.)); *see also* Dodsley v. Kinnersley, [1761] 27 Eng. Rep. 270, 271 (Ch.); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6-9 (2d ed. 1995) (citing these and other cases holding that republishing a "new work" that copies largely from an old one was legal in late 1700s).

149. *See* Governor Randolph, Address (June 10, 1788), *in* JONATHAN ELLIOT, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 203 (1799-1800) (Burt Franklin ed., 1888), *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ed0032)).

> The liberty of the press is supposed to be in danger. If this were the case, it would produce extreme repugnancy in my mind. If it ever will be suppressed in this country, the liberty of the people will not be far from being sacrificed. Where is the danger of it? He says that every power is given to the general government that is not reserved to the states. Pardon me if I say the reverse of the proposition is true. I defy any one to prove the contrary. Every power not given it by this system is left with the states. This being the

copyright was much more circumscribed in their day, resembling a regulation of unfair competition between printing houses rather than an excuse to quibble over imitation or quotation in a new work.[150] The Copyright Act of 1790, like the Statute of Anne, restricted its attention to printing, reprinting, and vending entire books, rather than nitpicking about excessive quotations, similar characters, or unacknowledged influences.[151] The Copyright Revision Act of 1831 similarly granted the public the "right to produce abridged or translated versions" of copyrighted books.[152]

> principle, from what part of the Constitution can the liberty of the press be said to be in danger?

Id.

150. Copyright in the eighteenth century operated "primarily as a trade regulation device—acting in the interest of society by preventing monopoly, and in the interest of the publisher by protecting published works from piracy . . . ." PATTERSON, *supra* note 146, at 14; *see also* Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 933 (2007); L. Ray Patterson & Craig Joyce, *Copyright in 1791*, 52 EMORY L.J. 909, 936 (2003) ("[A] reasonable inference is that the state legislators [who ratified the Constitution] viewed the copyright statute as a trade regulation act for the temporary benefit of authors but for the long-term benefit of the public as a whole . . . ."); OREN BRACHA, OWNING IDEAS: A HISTORY OF ANGLO-AMERICAN INTELLECTUAL PROPERTY 289 (June 2005) (unpublished S.J.D. dissertation, Harvard Law School), *available at* http://www.obracha.net/oi/OI5.pdf ("The only entitlement awarded by copyright was . . . the trade privilege of the publisher . . . to print and sell a particular text. . . . The [1790 Copyright] Act is, rather, based on the traditional trade-centered concepts of verbatim reproduction of texts and the sale of such verbatim copies. The transformation of a map, chart and book into the intellectual work and the broader notion of ownership of such a work [and its protection against non-verbatim copying] were yet to come."). Since then, copyright law has swept more and more private non-competitive conduct under its regulatory purview:

> Changes to the law have also enabled courts to punish private violations of those rights. Before July 8, 1870, when Congress added the word "copying" to the list of exclusive rights in the statute, copyright owners enjoyed only the exclusive rights of "printing, reprinting, publishing, and vending" their works. Because those rights related to publication in print, the exercise of those rights tended to involve public acts. Today, by contrast, section 106 of the Copyright Act provides copyright owners with the exclusive right of reproduction, which—unlike the exclusive rights of "printing, reprinting, publishing and vending"—is violated whenever the work is "fixed" in a "material object[]" (such as the memory devices of a home computer). The invasion of rights under copyright law, like the creation of those rights, is now, in many cases, a private act.

Stadler, *supra*, at 933.

151. *See* Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1793-94 (2002) (explaining that under the Copyright Act of 1790, "the actual scope of protection" was "slight," because "you could translate or adapt or abridge or set to song copyrighted works, without the permission of the author . . . ," as well as set up "pirate presses" to republish foreign works without restraint); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 534 n.119 (1990) (opining that the Statute of Anne and Copyright Act of 1790 "adopted a very limited view of infringement").

152. Judith L. Marley, *Guidelines Favoring Fair Use: An Analysis of Legal Interpretations Affecting Higher Education*, 25 J. ACAD. LIBRARIANSHIP 367, 368 (1999). Justice Story had an "intense dislike" for the fair abridgement doctrine, first grafting "many qualifications" onto it and

Moreover, by imposing a series of "formalities" and a relatively short fourteen-year initial term of protection,[153] the Copyright Act of 1790 "helped to maintain copyright's traditional balance between providing private incentives to authors and preserving a robust stock of public domain works from which future creators could draw."[154] In 1790, an author of a book had to be a citizen or resident of the United States, deposit a copy of its title in a district clerk's office, publish the clerk's record in a newspaper for four weeks, and deliver a copy of the book to the Secretary of State within six months of publishing it.[155] Eliminating publication and the other formalities expands the scope of regulation and shrinks the public domain to a shadow of what it otherwise would have been,[156] and means that copyright law is now "the principal barrier to the [digital distribution and] creative reuse of [many books] that under the [Copyright Act of 1790] would not have been subject to copyright in the first place."[157]

Breaking out of the "copyright cage" that regulates in byzantine, lobbyist-driven detail what can and cannot be said in digital media will require bold and creative thinking.[158] I suggest that courts and scholars look to the common-law "contours" of copyright in 1791 for a more principled basis with which to assess whether overbroad copyrights unconstitutionally abridge the freedom of speech. Efforts to inhibit the growth and development of the electronic press by shutting down fan fiction sites and book search technology, or to restrict free eBook sites from salvaging political and historical works condemned to obscurity by out-of-print status, should receive much closer First Amendment

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then eliminating it in favor of a vague ban on books tending to "[prejudice] the sale, or diminish the profits, or supersede the objects" of other books, which later became known as the fair use doctrine. *Id*.

153. A renewal had to be filed after fourteen years to receive an additional fourteen years of protection, a requirement which increased the size of the public domain by limiting the copyright monopoly to books still being marketed after fourteen years. *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124; ROBERT A. GORMAN, COPYRIGHT LAW 55 (2d ed. 2006).

154. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 487 (2004).

155. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 662-63, 667-68 (1834); Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829) (No. 2,872) (citing Act of May 31, 1790, 1 Stat. 124).

156. *See* Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 631-33, 641 (2006).

157. Sprigman, *supra* note 154, at 489.

158. Jonathan Zittrain, *The Copyright Cage*, LEGAL AFF., July/Aug. 2003, at 26, 29 (explaining how our "astonishingly intricate copyright regime" establishes a "copyright cage" for many individual users, but provides corporate users with "increasing numbers of exceptions, counterexceptions, contractual agreements, and licenses").

scrutiny.[159] Helpful standards for these inquiries, I believe, may be found in the common law of copyright.

IV. BROADBAND BANDITS AND NET NEUTRALITY

A. First Amendment Implications of Recent Efforts to Privatize and Deregulate Broadband Internet Markets

Emerging First Amendment issues implicate the right of oligopolistic owners of digital media infrastructure to block or discriminate against uses of the infrastructure that threaten their political ideology, business models, or market power. A notable example of this phenomenon occurred during the initial invasion of Iraq, when an ISP took down combat footage, claiming it was "adult content."[160] Most ISPs impose "acceptable use policies" with vague language allowing them to shut down Web sites or remove content they disagree with or that "people may find offensive."[161]

In addition to censoring political speech, ISPs use "acceptable use" policies to threaten upstart firms like Skype and Fon, which represent p2p communications platforms of great power.[162] Skype is a voice over Internet protocol or p2p voice communications technology, which turns personal computers into not only inexpensive telephones but also full-featured teleconferencing, videophone, and social networking tools.[163] Fon, on the other hand, is a company that is building a "grass-roots"

159. *See* Baker, *supra* note 12, at 904 ("The expressive liberty protected by the First Amendment encompasses *copying* as a way of receiving or preserving personal access to speech and *distributing* copies as a means of communicating to others what the distributor wants to communicate.").

160. *See* Tim Grieve, *No Dead Bunnies, No Dead Soldiers*, SALON.COM, Mar. 25, 2003, http://dir.salon.com/story/news/feature/2003/03/25/yellowtimes/index.html.

161. Caron Carlson, *ISPs Grapple With Censorship*, EWEEK, Mar. 31, 2003, at 1 (quoting Andrew Ulmer, an attorney with Simpson Partners LLP). AT&T, the largest broadband provider in North America, is now planning to delete Internet users' communications by means of automated technology that would likely provide little regard for fair use or First Amendment rights. *See* James S. Granelli, *AT&T to Target Pirated Content; It Joins Hollywood in Trying to Keep Bootleg Material Off Its Network*, L.A. TIMES, June 13, 2007, at C1; The Windsor Oaks Group LLC, *Voice of Broadband*, http://www.broadbandtrends.com/Newsletters/Volume3_2007/The_Voice_of_Broadband_Vol3_Issue_3.pdf (last visited Aug. 26, 2007) (AT&T/BellSouth accounted for 18.9% of North American broadband connections in 2006, ahead of second-largest broadband provider Comcast).

162. *See* Ethan Todras-Whitehill, *When a Stranger Calls, From Afar or Nearby*, N.Y. TIMES, Mar. 24, 2005, at G1; Skype Ltd., Skype Explained: P2P Telephony Explained—For Geeks Only, http://www.skype.com/download/explained.html (last visited July 28, 2007).

163. *See supra* note 162.

community that lets Internet users "share access across their wireless [i.e., Wi-Fi] networks to their broadband Internet access connections."[164] With about 400,000 users worldwide, Fon sells Wi-Fi transmitters, or routers, which permit other Fon users who share access to their own broadband connections (or who pay for access without sharing their own) to access the Web when they are away from home.[165] Some ISPs call this "stealing"; they claim that users cannot "choose to share their Internet access connections with anyone off the street."[166]

Both Skype and Fon potentially implicate high-speed ISPs' "acceptable use" policies, which purport to prohibit "high volume" use, commercial resale or similar noncommercial use, or use by persons outside the premises, without regard to whether such uses harm the network or other users.[167] High-speed Internet providers like the DSL and cable companies are buying up software to "block . . . Internet applications such as phone calls, video and photo downloads."[168] The creators of the Internet and World Wide Web warn that such discrimination against speech-enhancing uses of the Internet threatens the free exchange of ideas and new technologies desired by users, rather than network gatekeepers.[169]

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164. Joanie Wexler, *What's FON Up Against?*: *The Issue of Shared Public Wi-Fi Nets*, NETWORK WORLD, Nov. 8, 2006, http://www.networkworld.com/newsletters/wireless/2006/1106wireless2.html.

165. *See Startups to Watch*, CNNMONEY.COM, http://money.cnn.com/galleries/2007/biz2/0702/gallery.nextnet.biz2/11.html (last visited Aug. 26, 2007); *Fon Establishes Major US Beachhead, Lands Time Warner Cable*, ONLINE REPORTER, Apr. 27, 2007, http://www.onlinereporter.com/article.php?article_id=9366; Tom Sowa, *The Joy of Sharing: Fon Offers Wireless Social Networking for Members*, SPOKESMAN-REVIEW (Wash.), Oct. 9, 2006, at A11.

166. Wexler, *supra* note 164.

167. *See, e.g.*, AT&T, AT&T DSL Service Subscriber Agreement, §§ 8.a.-c., 10.a.-b., http://www.att.net/general-info/terms-dsl-data.html (last visited July 28, 2007); AT&T / Yahoo!, Terms of Service pts. 3, 14, http://edit.client.yahoo.com/cspcommon/static?page=tos (last visited July 28, 2007); Comcast, Comcast High-Speed Internet Acceptable Use Policy § ix, http://www.comcast.net/terms/use.jsp (last visited July 28, 2007); Time Warner Cable, Time Warner Cable Residential Services Subscriber Agreement, at pts. 4.b.i.-iii., 6, http://help.twcable.com/html/twc_sub_agreement2.html (last visited July 28, 2007); Verizon Online, Verizon Internet Access Service Terms of Service, pt. 3.6.1, 3.7.1, 3.7.5, http://www.verizon.net/policies/vzcom/tos_popup.asp (last visited July 28, 2007); John Windhausen, Jr., *Good Fences Make Bad Broadband: Preserving an Open Internet Through Net Neutrality*, at 19-20 (Feb. 6, 2006), http://www.publicknowledge.org/pdf/pk-net-neutrality-whitep-20060206.pdf; *see also* Arshad Mohammed, *Verizon Executive Calls for End to Google's "Free Lunch,"* WASH. POST, Feb. 7, 2006, at D01.

168. Peter Grant & Jesse Drucker, *Phone, Cable Firms Rein In Consumers' Internet Use*, WALL ST. J., Oct. 21, 2005, at A1.

169. *See Network Neutrality*, *supra* note 2, at 8-9; Decentralized Information Group, timbl's blog, Net Neutrality: This is Serious, http://dig.csail.mit.edu/breadcrumbs/node/144 (June 21, 2006,

The Supreme Court placed its imprimatur on such discrimination, however, by holding in 2004 and 2005 that neither antitrust nor federal "open access" laws force telephone or cable companies not to discriminate against smaller competitors or disfavored uses.[170] These cases, which reinforced barriers to entry confronted by municipalities and upstart private companies desiring to offer high-speed Internet access to the public, may be illustrative of a growing tendency toward "corporate socialism" in American media and the global economy more generally.[171] Corporate socialism views every increase in corporate

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4:35p.m.); Decentralized Information Group, timbl's blog, Neutrality on the Net, http://dig.csail.mit.edu/breadcrumbs/node/132 (May 2, 2006, 3:22p.m.).

170. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 973-75 (2005) (holding that "common carrier" and "telecommunications" nondiscrimination regulations under Telecommunications Act of 1996 did not apply to providers of "information" services, such as cable broadband); Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411-16 (2004) (holding that federal antitrust law does not impose nondiscrimination obligations on telecommunications providers); *see also* Covad Commc'ns Co. v. Bell Atl. Corp., 398 F.3d 666, 669-76 (D.C. Cir. 2005) (extending reasoning of *Trinko* case to claim by DSL broadband provider that incumbent monopolist discriminated against its requests for interconnection); Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1049-50 (11th Cir. 2004); *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C.R. 14,853, 14,855, 14,862 (2005) (extending reasoning of *Brand X* case to DSL broadband).

171. *See* Walter Adams, *Antitrust and a Free Economy*, 46 ANTITRUST L.J. 794, 797 (1977) (describing how oligopoly power has political consequences, including "disproportionate influence on the making of laws," as well as on their "interpretation," which result in mini-states "in the disguise of merchants—largely immune from social control but with a vested claim on government bailouts. In short, it helps convert a decentralized power structure into a camouflaged system of corporate socialism"); Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235, 292-93 (2004) (quoting critics who assail FCC auctions of exclusive communications licenses as "corporate socialism" that hurts small business); Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 CHI.-KENT. L. REV. 817, 823 (1996) ("As a result of the denial of true ownership to individuals, corporations, along with a small group of very rich individuals, have become the principal owners of the nation's wealth. This has produced an economy that might be described as 'corporate socialism'—a system that combines the worst features of socialism and capitalism. . . . Corporations possess the planning and allocation powers of socialist bureaucracies, but these powers are exercised only on behalf of the corporations themselves. . . . A general decline of living standards for the majority of Americans has been the result, accompanied by growing disparities of wealth . . . ."); Peter H. Schuck & Robert E. Litan, *Regulatory Reform in the Third World: The Case of Peru*, 4 YALE J. ON REG. 51, 64 (1986) (describing new "corporate socialism" or "mercantilism" in Latin America that involves "the 'regulatory capture' of vote-seeking politicians by rent-seeking corporate interests" at the expense of "competitive markets"); Peter H. Shuck, *The Politics of Regulation*, 90 YALE L.J. 702, 707-10 (1981) (book review) (describing how FCC and other federal agencies that regulate specific industries are susceptible to capture by those industries' leaders and therefore result in maintenance of cartels and in "'corporate socialism,'" to "regressively tax consumers," impoverish small firms, inhibit new entry, "stifle innovation, and "diminish consumer choice"); Russell Dean Covey, Note, *Adventures in the Zone of Twilight: Separation of Powers and National*

profits as a near-automatic increase in products and services that benefit the public, on the assumption that profits are "reinvested" in them.[172] As a mindset, it is exemplified by cases like *Eldred*, *San Francisco Arts & Athletics*, and *Harper & Row* that assume without any evidence that every increase in federal monopolies benefits the public by prompting reinvestment in quality products and services.[173]

Economic Security in the Mexican Bailout, 105 YALE L.J. 1311, 1311-12, 1337 n.134-36 (1996) (describing how former manager of $5 billion in Mexican investments at Goldman Sachs became U.S. Secretary of the Treasury and lobbied for legislation that forced U.S. taxpayers to contribute in excess of $20 billion to bail out investors in Mexican securities, in a form of "corporate socialism"). One might disagree with Professor Reich's assertion about living standards, if regarded on average, but his point becomes clear if the percentage of children living in poverty is examined. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., TRENDS IN THE WELL-BEING OF AMERICA'S CHILDREN & YOUTH 48 (1997), *available at* http://aspe.hhs.gov/hsp/97trends/es1-3.htm ("Between 1975 and 1993, the proportion of children living in extreme poverty, that is, at or below 50 percent of the poverty line doubled from 5 percent in 1975 to 10 percent by 1993.") (footnote omitted); FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 2005 19 (2005) (noting that seven percent of children lived in extreme poverty in 2003); OECD, STARTING STRONG II: EARLY CHILDHOOD EDUCATION AND CARE 426 (2006), *available at* http://www.oecd.org/dataoecd/16/14/37423831.pdf (explaining that the U.S. child poverty rate is twice the average of other developed countries).

172. This is known as the "Schumpeterian hypothesis" in economic literature, i.e., "that dominant firms innovate more than their competitively structured counterparts" because a firm with monopoly power "would enjoy greater *demand* for innovation by virtue of its ability to profit from its inventions," and "generate a greater *supply* of innovations relative to its competitive counterparts," making monopoly the "'most powerful engine of [economic] progress.'" Jim Chen, *Standing in the Shadows of Giants: The Role of Intergenerational Equity in Telecommunications Reform*, 71 U. COLO. L. REV. 921, 948 (2000) (quoting JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 106 (1942)). As one might have expected, it lacks empirical support. *See id*. at 950 (calling empirical support for the theory "elusive"). The Schumpeterian hypothesis is contrary to observed behavior in the case of the Internet. AT&T and its heirs—the "Baby Bell" DSL providers—tried mightily to restrict the growth and high-speed uses of the Internet, AT&T to protect its proprietary telephone network monopoly and later investments in cable broadband networks, and the Baby Bells to preserve the profits they earn due to underutilization of DSL's total high-speed access capacity. *See* LESSIG, *supra* note 2, at 27-45, 90, 148, 154-55, 158, 168; Travis, *supra* note 10, at 1714 (noting that Bell Labs had invented DSL by 1980 and Baby Bells could have offered it to Americans in 1980s or early 1990s but chose not to do so to protect existing revenue streams); PUBLIC KNOWLEDGE, PRINCIPLES FOR AN OPEN BROADBAND FUTURE 6-7 (2005), www.publicknowledge.org/doc/open-broadband-future.doc; Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 147, 152-154, 156-65 (2003). In actuality, reinvesting revenue from monopoly and duopoly exploitation of DSL and cable networks tends to reduce corporate profits, leading to inadequate investment and the breaking of corporate promises of wider access. *See* FMEA, *supra* note 11, at 9-10, 17.

173. *See* Eldred v. Reno, 537 U.S. 186, 207 (2003) (upholding copyright term extension because Congress "rationally credited projections that longer terms would encourage copyright holders to invest in the restoration and public distribution of their works"); *id*. at 248-49, 253 (Breyer, J., dissenting) (noting that majority's decision will actually "impede preservation [of American movie heritage] by forbidding the reproduction of films within their own or within other public collections," that copyright owners allowed half of feature films made before 1950 to be lost or destroyed, that extension "will mean the transfer of several billion extra royalty dollars to holders

A similar equation between corporate profits and public benefit may be at the root of the Court's rulings that neither antitrust nor telecommunications law has much to say about discriminatory and anticompetitive conduct in the market for high-speed Internet access.[174] According to traditional First Amendment analysis, which too often ignores the broader political and structural significance of a restraint on

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of existing copyrights—copyrights that, together, already will have earned many billions of dollars in royalty 'reward,'" and that in practice "the likely amounts of extra royalty payments are large enough to suggest that unnecessarily high prices will unnecessarily restrict distribution of classic works"); San Francisco Arts & Athl., Inc. v. U.S. Olympic Comm., 483 U.S. 522, 537 (1987) (upholding Act of Congress prohibiting some nonconfusing, noncommercial uses of words because "exclusive control" of words and trademarks helps "to ensure that the [owner] receives the benefit of its own efforts so that the [owner] will have an incentive to continue to produce a 'quality product,' that, in turn, benefits the public"); *id*. at 568, 573 (Brennan, J., dissenting) (stating that majority's decision actually "creates the potential for significant suppression of protected speech" and will result in "commercial monopolization of [noncommercial] language that otherwise belongs in the public domain"); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557-58 (1985) (rejecting First Amendment right to excerpt former President's memoirs because he and his publisher "invested extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by pre-empting the right of first publication." and because "copyright supplies the economic incentive to create and disseminate ideas"); *id*. at 589, 603 (Brennan, J., dissenting) (arguing that court actually deployed "the statutory monopoly" of copyright to "choke off multifarious indirect uses and consequent broad dissemination of information and ideas," and to allow plaintiffs to "monopolize revenue from that potential market" for information about Nixon and Ford presidencies by using "copyright as a shield from competition in that market").

174. *See Brand X*, 545 U.S. at 1000-02 (rejecting argument that FCC should be held to prior decisions determining that regulations against anticompetitive discrimination in high-speed Internet markets are needed, and instead praising FCC for engaging in a "fresh analysis" that emphasized why "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market") (citation and internal quotations omitted); *Trinko*, 540 U.S. at 407 (holding that "possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system[!]," because the "opportunity to charge monopoly prices . . . induces risk taking that produces innovation and economic growth"); Thomas O. Barnet, Remarks at Hearings Regarding Section 2 of the Sherman Act, *The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act* 6 (June 20, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/216738.htm (opining that *Trinko* "is in accord with Harvard economist Joseph Schumpeter's observation that high profits serve as 'baits that lure capital on to untried trails,' . . . resulting in better ways to satisfy our needs and desires"); Eleanor M. Fox, *Is There Life in* Aspen *after* Trinko*? The Silent Revolution of Section 2 of The Sherman Act*, 73 ANTITRUST L.J. 153, 155, 159, 167 (2005) ("The Court [in *Trinko*] held that even monopoly firms have the fundamental right to refuse to deal and that exceptions to this rule should be narrowly construed. . . . [The Court stated that:] 'Judicial oversight under the Sherman Act would seem destined to distort investment . . . .' Some scholars have concluded that the Supreme Court has now adopted a sacrifice-of-profits rule[!] for a Section 2 violation."); Christopher S. Yoo, *Beyond Network Neutrality* 63 (Vanderbilt Univ. Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 05-20, 2005), *available at* http://www.cdt.org/speech/net-neutrality/2005yoo.pdf ("Schumpeter's vision thus rejects the classic model of *horizontal competition within the market* in favor of competition among a succession of monopolists . . . .").

speech, such conduct would be an unproblematic result of contract law, a rule of general applicability, having an incidental content-neutral effect on speech.[175] "Contract with another provider, if you don't like the acceptable use policies of the one you have," this doctrine would tell Internet users. The analysis is not so simple in the broadband Internet context, however, because most potential new DSL and cable modem providers have been prohibited from offering another alternative by decades of anticompetitive legislation prohibiting new entry.[176] Local franchising laws prohibit or severely restrict competitive entry into the cable and DSL core of the high-speed Internet market.[177]

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175. *Cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . . The press may not with impunity break and enter an office or dwelling to gather news."); *id.* at 676 n.4 (Blackmun, J., joined by Marshall, J., and Souter, J., dissenting) (criticizing majority for ignoring principle that judicial "imposition of civil liability based on protected expression constitutes 'punishment' of speech for First Amendment purposes"); *id.* at 677-78 (Souter, J., joined by Blackmun, J., Marshall, J., and O'Connor, J., dissenting) (arguing that laws of general applicability "may restrict First Amendment rights just as effectively as those directed specifically at speech itself," and that courts should be wary of finding waiver of First Amendment rights by contract because such a finding is based on an erroneous "conception of First Amendment rights as those of the speaker alone," whereas it "'goes beyond . . . the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw'") (citation omitted).

176. Although alternatives to monopolistic DSL and cable modem providers are theoretically available in the form of T1 lines, fiber-optic connections, Wi-Fi, broadband over power lines, satellite Internet, etc., these options are not technologically or commercially viable for most residential customers, over ninety-five percent of whom stick with the duopoly of cable and DSL. *See* FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF JUNE 30, 2006, tbl. 3 & chart 6 (Jan. 2007), http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0107.xls; H.R. REP. NO. 109-541, at 7 (June 29, 2006); Wayne Rash, *Net Neutrality Advocates Face Off*, EWEEK (July 17, 2006), http://www.eweek.com/article2/0,1895,1990357,00.asp; FCC, HIGH-SPEED SERVICES FOR INTERNET ACCESS: STATUS AS OF DECEMBER 31, 2005, tbl.3 & chart 6 (July 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266596A1.pdf. Wireless and satellite broadband market share plunged nearly sixty percent from 1999 to 2004 compared to DSL and cable share. *See* Roy Mark, *Same Broadband Numbers, Different Conclusions*, INTERNETNEWS.COM, Aug. 26, 2005, http://www.internetnews.com/xSP/article.php/3530416.

177. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 633 (1994) ("Congress concluded that due to 'local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area,' the overwhelming majority of cable operators exercise a monopoly over cable service.") (quoting Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(2), Pub. L. No. 102-385, 106 Stat. 1460 (1992)); Press Release, FCC, FCC Adopts Rules to Ensure Reasonable Franchising Process for New Video Market Entrants (Dec. 20, 2006), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269111A1.pdf ("[T]he current operation of the [cable] franchising process constitutes an unreasonable barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment."); Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16,978, 17,028-41, 17,046 (2003) (explaining

Nearly half of all Americans have only one broadband provider to choose from, and many of the rest have only one other choice, which will inevitably impose nearly identical use restrictions.[178] As courts have recognized in the context of FCC licensing of broadcast frequencies, this is "a system in which the government excludes everyone from access to the media unless the approval of governmentally appointed caretakers (i.e., the licensees), is first secured."[179] Broadband operators with municipal franchises serve "as administrators of a highly valuable communications resource, [and should be] subject to First Amendment constraints."[180] A searching First Amendment inquiry should occur when the government "confers [a] right on licensees to prevent others from [communicating in violation of] an unconditional monopoly of a scarce resource which the [g]overnment has denied others the right to use."[181]

Laws purporting to restrict cities and counties from expanding their citizens' access to the Internet may be even more detrimental from the

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that DSL and cable modem providers are the beneficiaries of many exclusive government franchises); Paul L. Joskow & Roger G. Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 STAN. L. REV. 1249, 1264 (1999) (telephone companies created by breakup of AT&T long enjoyed a "near monopoly inside" regional areas); Kahn, *supra* note 2, at 184 (advocating federal action to "eliminate the thousands of local franchising regulations that restrict competitive entry and provisioning of broadband access services"); *id*. at 179-80 (noting that cable companies are "beneficiaries of exclusive territorial franchises," similar to FCC broadcast licenses); Travis, *supra* note 10, at 1709-10 (describing creation of "local telephone monopolies" by AT&T and its heirs, and "exclusive franchise rights" creating cable monopolies in many local markets, with over ninety-five percent of local areas in the United States having no effective choice between cable companies in 2004); Patricia M. Worthy, *Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of "Universal Service,"* 26 HASTINGS COMM. & ENT. L.J. 1, 10 n.27 (2003) (noting long tradition of granting exclusive franchises to telephone networks); FMEA, *supra* note 11, at 11 (DSL and cable modem providers obtain "exclusive franchises . . . to serve a particular geographic area," which prevent competition with providers like BellSouth or Comcast).

178. *See* Celia Viggo Wexler & Dawn Holian, *Senators Mull an Internet with Restrictions*, THE NATION, Feb. 8, 2006, http://www.thenation.com/doc/20060220/wexler. For use restrictions common to both cable modem and DSL providers, see *supra* note 167.

179. Writers Guild of Am., West, Inc. v. FCC, 423 F. Supp. 1064, 1131-32 (C.D. Cal. 1976), *rev'd*, 609 F.2d 355, 366 (9th Cir. 1979); *accord* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389, 396 (1969) (opining that the effect of FCC licensing is that a licensee gets to "monopolize a radio frequency to the exclusion of his fellow citizens . . . ," which monopoly may nevertheless be subject to regulation such as the "fairness doctrine"); *cf.* Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 236 (1943) (Murphy, J., dissenting) ("'What is happening to-day is that the National Broadcasting Co., which is a part of the great Radio Trust, to say the least, if not a monopoly, is . . . forcing the little stations off the board so that the people cannot hear anything except the one program.'") (quoting 68 CONG. REC. 3031 (1927)).

180. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 654 (D.C. Cir. 1971), *rev'd sub nom.* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

181. Columbia Broad. Sys., Inc. v. FCC, 629 F.2d 1, 25 n.115 (D.C. Cir. 1980) (citing *Red Lion*, 395 U.S. at 390-91).

standpoint of the public's access to digital media. These laws, which cable and DSL firms lobby for, hobble cities' efforts to reduce the cost and expand the accessibility of high-speed Internet access to their residents as a public service.[182] More than a dozen states have laws restricting cities and counties from setting up high-speed networks over cable, DSL, fiber-optic, broadband over power-lines, or Wi-Fi.[183] These public networks, when they are allowed, reinvigorate lazy monopolies and duopolies,[184] and bridge the digital divide between high-income and low-income Americans, between European-Americans and African-Americans or Latinos, and between suburban and central-city or rural residents.[185] The more broadband competitors there are, public or

182. *See* Neal Peirce, *City-Sponsored Wi-Fi's Wild Ride*, SEATTLE TIMES, Aug. 21, 2005, http://seattletimes.nwsource.com/html/opinion/2002446112_peirce21.html; Bruce Fein, *Choking Broadband Competition*, BROAD. & CABLE, Mar. 28, 2005, at 74.

183. *See* 151 CONG. REC. 85, S7203, S7298 (daily ed. June 23, 2005) (statement of Sen. Lautenberg) (declaring that fourteen states restrict municipal broadband); Travis, *Wi-Fi Everywhere*, *supra* note 10, at 1765-71 (summarizing legislation of this kind in Alabama, Florida, Iowa, Michigan, Missouri, Nebraska, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington State, and Wisconsin, and state constitutional law rules that might have this effect in California, Illinois, and New York); CALIFORNIA PUB. UTIL. COMM'N, DRAFT REPORT ON BROADBAND DEPLOYMENT IN CALIFORNIA, app. B (2004), http://www.cpuc.ca.gov/PUBLISHED/COMMENT_DECISION/43588.htm (listing thirty-two states restricting municipal broadband as of 2004).

184. *See* Kahn, *supra* note 2, at 181 n.66; Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 243, 298 (2005); Harvey L. Reiter & Stephen P. Chinn, *Municipal Entry into Telecommunications and Cable Services: Benefits and Barriers*, 44 MUNICIPAL LAW. 14, 17 n.34 (2003); Montgomery Van Wart, Dianne Rahm & Scott Sanders, *Economic Development and Public Enterprise: The Case of Rural Iowa's Telecommunication Utilities*, 14 ECON. DEV. Q. 131, 142 (2000).

185. *See In re* Missouri Mun. League, 16 F.C.C.R. 1157, 1162 (2001) (reasoning that municipal telecommunications utilities can help "bring the benefits of competition to all Americans, particularly those who live in small or rural communities"), *rev'd*, 299 F.3d 949 (8th Cir. 2002), *rev'd sub nom.* Nixon v. Missouri Mun. League, 541 U.S. 125 (2004); FCC, AVAILABILITY OF ADVANCED TELECOMMUNICATIONS CAPABILITY IN THE UNITED STATES, FOURTH REPORT TO CONGRESS 36-37, (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachment/FCC-04-208A1.pdf; NAT'L TELECOMMS. & INFO. ADMIN., FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE 5-9 (1999), *available at* http://www.ntia.doc.gov/ntiahome/fttn99/FTTN.pdf (describing the "digital divide" on demographic and geographic lines); Steve Alexander, *Wi-Fi network Will Help Fund Tech Initiative*, MINNEAPOLIS STAR TRIBUNE, June 12, 2007, http://www.startribune.com/154/story/1241548.html (describing how citywide Wi-Fi network to be debuted in Minneapolis area in late 2007 will help residents afford new technologies and make access "ubiquitous"); Cisco Systems Inc., The Ethnic Divide, http://www.cisco.com/web/learning/netacad/digital_divide/issues/DigitalEthnic.html (last visited Aug. 29, 2007); Lee Gomes, *Despite Opposition, Might the Web Need a New Government Jolt?*, WALL ST. J., Feb. 14, 2005, at B1 (noting that municipal Wi-Fi networks promise to improve service to underserved communities in Philadelphia); Helena Lindskog & Magnus Johansson, *Broadband: A Municipal Information Platform: Swedish Experience*, 31 INT'L J. OF TECH. MGMT. 47, 59, 61-62 (2005) (stating that

private, the lower prices will be and the more people will enjoy better access to information.[186]

After hearing testimony in 1995 about the benefits of entry by public utilities into telecommunications,[187] Congress amended the telecommunications laws to declare that any state law restricting the ability of "any entity" to provide a telecommunications service would be preempted.[188] In 2004, however, the Supreme Court held that Congress

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Sweden successfully used municipal broadband to bridge digital divide); Robert MacMillan, *Congress Tunes in to WiFi*, WASHINGTONPOST.COM, June 27, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/06/27/AR2005062700482.html (discussing how Canada used municipal broadband subsidies to achieve wider access); Sonina Matteo, *Philly Goes Wild for Wi-Fi, EarthLink Races to Deploy Megamunicipal Mesh Network in Philadelphia*, NETWORK WORLD, Aug. 6, 2007, http://www.networkworld.com/research/2007/080607-philadelphia-wifi.html; (describing how municipal Wi-Fi network in Philadelphia will "Web access for low-income families"); Robert W. McChesney & John Podesta, *Let There Be Wi-Fi: Broadband is the Electricity of the 21st Century—and Much of America is Being Left in the Dark*, WASH. MONTHLY, Jan./Feb. 2006, at 14, 15 (explaining that Japan achieved higher rate of broadband access by encouraging municipalities to build broadband networks); Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 12 (2002) ("[T]he high cost of Internet connection remains the major barrier to Internet access."); *see also* Travis, *Wi-Fi Everywhere*, *supra* note 10, at 1780, 1783 (opining that in the U.S., municipal broadband is bridging "suburban-rural digital divide" and has the "potential . . . to bridge racial and socioeconomic digital divides").

186. *See* Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 RUTGERS COMPUTER & TECH. L.J. 1, 29-30 (1999); AM. PUB. POWER ASS'N, COMMUNITY BROADBAND: SEPARATING FACT FROM FICTION 21 (2004), http://www.appanet.org/files/PDFs/BroadbandFactFiction.pdf; HAROLD FELD ET AL., CONNECTING THE PUBLIC: THE TRUTH ABOUT MUNICIPAL BROADBAND 12-14 (2005), http://www.mediaaccess.org/MunicipalBroadband_WhitePaper.pdf; RICHARD CADMAN & CHRIS DINEEN, BROADBAND AND i2010: THE IMPORTANCE OF DYNAMIC COMPETITION TO MARKET GROWTH 2 (2005), http://www.spcnetwork.co.uk/uploads/20050221_broadband_analysis.pdf.

187. *See The Communications Act of 1994: Hearing on S. 1822 Before the S. Comm. on Commerce, Sci., & Transp.*, 103d Cong. 354-55 (1994) (statement of William J. Ray, Manager, Glasgow Electric Plant Board, on behalf of the APPA) (arguing that Congress should remove legal "obstacles in the path to public ownership of new telecommunications facilities or the public provision of telecommunications services," because "the goals of universal service and vigorous competition can be enhanced if such public ownership and involvement is encouraged"); *The Communications Act of 1994: Hearing on S. 1822 Before the S. Comm. on Commerce, Sci., & Transp.*, 103d Cong. 379 (1994) (statement of Trent Lott, Senate Majority Leader) (opining that "municipalities" are "positioned to make a real contribution in this telecommunications area").

188. *See* Missouri Mun. League v. FCC, 299 F.3d 949, 955 (8th Cir. 2002), *rev'd*, Nixon v. Missouri Mun. League, 541 U.S. 125, 128, 141 (2004); H.R. REP. NO. 104-458, at 127 (1996) (Joint Explanatory Statement of the Committee of Conference explaining that Congress intended to encourage entry by "electric, gas, water or steam utilities," so "[e]xisting state laws or regulations . . . are not preempted . . . . However, explicit prohibitions on entry by a utility into telecommunications are preempted . . . ."); 141 CONG. REC. S7801, 7906 (daily ed. June 7, 1995) (noting that Senate Majority Leader Trent Lott stated that Congress wanted to pass "a framework where everybody can compete everywhere in everything," and remove "all barriers to and restrictions from competition . . . .").

had not been "plain" enough, under the Court's Eleventh Amendment jurisprudence, about preempting state laws banning municipal telecommunications entry.[189] This decision will suppress entry by major potential competitors in the broadband Internet market, and perpetuate the digital divide.[190] Two and a half years after the decision, the United States ranks sixteenth in broadband access per one hundred inhabitants, after Canada, several Scandinavian countries, the Netherlands, Belgium, Switzerland, South Korea, Japan, and Israel.[191]

B. A Free Speech Approach to Access to Information over the Broadband Internet

In recent decades, Congress, courts, and scholars have devoted heightened scrutiny to the issues of the concentration and consolidation of media ownership and control. Members of Congress have noted that the increasing concentration of broadcast and Internet industry ownership threatens the diversity of media expression.[192] Twenty years ago, Justice Brennan warned that broadcast station owners may seize an "'unfettered power'" to disseminate "'only their own views on public issues,'" thus distorting public debate.[193] Writing in a similar spirit, Professor Jerome A. Barron had argued that while the mass media were disingenuously invoking the First Amendment before the Supreme

189. *See Nixon*, 541 U.S. at 132-33, 138, 140.

190. *See supra* notes 10-11 and accompanying text.

191. *Missouri Municipal League* was decided in March 2004, while the most recent international broadband comparison is based on data from December 2006. *See* Organization for Economic Co-operation and Development (OECD), OECD Key ICT Indicators (Dec. 2006), https://www.oecd.org/dataoecd/24/32/38469057.xls.

192. *See* H.R. REP. NO. 109-541, at 7-8 (2006) (noting that "most Americans are subject to a broadband duopoly, many to a broadband monopoly, and some Americans (particularly in rural areas) have no access to broadband Internet" and that therefore, "[f]irms that control networks that provide access to the Internet may exercise market power to discriminate against rival services or competing technologies," which will "threaten[] the open architecture that has been a key feature of the Internet's success and utility"); S. REP. NO. 108-141, at 2-3 (2003) (noting that "media consolidation has resulted in substantial changes to the broadcast television programming market," with "five media conglomerates control[ling] 'about a 75 percent share of prime-time viewing' and . . . on pace to soon control roughly 'the same percentage of TV households in prime time as the three networks did 40 years ago.'" The "number of television station owners" was down "40 percent since 1995," the "number of commercial radio station owners" was down "34 percent since 1996," and one "station group" gained control over 1150 stations previously controlled by its competitors); 145 CONG. REC. S12147, 12154 (daily ed. Oct. 7, 1999) (statement of Sen. Wellstone) (reasoning that the continuation of an "unprecedented wave of mergers and concentration in the media and the communications industries" threatens "the flow of information in democracy and whether a few are going to control this").

193. FCC v. League of Women Voters of Cal., 468 U.S. 364, 398 (1984) (internal quotations omitted) (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969)).

Court, they were busy censoring controversial or disfavored views, engaging in misleading depictions of the plight and aspirations of minority groups, and ignoring critical political issues.[194] Professor Barron favored extending broader rights of access to information and opinion, rather than an unlimited right of corporations to "speak."[195]

High-speed Internet access is a critical precondition for individual liberty and democratic deliberation because traditional media suffer from apparently irremediable bias in their political coverage. Since the 1960s, many scholars, politicians, and journalists have argued that traditional media deliberately suppress points of view that undermine established notions of patriotism, foreign relations, religious orthodoxy, consumerism, economic policy, and personal conduct.[196] The demonization and stereotyping of minority groups and women have been and remain endemic to traditional media.[197] Other mass media may not

194. Professor Barron argued, among other things, that the public needed to be protected from biased media information and skewed debates by more legally enforceable rights of neglected "sides" of public debates to reply after the holder of a governmental broadcast monopoly (or "license") has "taken a position." *See* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1646-47, 1657, 1661, 1663-64, 1677-78 (1967); Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487, 487-90, 500-01 (1969) [hereinafter Barron, *Access*]. For a discussion of the problem of "private censorship" by the mass media when it denies members of the public effective access to government-regulated communications infrastructure, see *Red Lion*, 395 U.S. at 386-92.

195. Barron, *Access*, *supra* note 194, at 1659-60, 1664. He also advocated giving constitutional sanction to laws mandating retractions of false statements and publication of replies by criticized or falsely characterized individuals. *See id.*

196. *See, e.g.*, C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 7-19, 193-213 (2002); ROBERT W. MCCHESNEY, RICH MEDIA, POOR DEMOCRACY 15-77 (1999); DANNY SCHECHTER, THE MORE YOU WATCH, THE LESS YOU KNOW 445-62 (1997); HERBERT I. SCHILLER, CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION 1, 5-7 (1989); C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 903-04 (2002); Rachel Smolkin, *A Source of Encouragement*, AM. JOURNALISM REV., Aug./Sept. 2005, at 31, *available at* http://www.ajr.org/Article.asp?id=3909; PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, FEWER FAVOR MEDIA SCRUTINY OF POLITICAL LEADERS: PRESS "UNFAIR, INACCURATE AND PUSHY" (Mar. 21, 1997), http://people-press.org/reports/display.php3?ReportID=112.

197. *See, e.g.*, Kathleen Jones, *On Authority: Or, Why Women Are Not Entitled to Speak*, *in* FEMINISM AND FOUCAULT 119, 130-31 (Irene Diamond & Lee Quinby eds., 1988); DENNIS ROME, BLACK DEMONS: THE MEDIA'S DEPICTION OF THE AFRICAN AMERICAN MALE CRIMINAL STEREOTYPE 46 (2004); JACK G. SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE 1-2 (2001); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2332-33 (1989); Ediberto Román, *Who Exactly is Living* La Vida Loca*?: The Legal and Political Consequences of Latino-Latina Ethnic and Racial Stereotypes in Film and Other Media*, 4 J. GENDER RACE & JUST. 37, 42 (2000); S. Craig Watkins & Rana A. Emerson, *Feminist Media Criticism and Feminist Media Practices*, 571 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 151, 152-53 (Sept., 2000); Jennifer L. Pozner, *Missing Since 9-11: Women's Voices*, NEWSDAY, Dec. 13, 2001, at A43.

be slanting the presentation of political and social questions; they are avoiding ideas altogether in favor of mindless violence.[198]

The First Amendment implications of federal telecommunications and antitrust policy are currently the subject of an important emerging area of analysis and activism. Legislation proposed in Congress in 2006, but allowed to languish throughout most of 2007, would have expanded access to broadband by preempting laws against city-supported networks.[199] Perhaps even more important is proposed "net neutrality" legislation that would restrict censorship by broadband providers of lawful content, as well as discriminatory fees or other monopolistic conduct in connection with Internet applications and content.[200]

Opponents of net neutrality requirements have opined that the First Amendment rights of corporate owners of telecommunications infrastructure should trump the First Amendment rights of individual speakers and users of telecommunications media. Under this view, the foremost free speech interests on the Internet are those of broadband infrastructure owners, rather than the senders and recipients of Internet speech such as Web content, blogs, eBooks, or online videos.[201]

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198. *See, e.g.*, SCHECHTER, *supra* note 196, at 202-03, 385-88, 446; 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, 1436 (2004); Neil Hickey, *Unshackling Big Media*, COLUM. JOURNALISM REV., July/Aug. 2001, at 30, 31, *available at* http://archives.cjr.org/year/01/4/fcchickey.asp; James F. Hoge, Jr., *Foreign News: Who Gives a Damn?*, COLUM. JOURNALISM REV., Nov.-Dec. 1997, at 48, 49-51, *available at* http://archives.cjr.org/year/97/6/foreign.asp; PARENTS TELEVISION COUNCIL, TV BLOODBATH: VIOLENCE ON PRIME TIME BROADCAST TV 1 (2003), http://www.parentstv.org/PTC/publications/reports/stateindustryviolence/ReportOnViolence.pdf.

199. *See* Communications, Consumer's Choice, and Broadband Deployment Act of 2006, S 2686, 109th Cong. § 502(c) (2d Sess. 2006) (preempting state laws that "may prohibit or have the effect of prohibiting any public provider from providing, to any person or any public or private entity, advanced telecommunications capability"); Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. § 502 (2d Sess. 2006) (noting additional restrictions against public competition with private broadband providers); S. REP. NO. 109-355, tit. 5, at 213-17 (2006).

200. *See* Internet Freedom and Nondiscrimination Act of 2006, H.R. 5417, 109th Cong. § 3 (2d Sess. 2006) (prohibiting discrimination or additional charges by broadband providers in offering services or interconnecting with another provider, and interfering with consumers' ability to use the network service "to access, to use, to send, to receive, or to offer lawful content, applications or services over the Internet," or their ability to use digital devices on the network that do not materially degrade the network's other uses); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. § 4 (2d Sess. 2006) (prohibiting, among other things, discrimination or blocking of consumers' ability to send or receive lawful content, use applications over broadband including the Internet, or attach and use any device that does not materially degrade the network).

201. *See, e.g.*, Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J. LAW & TECH. 1, 47-48 (2005) ("The fact that telecommunications networks now serve as the conduit for mass communications and not just person-to-person communications greatly expands the justification for

This line of argument misconceives both the distinctive character of the Internet and the purposes for which the First Amendment was enacted. The Internet and its principal applications such as the World Wide Web grew as rapidly as they did because they were designed to be open, flexible, and uninhibited by gatekeeper control.[202] The high degree of concentration in the broadband market, the inability of many consumers to switch broadband carriers, and plans by broadband providers to discriminate among different sources of Internet content, combine to threaten "the open, decentralized platform of the Internet."[203] Such an assault on the distinctive qualities of the Internet would erode its capacity, praised by the Supreme Court, to provide "relatively unlimited, low-cost capacity for communication of all kinds."[204]

The First Amendment, moreover, is not offended by regulations designed to ensure that beneficiaries of telecommunications monopolies exercise their power to restrict mass communication in a manner consistent with the public interest.[205] The overriding purpose of the First

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allowing [broadband infrastructure owners] to exercise editorial control over the information they convey. In the process, it further weakens the case in favor of network neutrality."); Randolph J. May, *Net Neutrality Mandates: Neutering the First Amendment in the Digital Age*, 3 I/S: J. L. & POL. FOR THE INFORMATION SOC. 197, 198, 202-4 (2007) (arguing that "net neutrality" laws violate First Amendment rights of broadband companies such as AT&T and Comcast, because they are engaging in "speech" when they censor Internet content, so forcing them to transmit information or opinions with which they disagree constitutes compelled speech).

202. *See Net Neutrality: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. 7-9 (2006) (statement of Vinton G. Cerf, Vice President and Chief Internet Evangelist, Google, Inc.), *available at* http://commerce.senate.gov/pdf/cerf-020706.pdf; *Digital Future of the United States: Part I—The Future of the World Wide Web: Hearing Before the H. Comm. on Energy and Commerce, Subcommittee on Telecommunications and the Internet*, 110th Cong. 2-5 (2007) (statement of Sir Timothy Berners-Lee, 3Com Founders Chair, Computer Science and Artificial Intelligence Laboratory, Decentralized Information Group, Massachusetts Institute of Technology), *available at* http://energycommerce.house.gov/cmte_mtgs/110-ti_hrg030107.Sir-Tim-Testimony.pdf.

203. *Net Neutrality: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 109th Cong. 7-9 (2006) (testimony of Vinton G. Cerf, Vice President and Chief Internet Evangelist, Google, Inc.), *available at* http://commerce.senate.gov/pdf/cerf-020706.pdf. *See also* Applications for Consent to Assignment and/or Transfer of Control of Licenses, 21 F.C.C.R. 8203 (July 21, 2006) (Copps, Commissioner, dissenting) ("I believe that ceding gatekeeper control over the content we receive in our homes to fewer and fewer media distributors is something that should alarm us. Combining content and conduit is, after all, the classic strategy for monopoly or control by a privileged few . . . ."); Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103, 154 (2006) ("By threatening to ban, block, or extract the value from online communication, [broadband service providers] reduce the incentive to create new technologies, and they threaten to erode the remarkable ethos of unpaid online production. Even if rare, the mere possibility of [this kind of] censorship is a clear danger to First Amendment values.").

204. Reno v. ACLU, 521 U.S. 844, 870 (1997).

205. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) (federal law requiring cable television providers to carry local broadcast stations on their systems did not necessarily

Amendment is to ensure that readers, listeners, and viewers of public debates obtain access to a wide variety of facts and opinions so as to be able to discern the truth as best they can.[206] Even privileging the speaker's perspective, surely the First Amendment interests of the creators, editors, and aggregators of Web sites, blogs, and online videos—rather than the supposed "speech" interests of the owners of the wires along which content travels—should prevail in the event of a conflict.[207]

The claim that net neutrality laws violate the First Amendment is particularly unpersuasive in that all broadband providers already allow users to access a plethora of offensive content with which they surely disagree as an editorial matter, undermining any suggestion that

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violate First Amendment because law was justified without reference to the content of the local stations, and there had been no finding that practical effects of the law would be to force cable systems to drop other channels or otherwise change their programming selections); FCC v. Pacifica Found., 438 U.S. 726 (1978) (federal statute forbidding on-the-air use of indecent or obscene language did not violate First Amendment because federal government had legitimate interest in curtailing broadcasters' ability to intrude into their listeners' homes with offensive and indecent materials); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (federal regulations that forced radio and television broadcasters to, among other things, give fair coverage of public issues, did not violate the First Amendment because broadcasters had no right to monopolize government licenses with the effect of distorting public debate); *compare* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (state law guaranteeing political candidates "right of reply" to attacks in newspapers on their personal characters or official records violated First Amendment because newspapers exercised editorial control over their contents; newspapers in question were not licensed to operate by federal government or otherwise empowered to inhibit use of telecommunications media).

206. *See, e.g.*, Turner Broad. Sys. v. FCC, 520 U.S. 180, 226-27 (1997) (Breyer, J. concurring) ("First Amendment seeks to achieve" vigorous "public discussion and informed deliberation" of issues, and to ensure "that the public has access to a multiplicity of information sources."); *Red Lion*, 395 U.S. at 390 (overriding concern of First Amendment is that "the people as a whole retain their interest in free speech by [telecommunications] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment"); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'") (citation omitted). As Justice White held in *Red Lion*:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. "Speech concerning public affairs is more than self-expression; it is the essence of self-government."

395 U.S. at 390 (citations omitted).

207. *See* Herman, *supra* note 203, at 113-14 (First Amendment interests of "each content creator or end-user as her own editor of the Internet" should prevail over asserted interest in "editorial control for broadband providers"); Barbara A. Cherry, *Misusing Network Neutrality to Eliminate Common Carriage Threatens Free Speech and the Postal System*, 33 N. KY. L. REV. 483, 505 (2006) ("Telecommunications carriers, as providers of only transmission facilities, bear the obligations of common carriers but possess no First Amendment rights.").

broadband companies are like the editors of newspapers.[208] Net neutrality would inflict minimal harm on broadband providers' First Amendment interests, because they would continue to carry the vast majority of Internet content whether required to by law or not.[209]

The Supreme Court has yet to decide any First Amendment claims by citizens whose speech or access to information have been restricted by local cable or DSL broadband providers imposing "acceptable use" requirements under cover of existing or historical exclusive municipal franchises. When these cases arise, however, I believe that the Court should scrutinize such restrictions on speech very closely, and keep in mind that Madison, Jefferson, and other constitutional framers conceived of the freedom of speech as a citizen's right to receive information relating to self-government. Madison wrote that: "A popular government without popular information, or the means of acquiring it, is but a

208. Unlike cable system operators, which develop original programming and "'exercis[e] editorial discretion over which stations or programs to include in [their] repertoire,'" broadband providers typically do not develop a significant portion of the Internet content accessed by their users, and do not exercise much discretion over which e-mails or Web sites to include in the public Internet. *Turner Broad. Sys.*, 512 U.S. at 636 (quoting Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986)); *See, e.g.*, Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1096-1102, 1108-11 (2005) (noting that Internet contains Web sites that "makes it easier for people to commit" dozens of crimes); Paul Przybylski, Note, *A Common Tool for Individual Solutions: Why Countries Should Establish an International Organization to Regulate Internet Content*, 9 VAND. J. ENT. & TECH. L. 927, 952-53 (2007) (noting that content of the Internet includes "dozens of sites that espouse hatred of blacks, homosexuals, and Jews"). Indeed, federal law expressly exempts broadband providers from editorial responsibility over the Internet content they transmit from one user to another, and immunizes them from state law claims based upon such transmissions. *See* 47 U.S.C. § 230(c)(l) (2000) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); 47 U.S.C. § 230(e)(3) ("no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section"); Herman, *supra* note 203, at 113 (noting that this statute specifically provides that Internet service providers are not editors).

209. *See Turner Broad. Sys.*, 520 U.S. at 215 (must-carry regulation of cable systems did not "represent a significant First Amendment harm" because systems would have carried most affected channels "in the absence of any legal obligation to do so") (citation omitted). For example, in 2006, the President of the United States Telecom Association addressed net neutrality concerns by making a public commitment to Congress that the association's member companies "will not block, impair, or degrade content" even in the absence of net neutrality. *Net Neutrality: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 109th Cong. 1 (Feb. 7, 2006) (testimony of Walter B. McCormick, Jr., President and Chief Executive Officer, U.S. Telecom Ass'n), *available at* http://commerce.senate.gov/pdf/mccormick-020706.pdf. The President of the National Cable & Telecommunications Association similarly represented to Congress that "no one has yet identified" cases of discrimination against Internet content in the "real world" without net neutrality regulation that would suggest that "government intervention" was needed. *Net Neutrality: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 109th Cong. 4 (Feb. 7, 2006) (testimony of Kyle McSlarrow, President & CEO, National Cable & Telecommunications Ass'n), *available at* http://commerce.senate.gov/pdf/mcslarrow-020706.pdf.

Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[210] Madison thought a democratic press to be worthy of protection against the states, as well as Congress.[211] Jefferson, similarly, believed that to ward off tyranny required that the people receive "'full information of their affairs thro' the channel of the public papers, and . . . that those papers should penetrate the whole mass of the people.'"[212] Jefferson thought freedom of the press served to "fortify the habit of testing everything by reason."[213] Learning and communication were the very ends for which civilization was established, so the "right of free correspondence between citizen and citizen, on their joint interests, whether public or private," is a "natural right."[214]

As with blog trademark cases and eBook copyright cases, the common law in 1791 may also provide an instructive point of departure for analyzing assertions of a First Amendment right of access to digital media over broadband. When the First Amendment was ratified, local monopolies of the type inherited by many cable and DSL broadband providers were frequently, although not always, regarded as unlawful at common law.[215] The common law protected the freedom of the

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210. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON, *supra* note 57, at 103.

211. The second sentence of the First Amendment as introduced by Madison stated: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." 4 ANNALS OF CONGRESS 934 (1794), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_speechs14.html; *see also* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 483 (1983).

212. Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1170 n.16 (3d Cir. 1986) (quoting Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted in* 11 THE PAPERS OF THOMAS JEFFERSON 49 (J. Boyd ed., 1955)).

213. Letter from Thomas Jefferson to Judge John Tyler (June 28, 1804), *in* JEFFERSON: POLITICAL WRITINGS 271 (Joyce Appleby & Terence Ball eds., 1999), *available at* http://books.google.com/books?id=6rOu3WYEiiQC&pg=PA271&lpg=PA271&dq=%22fortify+the+habit+of+testing+everything+by+reason%22&source=web&ots=FjUBoJD0Sb&sig=DvmyW82YbukTDV6m4jBdSFNR5Y0.

214. Letter from Thomas Jefferson to Colonel James Monroe *in* 9 THE WRITINGS OF THOMAS JEFFERSON 422 (Library ed. 1903). Nature itself seemed to Jefferson to have intended ideas to spread "freely" from one person to another "over the globe, for the . . . instruction of man, and improvement of his condition." Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 8 n.2 (1966) (quoting 6 WRITINGS OF THOMAS JEFFERSON 180-81 (H.A. Washington ed., 1855)).

215. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 54 (1911) ("[B]y the common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public."); *see also* Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter House Co., 111 U.S. 746, 761 (1884) (Bradley, J., concurring) (declaring an "incontrovertible proposition of both English and American public law, that all *mere* monopolies are odious and against common right"); People *ex rel.* Peabody v. Chicago

individual to practice any lawful trade, contrary to attempts to concentrate the trade and its benefits in a few hands.[216] Its legacy should

Gas Trust Co., 22 N.E. 798, 803 (Ill. 1889) ("All grants creating monopolies are made void by the common law.") (citations omitted); *id*. at 293 ("Whatever tends to create a monopoly is unlawful, as being contrary to public policy.") (citations omitted); State v. Nebraska Distilling Co., 46 N.W. 155, 160 (Neb. 1890) ("Whatever tends to destroy competition and create a monopoly is contrary to public policy, and therefore unlawful.") (citations omitted); People v. N. River Sugar Ref. Co., 121 N.Y. 582, 625 (1890) (ordering dissolution of corporation at common law because "if corporations can combine . . . , without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations" that could overpower "individual ownership"); State *ex rel.* Attorney Gen. v. Standard Oil Co., 30 N.E. 279, 290 (Ohio 1892) ("Monopolies have always been regarded as contrary to the spirit and policy of the common law.") (citing Darcy v. Allein, [1602] 77 Eng. Rep. 1260 (K.B.)); E. India Co. v. Sandys (The Great Case of Monopolies), 10 St. Tr. 371, 538 (1683) ("[T]hough monopolies are forbidden, yet that cannot be understood to be so universally true, (as no general law can ever be) that it should in no respect, and upon no occasion or emergency whatsoever, admit of any exception or limitation."); *In re* Clothworkers of Ipswich, [1615] 78 Eng. Rep. 147, 148 (K.B.) ("[I]t was agreed by the Court, that the King might make corporations, . . . but thereby they cannot make a monopoly for that is to take away free-trade, which is the birthright of every subject."); Darcy v. Allein, 77 Eng. Rep. at 1265-66 (explaining that the common law invalidated attempt to convey national monopoly over manufacture or importation of playing cards); 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEASE OF THE CROWN, AND CRIMINAL CAUSES 181 (6th ed. 1985) (1641), *available at* http://dewey.library.upenn.edu/sceti/printedbooksNew/index.cfm?TextID=coke_insts3&PagePosition=191 ("[A]ll grants of monopolies are against the ancient and fundamental [sic] laws of this kingdome [sic] . . . ."); James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments*, *reprinted in* JAMES MADISON: WRITINGS, *supra* note 58, at 756 (declaring that the U.S. Constitution restricted official monopolies to "two cases, the authors of Books, and of useful inventions"); Edward G. Buckland, *Combinations and Trusts*, 16 NEW ENGLANDER AND YALE REV. 343, 352 (1890) ("In the infancy of this nation, the disposition was to regard with suspicion any approach to facilitating corporate organization . . . . The old memories of English monopolies still lingered . . . .").

216. *See* Beall v. Beck, 2 F. Cas. 1111, 1114 (C.C.D.C. 1829) (No. 1,161) ("Wherever the privilege of [a] landlord would destroy a lawful trade or occupation which is useful to the public, it is restrained by law."); Corfield v. Coryell, 6 F. Cas. 546, 548, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (holding that a law restricting any person not an "actual inhabitant and resident" of New Jersey from practicing fisherman's trade violated Privileges and Immunities Clause of the Constitution because it restricted ability of citizens of the United States "to acquire . . . property," "pursue and obtain happiness," and engage in a lawful "trade, agriculture, [or] professional pursuit[]"); Mayor of Memphis v. Winfield, 27 Tenn. 707, 709-10 (1848) (striking down discriminatory curfew imposed on African-Americans as contrary to their "liberty" because "in cities, very often, the most profitable employment is to be found in the night"); Darcy v. Allein, 77 Eng. Rep. at 1262-63 (declaring monopolies to be contrary to the "benefit and liberty of the subject"); MAGNA CARTA sec. 41, 1215, *reprinted in* JAMES C. HOLT, MAGNA CARTA 327 (1965) ("All merchants are to be safe and secure . . . to buy and sell free from all maletotes [impositions] by the ancient and rightful customs."); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 415 (1765) ("At the common law, every man might use what trade he pleased."); 3 COKE, INSTITUTES, *supra* note 215, at 181 ("[A] Monopolist that taketh away a mans trade, taketh away his life . . . ."); James Madison, *Property*, *reprinted in* JAMES MADISON, WRITINGS, *supra* note 58, at 515-16 ("That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to a part of its citizens that free use of their faculties, and free choice of their occupations . . . ."); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370, 373 (1886)

force advocates of preserving unregulated broadband monopolies and oligopolies to bear the heavy burden of establishing how such monopoly power over the means of public debate can possibly be reconciled with the common law tradition of individual liberty.

V. CONCLUSION

In 1791, when the First Amendment was ratified, the press had wide latitude under the common law to print material that might today be considered to be outside the scope of the freedom of speech. From the standpoint of the areas of law addressed in this Article, citizens had a comparatively more expansive right to engage in political and cultural communication, despite the social and technological limitations of the time. First, trademark law remained strictly limited to core cases of "passing off" between commercial competitors actively engaged in advertising and promotion.[217] Second, a generous right to imitate and copy from copyrighted works in preparing new works was recognized under the common law of copyright, as a way of assuring authors and the public of the ability to read and reuse other authors' books without having to grovel for permission, quaver with fear of being enjoined for a quotation, or pay a license fee for the privilege of speaking.[218] Finally, the common law guaranteed each citizen the liberty of practicing a legitimate trade or enterprise free from official monopolies.[219]

By hearkening back to the common law and articulating originalist principles of constitutional, intellectual property, and antitrust law, Internet freedom can be founded upon a surer footing than the ad hoc balancing that characterizes contemporary cyberlaw scholarship and judicial decisions. Specifically, demanding freedom of speech at least equal to that exercised in Britain and North America in 1791 can preserve Internet users' access to voices and digital technologies threatened by overbroad assertions of copyright, trademark, or telecommunications licensing interests. Moreover, returning antitrust law to its original foundations in the liberty of the subject, suspicion of

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(law conferring upon city government the "arbitrary power" to withhold the right to carry on a trade violated Equal Protection Clause: "[T]he very idea that one man may be compelled to hold . . . any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."); Timothy Sandefur, *The Common Law Right to Earn a Living*, 7 INDEP. REV. 69, 70 (2002) ("In 1377, the court struck down a royal monopoly on the sale of wine in London that had been granted to a man named John Peachie. The court held this grant to violate the right of free trade.").

217. *See supra* Part II.B.

218. *See supra* Part III.B.

219. *See supra* note 207 and accompanying text.

concentrated public or private power, and insistence on vigorous price and quality competition promises to roll back recent Supreme Court decisions celebrating monopoly power in a variety of contexts critical to digital media, most notably telecommunications and Internet infrastructure. A First Amendment that accounts for the freedom guaranteed by the common law would mandate the breakup of private tyrannies over information, and the liberation of audiences from monopoly control over the instrumentalities of free speech.