MEDIA POLICY AND FREE SPEECH: THE FIRST AMENDMENT AT WAR WITH ITSELF

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I. INTRODUCTION

A symposium on "reclaiming" the First Amendment for media policy begs the question from what and whom the First Amendment must be reclaimed. Who has it and what are they doing with it? Since we also gather to commemorate the fortieth anniversary of Jerome Barron's watershed article, *Access to the Press*,[1] I consider these questions as they relate to his aspirations for a more pluralistic system of communication.[2]

Media policy, as I define it, consists of regulatory interventions specifically designed to promote communicative opportunities. Communications and copyright law are the federal government's two principal tools in this project.[3] Such an expansive definition of media policy is not uniformly accepted today and certainly would not have been in 1967 when *Access to the Press* was published. Then, media policy was virtually coextensive with broadcast regulation. The comprehensive system of subsidies at the federal level for noncommercial media had only just begun with the passage of the Public Broadcasting Act that same year.[4] The regulation of mere

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1. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

2. *Id.* at 1678.

3. There are many other governmental interventions, both statutory and judicial. Postal service subsidies and relief from defamation liability come to mind. *See* C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57, 74 n.55, 96, 122; ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 75-91 (1983).

4. *See* Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 368-69 (codified as amended at 47 U.S.C. § 396(a)).

communications carriers, like telephones, was thought to have little to do with speech. And the implications of copyright law for media policy were still obscure.[5]

Digital networks have strengthened and revealed the nexus between copyright and communications law, and the impact of both on speech.[6] Information is produced with the help of these networks, distributed through them, and then reused and distributed anew. Copyright and communications law together regulate this lifecycle of information. The campaign for communicative pluralism that Jerome Barron launched necessarily engages both disciplines and would benefit from a coherent constitutional approach to media policy that transcends the disciplinary divide. We are far from this goal. Communications and copyright pluralists have deployed First Amendment arguments in ways that are inconsistent and ultimately at cross purposes to the "reclamation" project. Within each discipline, the arguments are not succeeding, and they undermine each other across disciplines.

Communications pluralists have supported regulation that requires propertied interests—let us call them communications proprietors—to accommodate independent voices.[7] This regulation typically comes in two forms: access mandates and ownership limits. Access mandates, such as must-carry obligations, force network operators to transmit the content of unaffiliated providers. Ownership regulations cap the share of communicative resources a single network operator can own. Communications proprietors resist access and ownership regulation and, if unsuccessful in Congress or at the Federal Communications Commission, they often go to court asserting their First Amendment rights to be free from such government controls.

Communications pluralists play defense when it comes to First Amendment rights, arguing that the First Amendment is no bar to access and ownership regulation.[8] When they do make an affirmative First

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5. Interestingly, 1967 was the year that Benjamin Kaplan published his collection of lectures on copyright laying out the "low-protectionist bias" which inspires so many copyright scholars today in its promotion of "easy public access to, and use and improvement of products of the mind." BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 125 (1967).

6. *See generally* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 383-84 (2006) (considering telecommunications, media, and intellectual property struggles as skirmishes in "the battle over the institutional ecology of the digital environment").

7. *See* Barron, *supra* note 1, at 1668, 1675.

8. Some pluralist scholars have suggested that the First Amendment may in some instances require government intervention in speech markets. *See, e.g.*, Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783 (1987) ("state regulation of speech is consistent with, and may even be required by, the first amendment [sic]"). *See also* Yochai Benkler, *Free As the Air to Common Use:*

Amendment case for regulation, it is with the rhetoric not of rights, but of "interests" or "values."[9] Pluralists typically emphasize the instrumental role of the First Amendment in advancing collective interests in the free exchange of ideas.[10] Owen Fiss and Jerome Barron are the leading exponents of this instrumental, values-oriented conception of the First Amendment. For Fiss, the purpose of the individual right is to serve "the larger political purposes" of establishing a "rich public debate" and enhancing "the quality of public discourse."[11] Barron too emphasizes listener interests in criticizing a free speech jurisprudence that unduly romanticizes press rights at the expense of other expressive values.[12] Barron has had a significant influence on "collectivist" free speech theories,[13] including Greg Magarian's "public rights" theory of free speech[14] and Justice Stephen Breyer's "active

First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. L. REV. 354, 384 (1999) (arguing that the Supreme Court in at least one case (Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) "came close[] to identifying not only a constitutional interest in diversity, but an actual constitutional constraint on regulation that unnecessarily causes concentration").

9. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 79-89 (1960); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 121-65 (1993); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 562-79 (1991); Fiss, *supra* note 8, at 785-89.

10. Not all pluralists embrace instrumentalism. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194-224 (1989); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 391-94.

11. Fiss, *supra* note 8, at 785-86.

12. Though styled as a "right of access" to the press, Barron did not in *Access to the Press* advocate an individual right of speakers to reply, as exists in many European jurisdictions and existed in the FCC's erstwhile personal attack rule. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 378 (1969) ("When a personal attack has been made on a figure involved in a public issue . . . the individual attacked himself [must] be offered an opportunity to respond."). Rather, the proposal was much closer to the collective interest the now-defunct fairness doctrine sought to advance: a requirement that "each side of [public] issues must be given fair coverage." *Id.* at 369.

13. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993). *See also* Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1408-12 (2005) (characterizing these collectivist arguments as "enhancement" theories of the First Amendment).

14. *See* Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1972-91 (2003) (building on Meiklejohn's political theory to describe a "public rights" approach to the First Amendment which would allow greater regulation); Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 110-14 (2004) (arguing that courts should invoke the First Amendment to enjoin private action that undermines public debate on matters of national policy).

liberty" theory, both of which tolerate speech regulation in the interest of enhancing public discourse.[15]

Copyright pluralists share with communications pluralists the politics of the First Amendment. They too fear that a concentration of property rights in communicative resources will unduly constrict the production and circulation of speech.[16] They too urge rights of access to these resources and limits on ownership in furtherance of a vibrant and heterogeneous system of communications.[17] The insistence on a robust fair use doctrine, for example, is a demand for access rights to copyrighted works.[18] Pluralists' recent Supreme Court challenge to the extension of copyright terms in *Eldred v. Ashcroft* sought limits on the ownership rights of a single speaker.[19]

It is in the domain of First Amendment law, not politics, that pluralist strategies diverge. Where the communications pluralist parries First Amendment rights to defend regulation, the copyright pluralist wields First Amendment rights to attack regulation. Copyright pluralists argue that copyright is itself a regulation of speech that should be subject

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15. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 39 (2005) (stressing "the importance of reading the First Amendment not in isolation but as seeking to maintain a system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions"). *See also* SUNSTEIN, *supra* note 9, at 93-120; Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 796-98 (1981).

16. *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE 17-20 (2005); JESSICA LITMAN, DIGITAL COPYRIGHT 171-91 (2001); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 47-50 (1996); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537 (2004); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 899-904, 951 (2002); Benkler, *supra* note 8, at 357-60; Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 217 (1996).

17. *See, e.g.*, Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1880-81 (2000); Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 187 (2003). Ed Baker's position is uniquely informed by his understanding of both the speech and the press clauses of the First Amendment. Baker, *supra* note 16, at 951 (arguing that "copyright restrictions on *commercial* copying are constitutionally acceptable forms of media policy" but that "[c]opyright legislation that restricts an individual's expressive choices and copyright rules that limit the media's capacity to perform the democratic roles of a free press should be found unconstitutional").

18. Fair use is a defense to a claim of copyright infringement based on the character, amount, and effect of the secondary use. *See generally* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560-69 (1985); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1135-36 (1990).

19. 537 U.S. 186, 193 (2003).

to skeptical judicial review.[20] For them, reclaiming the First Amendment means successfully asserting free speech claims, not wresting such claims from proprietors. They argue not in terms of collective interests and instrumental value, but of individual speech rights and negative liberties: the right of the downstream user of copyrighted material to speak without governmental restraint.[21]

Communications proprietors naturally mirror these divergent First Amendment approaches. They complain that communications regulation trenches on their speech rights, while endorsing strong copyright controls that they suggest constitute mere economic regulation with only incidental effects on speech.[22] As Jack Balkin has observed, "at the same time that media corporations have resisted free speech objections to the expansion of intellectual property rights, they have avidly pushed for constitutional limits on telecommunications regulation on the ground that these regulations violate their own First Amendment rights."[23] This same tension exists within the community of pluralist advocates.

To strengthen and harmonize pluralist constitutional strategies, it is not necessary that one side make an about face in support of judicial deference for media regulation or that the other come to embrace judicial skepticism. Rather, what is needed is a retreat from the traditional First Amendment regulatory categories and the associated "scrutiny" analyses that have shaped the positions of pluralists in both disciplines.

Parts II and III below show how the stark and consequential distinction between highly suspect speech regulation and almost certainly permissible economic regulation has played out in communications and copyright regulation review. A doctrine that leans so heavily on this distinction is badly suited to media policy review.[24]

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20. *See* Alfred C. Yen, Eldred, *The First Amendment, and Aggressive Copyright Claims*, 40 HOUS. L. REV. 673, 675-76, 688, 689 n.44 (2003) (copyright laws should be subject at least to intermediate scrutiny); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 54-59 (2001) (copyright is a content-neutral restriction that should be subject to intermediate scrutiny); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 186 (1998) (copyright is a content-based restriction which should be subject to strict scrutiny).

21. This argument flows from the insight that injunctive relief for copyright infringements, which is a standard remedy, functions as a prior restraint of speech. *See* Lemley & Volokh, *supra* note 20, at 159.

22. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 18, 20 (2004).

23. *Id.* at 18.

24. This First Amendment doctrine took shape in the years after *Access to the Press* was published. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 97-98, 102 (1972). *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 212-17 (2d ed. 2003).

Designed to protect individuals against a censorious government, the doctrine shortchanges the full array of speech values when it polices government efforts to support speech.

Part IV forecasts the growing conceptual and strategic difficulties pluralists will face in trying to exploit binary First Amendment categories. If copyright pluralists' constitutional arguments carry the day, regulatory interventions many of them support, such as a "net neutrality" mandate that broadband access providers transmit Internet content without discrimination, might well be found to abridge providers' speech rights.[25] The risk of collision between communications and copyright pluralists grows with changes in their regulatory agendas. Copyright pluralists have begun to pursue legislative rights of access in the form of compulsory copyright licenses. At the same time, communications policy pluralists have turned against regulation in their pursuit of unlicensed wireless access to spectrum[26] and municipal Wi-Fi projects.[27]

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25. This argument is being made already. In opposing the imposition of net neutrality requirements on broadband wireless spectrum, Verizon Wireless has argued to the FCC that "wireless broadband service providers engage in protected speech (create content); act as a conduit for speech (distribute the content of others); and exercise editorial discretion (choose to feature certain content)." Given this editorial status, the company argues, the "open access" provisions it opposes would impermissibly "place part of a platform for protected speech under government control – much like a requirement that movie theatres open their screens to any content, rather than select the movies to be presented on their property." Letter from John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC (July 24, 2007), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519560209 [hereinafter Verizon Wireless Letter]; *see also* Randolph J. May, *Net Neutrality and Free Speech*, BROADCASTING & CABLE, Sept. 18, 2006, at 34 (comparing net-neutrality requirements to a right-of-reply mandate for newspapers and concluding that "[n]et-neutrality mandates almost certainly would violate the First Amendment rights of the broadband Internet service providers"). For an excellent discussion of the free speech tensions in the net-neutrality debate, see Moran Yemini, *Mandated Internet Neutrality and The First Amendment: Lessons from Turner, and a New Approach*, VA. J.L. & TECH. (forthcoming 2008), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID984271_code806867.pdf?abstractid=984271&mirid=1.

26. *See, e.g.*, Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEX. L. REV. 863, 864-67 (2004) (arguing for a largely unregulated "supercommons" in the electromagnetic spectrum).

27. *See, e.g.*, BENKLER, *supra* note 6, at 405-08 (disparaging state legislation adopted to prevent municipalities from funding public WiFi networks). In order to reverse a court ruling that such laws are permitted under federal law, Nixon v. Mo. Mun. League, 541 U.S. 125, 140-41 (2004), pluralists have tried to secure federal legislation that would preempt state prohibitions against municipal broadband networks. *See, e.g.*, Community Broadband Act S. 2686, 109th Cong. § 502 (2006); Advanced Telecommunications and Opportunities Reform Act, H.R. 5252, 109th Cong. (2006).

Part v. concludes that media pluralism would benefit from a method of First Amendment review that supports a finer calibration of speech rights and interests for content-neutral efforts to reallocate speech entitlements. Justice Breyer's First Amendment jurisprudence has been moving in this direction, steadily if not without stumbles. His approach, if properly disciplined, could yield a rule of reason for media policy that would probe carefully, without undue skepticism, whether speech reallocations appropriately balance expected gains and losses.

II. COMMUNICATIONS POLICY AND FREE SPEECH

The constitutional terrain of communications policy is marked by a conflict between First Amendment rights and values.[28] Regulations that limit ownership of cable systems and channels,[29] limit ownership of broadcast stations,[30] mandate that satellite systems provide access for noncommercial programming,[31] and mandate that cable systems provide access for local broadcast programming[32] all reallocate speech opportunities from communications proprietors. In all cases, the government is intervening in media markets by redistributing power over the means and content of communication to further First Amendment speech values.[33] In all cases, the regulations clip the rights of proprietors to control private means of communications.

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28. *See* R. Randall Rainey, S.J., *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 319-20 (1993) ("[T]wo aspects of liberty—individualist and communitarian—are in constant dialectical tension within the First Amendment tradition.").

29. *See* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1130-36 (D.C. Cir. 2001) (invalidating cable ownership caps and channel occupancy provisions).

30. *See* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1053 (D.C. Cir. 2002) (vacating rules prohibiting broadcast station and cable system ownership in same market and remanding national broadcast ownership cap); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 162-65 (D.C. Cir. 2002) (invalidating limits on ownership of multiple television broadcast stations within a market).

31. *See* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 973-77 (D.C. Cir. 1996) (upholding rules requiring satellite operators to provide access to noncommercial educational video programming providers).

32. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 668 (1994) (remanding the case for further consideration of the issue); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 225 (1997) (affirming the district court's judgment that the provisions further important governmental interests).

33. *See, e.g.*, Benkler, *supra* note 8, at 365 (arguing that many of the Supreme Court's media policy cases "have adopted, in large part, the view that a concentrated information environment menaces First Amendment values"); Balkin, *supra* note 22, at 52 (urging a "shift [in] concern from free speech *rights* narrowly considered to free speech *values*"); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 34 (1986) (Rehnquist, J., dissenting) (noting that the requirement that

In the contest between rights and values, communications pluralists will generally draw the short stick because First Amendment doctrine favors rights over values, negative liberties over positive ones.[34] It accomplishes this through the use of binary distinctions. There are editors and mere conduits for speech, speech regulation and mere economic regulation. If a communications proprietor is an editor and is constrained by a speech regulation, courts will privilege her rights to be free from such constraint over the values served by the regulation by reviewing skeptically any regulation that limits her rights in more than an incidental way.[35] The degree of skepticism will vary depending on whether the speech regulation is content-based or content-neutral.[36] Content-based regulations will be subject to strict scrutiny and presumptive invalidity,[37] while content-neutral regulations will be

a utility include opposing views in its billing statements "constitutes an effort to facilitate and enlarge public discussion; it therefore furthers rather than abridges First Amendment values").

34. *See* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1806-07 (1999) ("[I]t is plainly true that a negative conception of the First Amendment generally, and freedom of speech in particular, have held sway, both in the literature and in the case law, over the past several decades.").

35. There are exceptions to this elevation of rights over values in doctrinal ghettos, like commercial speech and broadcast regulation, where the Supreme Court has privileged the value of a robust public informational environment over the right of individuals to speak. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563-64 (1980) (applying a deferential form of intermediate level scrutiny to commercial speech); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969) (relying on the scarcity rationale to defer to Congress even on content-based broadcast regulation); Nat'l Broad. Co. v. United States, 319 U.S. 190, 218-27 (1943) (applying a deferential form of review, possibly as low as rational basis scrutiny, to content-neutral broadcast regulations because of spectrum scarcity). The campaign speech cases provide another example, although here, the rights-values conflict is obscured by interests in electoral integrity. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93, 136 (2003) (Interests served by election contribution limits, including preventing corruption and its appearance, "directly implicate 'the integrity of our electoral process'") (citation omitted)).

36. Content-based regulations are subject to strict scrutiny and the government will prevail only if its interest is compelling and the regulations are the least restrictive alternative. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). *See generally* SULLIVAN & GUNTHER, *supra* note 24, at 212-17. Content-neutral regulations are subjected to an intermediate level of scrutiny, and are permissible if they are narrowly tailored to further an important or substantial governmental interest. *Turner I*, 512 U.S. at 642; United States v. O'Brien, 391 U.S. 367, 376 (1968).

37. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47-48 (1987) ("[T]he Court has invalidated almost every content-based restriction that it has considered in the past thirty years."). *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid." (citation omitted)). This standard applies to communications regulations that are clearly content-based. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 814 (2000) (applying strict scrutiny to provision limiting the transmission of sexually explicit content on cable); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (striking down a right-of-access law which was triggered only by candidates whose character was assailed by a newspaper).

subject to less exacting review under the intermediate scrutiny standard.[38]

The true distance between intermediate and strict scrutiny varies with context. For incidental speech regulations, like noise restrictions, intermediate scrutiny is quite deferential and puts the regulator to little trouble in defending its rules against constitutional attack.[39] But judicial scrutiny is considerably more rigorous, and therefore more protective of speech rights, when it comes to communications regulation that specifically targets speech. Indeed, in the leading case, *Turner Broadcasting System, Inc. v. FCC*,[40] the Court deferred so little to legislative predictive judgments underlying content-neutral communications regulation that the level of scrutiny is best described as "intermediate plus"—a standard of review that decidedly privileges speech rights over values.[41]

The *Turner* litigation resulted in two opinions. In *Turner I*, the Court narrowly held a statutory requirement that cable operators carry local broadcast signals to be a content-neutral regulation of cable operators' speech.[42] It went on to graft onto the fairly deferential intermediate scrutiny test a requirement that the government show with "substantial evidence" that the requirement was narrowly tailored to advance an important governmental interest.[43] Accordingly, the Court remanded the case for further consideration despite the fact that Congress had already amassed an unusually large amount of evidence.[44]

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38. *See O'Brien*, 391 U.S. at 377 (stating that a content neutral regulation will be upheld if the government can show that the regulation furthers an important governmental interest unrelated to the suppression of speech and the restriction of speech is no more burdensome than necessary).

39. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-90 (1983) (discussing incidental speech regulations including noise restrictions and licensing requirements for demonstrations). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 784, 803 (1989) (upholding regulation requiring use of city-provided sound systems for public park concerts); Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 791, 817 (1984) (upholding ban on posting messages on utility poles); *O'Brien*, 391 U.S. at 385-86 (upholding conviction for burning draft card at anti-war rally).

40. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

41. This point has been made using other formulations. *See, e.g.*, Michael J. Burstein, Note, *Towards a New Standard for First Amendment Review of Structural Media Regulation*, 79 N.Y.U. L. REV. 1030, 1038-41 (2004); Comment, *Constitutional Substantial-Evidence Review? Lessons from the Supreme Court's* Turner Broadcasting *Decisions*, 97 COLUM. L. REV. 1162, 1165-70, 1165 n.23 (1997); Note, *Deference to Legislative Fact Determinations in First Amendment Cases After* Turner Broadcasting, 111 HARV. L. REV. 2312, 2312-15 (1998).

42. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 643-49 (1994).

43. *Id.* at 664, 666 (requiring the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way").

44. *Id.* at 646, 668.

It had held more than a dozen hearings, accumulated a legislative record of more than 30,000 pages, and made detailed findings based on a decade's experience with intermittent must-carry rules.[45] Three years of litigation later, in *Turner II*, the Court again applied the intermediate-plus standard to uphold the regulations in a 5-4 vote.[46]

The most significant lower court decision to apply *Turner* showed that intermediate-plus scrutiny would indeed be highly skeptical.[47] More recently, regulators have hesitated to adopt content-neutral communications regulation because of what they perceive to be a constitutional requirement that they substantiate predictive judgments about speech markets with ironclad empirical support.[48] In practice, the intermediate-plus standard erects a constitutional presumption against access and ownership rules, relegating the affirmative, values-based argument for regulation to rebuttal.

A. Communications Regulation as Editorial Control

Given the burden that intermediate-plus scrutiny imposes on the government, communications proprietors asserting First Amendment claims against regulation will fare well so long as they can qualify what they do (e.g., running a communications network) as a First Amendment activity that is burdened by a speech regulation.[49] And so they have sought recognition that programming a channel, or providing broadband connectivity, is engaging in protected speech. They have likened these activities to those of the newspaper editor whose "choice of material [to publish], and . . . decisions made as to limitations on the size and content

45. Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. TELECOMM. & HIGH TECH. L. 217, 258 (2002).

46. *Turner II*, 520 U.S. at 211.

47. Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (applying *Turner I*'s substantial evidence test to FCC rules limiting cable concentration).

48. *See, e.g.*, Carriage of Digital Television Broadcast Signals, 20 F.C.C.R. 4,516, 4,523-24 (Feb. 23, 2005) (finding insufficient evidence to support requirement that cable carry multiple programs transmitted within broadcast signal in light of the First Amendment concerns).

49. As Frederick Schauer has observed, it is in defining the boundaries of First Amendment coverage that the most important decisions are made. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981) (discussing the exclusion from First Amendment protection of many kinds of regulated speech through contracts, property, fraud, perjury, antitrust and securities law). *See also* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 880-86 (1991) (it is better to think of "exceptions" to free speech protection as limitations on the scope of the First Amendment); Schauer & Pildes, *supra* note 34, at 1822 ("In reality, the First Amendment itself might better be seen as an exception to the prevailing principle that speech may be regulated in the normal course of governmental business.").

of [what is published] . . . constitute the exercise of editorial control and judgment."[50]

Correspondingly, proprietors have sought to avoid being classified as common carriers. Common carrier regulation has historically granted public access rights to private networks and regulated the ownership of network operators without any First Amendment review.[51] Courts simply did not treat rules limiting what telephone companies could own, or requiring them to open their networks to all comers, as speech regulations.[52] To the extent that proprietors can win classification as the press, and not common carriers, they will have the high ground in First Amendment disputes.[53]

Every sort of network proprietor to try this line of argument has succeeded. For broadcasters this was easy. Almost all entities that hold broadcast licenses also produce programming and usually produce core First Amendment speech relating to politics and policy. It was thus to be expected that, notwithstanding its anomalous tolerance for broadcast regulation, the Court would accord due respect for broadcasters' "journalistic discretion."[54] Indeed, it is only because of broadcasters' editorial function that the Court felt it necessary to adopt a sui generis approach to uphold broadcast regulation. By characterizing the broadcast airwaves as a uniquely scarce resource, the Court could overcome what would ordinarily be substantial First Amendment protection.[55] The

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50. Miami Herald Publ'g Co., v. Tornillo, 418 U.S. 241, 258 (1974).

51. *See* POOL, *supra* note 3, at 102-03. *But see* Baker, *supra* note 3, at 94-96 (observing that before they were regulated as common carriers, telephone companies could have asserted editorial control over their systems as the publishers of the communications they carried).

52. A lower court cast some doubt on the continued viability of a distinction between common carriers and editors when it held that a law restricting telephone company entry into video businesses violated their First Amendment rights. Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 185 (4th Cir. 1994), *vacated and remanded*, 516 U.S. 415 (1996). *See also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 825 (1996) (Thomas, J., concurring in part and dissenting in part) ("Whether viewed as the creation of a common carrier scheme or simply as a regulatory restriction on cable operators' editorial discretion, the net effect is the same: operators' speech rights are restricted to make room for access programmers.").

53. The Communications Act expressly excludes broadcasting and cable from common carrier regulation. 47 U.S.C. § 153(10) (2000). *See also* Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 105 (1973) ("Congress . . . firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.").

54. *See Columbia Broad. Sys.*, 412 U.S. at 130 (rejecting interpretation of the law that would have required broadcasters to accept paid editorial advertisements). *See also* FCC v. League of Women Voters, 468 U.S. 364, 399-401 (1984) (stating that government cannot prevent public television stations from editorializing as a condition of receiving federal funds).

55. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 226 (1943) (reasoning that the "unique characteristic" of radio, which is that it is "inherently . . . not available to all," justifies regulation); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969).

spectrum scarcity rationale worked to dilute broadcasters' editorial function by converting them into quasi public trustees.

Cable operators, in their early days, were not as clearly editors. When the Supreme Court first came to consider their constitutional status, cable operators engaged in much less program production than did broadcasters. Because they had monopolies in their communities, operators did not compete on the basis of their content choices, nor did they brand their services with a message. For the most part, they retransmitted broadcast programming.[56] As cable operators began to add national programming channels, their claims to First Amendment protections grew more substantial. In 1984 the Court found that "[c]able operators . . . share with broadcasters a significant amount of editorial discretion" in the selection of programming.[57] This decision that cable operators were editors was reaffirmed in later decisions[58] and subsequently extended by lower courts to satellite,[59] and to telephone companies seeking to provide video services.[60] Because the spectrum scarcity rationale does not apply to wired services, the conclusion that cable and telephone operators engage in protected speech meant that they would enjoy undiluted First Amendment protection.

Proprietors' success in achieving editorial status is unabating. The classification of network operators as editors seems to be a one way ratchet, moving towards a more generous understanding of the editorial function and expanded First Amendment protections. If traditional common carriers were to be deemed speakers when they acted like cable

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56. *See* STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 450 (2d ed. 2006).

57. FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979). *See also* Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986) (establishing that cable exercises editorial discretion in its production of "original programming" and in its selection of "stations or programs").

58. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 806, 808, 815 (2000) (holding that the Cable Act requirement that cable prevent signal bleed from imperfectly scrambled adult cable channels failed strict scrutiny); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 767-68 (1996) (plurality opinion) (applying strict scrutiny to overturn requirements that cable segregate and block sexually oriented programming on leased access channels).

59. Satellite Broad. & Commc'ns Ass'n v. FCC, 275 F.3d 337, 352-53 (4th Cir. 2001).

60. *See* Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 202-03 (4th Cir. 1994) (holding that the cross-ownership ban that prohibited incumbent telephone companies from providing video was unconstitutionally overbroad under the intermediate scrutiny test). The Telecommunications Act of 1996 repealed the ban on telephone company provision of video. Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56, 124 (repealing 47 U.S.C. § 533(b)). For a discussion of common carriers' First Amendment arguments, see Susan Dente Ross, *First Amendment Trump?: The Uncertain Constitutionalization of Structural Regulation Separating Telephone and Video*, 50 FED. COMM. L.J. 281 (1998).

operators, one might have thought that cable operators would be considered common carriers when they acted like telephone companies, merely transmitting voice and Internet communications. The Supreme Court has not yet spoken on this issue, but a lower court has held that even under these conditions, the cable broadband provider is an editor entitled to full First Amendment rights.[61] If in fact this trend holds up, the "editor" classification confers on communications proprietors a constitutional bonanza which, once given, will not be taken away.

B. Communications Regulation as Economic Control

The First Amendment system of binary classifications has naturally shaped the arguments of communications pluralists in defending ownership and access regulation. To avoid intermediate-plus scrutiny of communications regulations, they have challenged both the characterization of communications proprietors as editors and content-neutral regulation as speech regulation. What proprietors call editorial discretion, pluralists call network management, and what proprietors call speech regulation, pluralists say is mere economic regulation.

Professor Barron contributed to this process of "defining out" of stringent First Amendment protection certain communications activities and regulation. He pioneered the use of a "pragmatic First Amendment instrumentalism"[62] by downplaying the speech rights of large media enterprises.[63] Barron was one of the first media law scholars to ground a theory of media regulation on a sophisticated understanding of market structure, showing why mass media markets tend towards concentration and what consolidation does to the editorial vibrancy of the medium.[64] Because commercial media operate differently from the lonely pamphleteer, and to very different effect, regulation of one should not be confused with regulation of the other.[65] In identifying the economic

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61. Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000) ("'The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'") (quoting Lovell v. Griffin, 303 U.S. 444, 452 (1938)). Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 976, 1002-03 (2005) affirmed, as a matter of administrative law, the FCC's decision not to treat broadband as a common carrier, but neither the initial administrative, nor the Supreme Court, decision meant that broadband providers might not be treated as speakers for First Amendment purposes down the road.

62. Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817, 829 (1998) (characterizing with approval Justice Breyer's concurrence in *Turner II*).

63. *See* Barron, *supra* note 1, at 1642-43.

64. *See id.* at 1666.

65. *See id*. at 1651-53.

dynamics of the institutional press, Barron recommended less sympathy for speaker rights, unduly romanticized, and more for speech-promoting regulation, unfairly demonized.

The distinctions Barron drew between the institutional media and other speakers made it possible for him and others to characterize ownership and access regulation as mere structural or economic regulation. Such an approach is clearly helpful for the pluralist seeking to defend communications regulation against constitutional attack. If access and ownership regulations are seen as trenching only on economic interests, rather than on speech, then the use of constitutional rights to defeat such regulations evokes the discredited judicial activism of the *Lochner*-era Court.

The *Lochner*[66] Court invalidated a state law limiting the number of hours bakers could work as an unconstitutional interference with freedom of contract without due process of law.[67] If communications regulation functions as economic regulation, then the use of speech rights to overturn communications regulation looks much like the use of contract freedoms to overturn labor laws. Scholars on all sides of the debate, including those who generally support ownership and access regulations[68] and those who do not[69] have observed that communications proprietors have "Lochnerized" the First Amendment.[70]

We would not be here today to discuss "reclaiming" the First Amendment for media policy if courts by and large had agreed that access and ownership regulations constitute mere economic controls.

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66. Lochner v. New York, 198 U.S. 45 (1905).

67. *Id.* at 64.

68. *See* Balkin, *supra* note 22, at 27-28 ("Freedom of speech is becoming a generalized right against economic regulation of the information industries."); Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 255-56 (2002) (criticizing the reappearance of *Lochner* in "modern First Amendment guise"); Balkin, *supra* note 10, at 375-85 (noting the 'ideological drift' of free speech principle to protect propertied and corporate interests).

69. *See* Chen, *supra* note 13, at 1443 ("Partisans are determined to contest the economic structuring of communications in constitutional terms, the better to secure a legal arena for rehashing settled legislative battles."); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 945 (1998) ("The First Amendment has become . . . a vehicle for selectively reviving *Lochnerian* review within the domain of electronic media regulation.").

70. The same observations have been made in the commercial speech context. *See* Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30 (1979) (arguing that, when courts are sympathetic to First Amendment attacks on advertising regulation, economic due process has been "resurrected, clothed in the ill-fitting garb of the first amendment"); *see also* Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 180 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

The Supreme Court has declined to "define out" of the zone of full First Amendment protection cable access regulations such as must-carry requirements. *Turner* reaffirmed that cable operators are editors[71] and found the access requirement that cable retransmit local broadcast signals to be a speech control.[72] Although the Court narrowly upheld the requirement, scholars have criticized its review as Lochneresque because of the refusal to characterize access regulation as "merely economic."[73] Lower courts have been similarly tough on rules that purport to do no more than order the market.[74]

In broadcasting, the constitutional calculus has been different, but even here the "mere economic regulation" argument has not carried the day. *Red Lion Broadcasting v. FCC*[75] followed prior Supreme Court precedent in defining access and ownership regulation out of rigorous First Amendment review.[76] *Red Lion* concerned a content-based access regulation—it provided for a right of reply to those who had suffered a personal attack or whose issues had been editorialized against on a broadcast.[77] The Court eschewed the rigorous scrutiny that content-based regulations would ordinarily receive. It did this at least in part using Professor Barron's tools of market analysis, finding that the access rules

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71. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 661-62 (1994).

72. *See id.* at 643-47.

73. *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 771-72 (2001) (criticizing the *Turner* Court's rigorous review of regulation and calling it the "*O'Brien-as-Lochner* result"). *See also* Robinson, *supra* note 69, at 945 (*United States v. O'Brien* was "a partial revival of *Lochner*.").

74. *See, e.g.*, Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 185 (4th Cir. 1994) (determining that limits on telephone company provision of video services was a speech regulation); Preferred Commc'ns, Inc. v. Los Angeles, 13 F.3d 1327, 1334 (9th Cir. 1994) (holding that a grant of exclusive local cable franchises was a speech regulation); Comcast Cablevision of Broward County, Inc. v. Broward County, 124 F. Supp. 2d 685, 686 (S.D. Fla. 2000) (holding that Internet open access requirement was a speech regulation); *see also* Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1129 (D.C. Cir. 2001) (stating in dicta that cable ownership restrictions interfere with operators' "speech rights by restricting the number of viewers to whom they can speak"); Time Warner Entm't Co. v. FCC, 93 F.3d 957, 965-67 (D.C. Cir. 1996) (seriously entertaining, although ultimately rejecting, the argument that rate regulation of cable systems constituted an impermissible tax on speech).

75. 395 U.S. 367 (1969).

76. *Id.* at 386-90; *see also* Nat'l Broad. Co. v. United States, 319 U.S. 190, 226 (1943) ("Unlike other modes of expression, radio inherently is not available to all. [Because of this] unique characteristic . . . it is subject to government regulation."). The precise standard of review applied in these cases is not clear since they were decided before the First Amendment tests had hardened into today's hierarchy. *Red Lion* seemed to apply something between rational basis and intermediate level scrutiny. *See Red Lion*, 395 U.S. at 386-90. *But see* FCC v. League of Women Voters, 468 U.S. 364, 380 (1984) (using the language of intermediate scrutiny to characterize *Red Lion*'s inquiry into whether "the restriction is narrowly tailored to further a substantial governmental interest").

77. *Red Lion*, 395 U.S. at 369-71.

ameliorated the effects of a highly concentrated media market.[78] Especially where government action, in the form of licensing requirements, was responsible for limiting entry, government could legitimately act to enlarge broadcast opportunities.[79] In this context alone, the Court recognized a "collective . . . . right of the viewers and listeners" that is strong enough to depose the customary constitutional presumption against even content-neutral speech regulations.[80]

Unfortunately, *Red Lion*'s analysis obscured the importance of market structure to the analysis by relying on the poorly conceived spectrum scarcity rationale. Rather than treating spectrum constraints as one of several factors that contribute to concentration, the decision fetishized limited spectrum as the distinguishing feature of broadcasting.[81] *Red Lion* defined broadcasting regulation out of the most rigorous First Amendment review, but did not define it as mere economic regulation. The result has been a schism in First Amendment doctrine, with relaxed review of broadcast regulation and intermediate-

78. It is in light of the market realities that "the Court essentially held that the government has the power to structure the media in a manner that the government thinks will promote the best communications environment." Baker, *supra* note 3, at 104.

79. *Red Lion*, 395 U.S. at 388-89 (discussing government's responsibilities in licensing scarce spectrum resource). For similar understandings of *Red Lion*, see Baker, *supra* note 3, at 99-105; Daniel A. Farber, *Afterword: Property and Free Speech*, 93 NW. U. L. REV. 1239, 1251 (1999) (characterizing *Red Lion* as a compromise that imposed "a trust obligation [on broadcasters] toward excluded speakers and their viewpoints" to compensate the public for the government's allocation of expressive resources to broadcasters, without going so far as to treat broadcasters like common carriers). Taken to its extreme, this conception of government action and concomitant responsibility might support a First Amendment *mandate* for speech regulation. *See, e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 180-81 (1973) (Brennan, J., dissenting) (stating that the FCC's refusal to require broadcasters to air anti-Vietnam War spots violated the First Amendment because of the "public nature of the airwaves, the governmentally created preferred status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy . . . the Government has so far insinuated itself into a position of participation in this policy that the absolute refusal of broadcast licensees to sell air time to groups or individuals wishing to speak out on controversial issues of public importance must itself be subjected to the restraints of the First Amendment") (internal citation omitted).

80. *Red Lion*, 395 U.S. at 390. *See also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 783 (1985) (Brennan, J., dissenting) (stating that the free speech guarantee contained in the First Amendment "also protects the rights of listeners" to obtain "information from diverse . . . sources").

81. Barron opposed this notion of broadcast exceptionalism two years before *Red Lion*, recognizing that resource scarcity was neither acute in broadcasting nor unique to that medium. *See* Barron, *supra* note 1, at 1666 ("It is to be hoped that an awareness of the listener's interest in broadcasting will lead to an equivalent concern for the reader's stake in the press, and that first amendment recognition will be given to a right of access for the protection of the reader, the listener, and the viewer.").

plus scrutiny for the regulation of all other media.[82] Lower court judges hold their noses when applying *Red Lion* deference to communications regulation,[83] and one cannot but agree with Professor Glen Robinson's assessment that *Red Lion* "is at best a crippled precedent."[84] It is puzzling why the schism has persisted given the near universal agreement that constitutional doctrine should not hinge on technological differences that are no longer relevant, if they ever were.[85]

The failure of the "defining out" project is not fatal to the pluralist cause. As *Turner* demonstrates, pluralists can prevail without defining communications regulation out of speech regulation. Courts applying intermediate-plus scrutiny may side with First Amendment values against First Amendment rights.[86] The *Turner* Court treated cable operators as editors, but also recognized at the end of its vigorous review that editorial discretion has varying degrees of First Amendment salience. "[C]able's long history of serving as a conduit for broadcast signals" compromised operators' editorial pretensions and reduced the risk "that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."[87] Although the Court treated must-carry regulations as speech

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82. It is not clear where satellite falls. *Compare* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 978 (D.C. Cir. 1996) (satellite is subject to intermediate scrutiny for First Amendment review), *with* Satellite Broad. & Commc'ns Ass'n v. FCC, 275 F.3d 337, 353 (4th Cir. 2001).

83. *See, e.g.*, Am. Family Ass'n v. FCC, 365 F.3d 1156, 1169 (D.C. Cir. 2004) (refusing to reject *Red Lion*'s scarcity rationale as a "relic of the past").

84. Robinson, *supra* note 69, at 965.

85. *See, e.g.*, Robert M. O'Neil, *Dead or Alive: How Long Will the* Red Lion *Specter Haunt Free Speech and Broadcasting?*, *in* RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA 33 (Robert Corn-Revere ed. 1997) ("[*Red Lion*] has proved remarkably durable despite massive changes in the realities of broadcasting, the disenchantment of the FCC and the Court of appeals, and much skepticism among judges and scholars."). *See generally* Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 289 (2002) ("The impending shift of all networks to packet-switched technologies promises to cause all . . . distinctions based on the means of conveyance . . . to collapse entirely."). Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1726 (1995) ("[O]nly a unitary First Amendment for all media will do.").

86. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 663 (1994) (upholding an access requirement that "promotes values central to the First Amendment"); *Satellite Broad. & Commc'ns Ass'n*, 275 F.3d at 366.

87. *Id.* at 655. Cable's role as a conduit was also important in distinguishing *Tornillo*. Cable's obligation to carry broadcast stations was not like a newspaper's obligation to carry replies because cable controlled "the physical connection between the television set and the cable network", making it a "bottleneck, or gatekeeper . . . . The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Id.* at 656-57.

regulations, it was sensitive to the structural considerations that motivated Congress. Without an access mandate, the Court recognized, cable operators could "exploit[] their economic power to the detriment of broadcasters," and with it, "all Americans . . . [are ensured] access to free television."[88]

That this deft consideration of speech markets was wrapped up in a substantial evidence review, accompanied by a presumption of invalidity, makes *Turner* something less than an enduring win for pluralists. The closeness of the Court's decision, the stringency of its review, and the solicitude it showed for cable speech rights have all fortified the hopes of communications proprietors that future decisions will go the other way.[89] What pluralists failed to do in *Turner* and in subsequent non-broadcast cases was to overcome the definitional hurdle at the boundaries of the First Amendment. Pluralists will have a difficult time defending policies deemed speech regulation under *Turner* and there is little prospect of defining such policies out. Indeed, *Red Lion*'s failed technological determinism has perhaps so damaged the "defining out" project that, as a practical matter, it cannot be revived.

C. Speech Interests on Both Sides

The problems with defining access and ownership regulations out of the ambit of First Amendment concerns are not merely practical. This defining out gives short shrift to the First Amendment values that motivate the regulations in the first place. The purpose of access and ownership regulations is not only to structure economic markets, after all, but to rescue a robustly heterogeneous speech culture from the risks of concentrated control of communicative resources.[90] Market interventions in the name of speech values intentionally shape the

88. *Turner I*, 512 U.S. at 649. Justice Breyer provided the fifth vote for the *Turner II* majority. In his partial concurrence, he disclaimed any reliance on the competition rationale that had been important to the other Justices upholding the carriage requirement. Nevertheless, he emphasized the structural infirmities in the market that the law addressed, including the extent to which cable's physical dependence on city rights of way imposes "a kind of bottleneck that controls the range of viewer choice" and justifies "at least a limited degree—of governmental intervention." Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 227-28 (1997) (Breyer, J., concurring in part).

89. *See* Robinson, *supra* note 69, at 945 (in *Turner*, the cable industry "gained a clear victory in the long-term struggle with regulators").

90. *See* Benkler, *supra* note 8, at 377-78 (associating "concentrated commercial systems" with the exclusion of "challenges to prevailing wisdom that are necessary for robust political discourse" and the translation of "unequal distribution of economic power in society into unequal distribution of power to express ideas and engage in public discourse"); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 22-23 (1996); Balkin, *supra* note 10, at 404-12.

communications environment, and not for a purpose unrelated to speech.[91]

Pluralists have avoided reckoning with the true purpose of communications regulation by using as a rhetorical touchstone Justice Black's majority opinion in *Associated Press v. United States*.[92] In this case, the Court upheld the application of antitrust law to the press, finding that such application was both constitutionally permissible and furthered the speech values on which the First Amendment "rests"—namely that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[93] This language has served as a bridge of sorts between the "mere economic regulation" and the very different "furtherance of First Amendment values" arguments for ownership and access regulations. *Associated Press* held that press freedoms did not justify an exemption from antitrust law—an ordinary and generally applicable regulation.[94] As the Court would later hold with respect to tax law[95] and labor law,[96] First Amendment rights do not give speakers special dispensation in economic life.

Associated Press cannot carry the weight it has been given. Antitrust laws really are mere economic regulation. They are not designed to further First Amendment values, although they had this effect when applied to the Associated Press by prohibiting restraints of trade and encouraging entry into the media sector.[97] Pluralists capitalized

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91. Indeed, the purpose of even content-neutral communications law is often to shape content. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) (upholding rules that limit the number of national networks a single entity can own and regulate the relationship of networks and affiliates even though such rules do more than merely supervise communications traffic, but "determine[] the composition of that traffic"); *see also* Baker, *supra* note 3, at 91-99 (arguing that much legitimate regulation of information services that is framed as content-neutral is actually content-based).

92. 326 U.S. 1 (1945).

93. *Id.* at 20.

94. *Id.* at 21-23; *see also* 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."); Lorain Journal Co. v. United States, 342 U.S. 143, 154-56 (1951) (holding that newspapers are subject to injunctive relief under the Sherman Act); Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws . . . . He is subject to the anti-trust laws.").

95. Leathers v. Medlock, 499 U.S. 439, 452-53 (1991) (personal property tax can be applied to cable systems).

96. Citizen Publ'g Co. v. United States, 394 U.S. 131, 139 (1969) ("The restraints imposed by . . . private arrangements have no support from the First Amendment . . . .").

97. Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.").

on this fortuitous alignment between mere economic regulation and First Amendment values by turning Justice Black's dicta into a justification for communications regulation.[98] In the second half of the twentieth century, "the widest possible dissemination of information from diverse and antagonistic sources" became a substantive goal for regulation developed specifically to shape communications. This dicta was to morph into "'a basic tenet of national communications policy.'"[99]

The first step came in *New York Times Co. v. Sullivan*, where the Court characterized the wide dissemination of diverse speech as a principal instrumental goal, rather than merely an underlying value, of the First Amendment.[100] Justice Brennan then invoked the phrase in 1973, in a dissent supporting government power to enact content-based access rights to broadcasting facilities.[101] A year later, the Supreme Court relied on the phrase to uphold communications regulation on the grounds that the "widest possible dissemination of information from diverse and antagonistic sources" was a "First Amendment goal" which the FCC could pursue through ownership regulations.[102] Later, in *Turner*, the same goal was held to justify access regulations.[103]

The use of Justice Black's language as a First Amendment justification for communications regulation obscures the basic constitutional difficulty with communications law: it is not mere economic regulation even when it is content-neutral and competition-

98. *See, e.g.*, Benkler, *supra* note 8, at 366-67.

99. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 663-64 (1994) (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668 n.27 (1972)) (plurality opinion). *See also* Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 159 (D.C. Cir. 2002).

100. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (limiting the right of action against a newspaper falsely criticizing a public official so as not "to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources'") (citation omitted).

101. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 184 (1973) (Brennan, J., dissenting) (disagreeing with majority ruling that the First Amendment does not require broadcasters to accept paid political advertising).

102. FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795, 802 (1978) (finding that restrictions on the communications outlets a single entity could own were "designed to further, rather than contravene, 'the system of freedom of expression'") (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 663 (1970)).

103. *Turner I*, 512 U.S. at 663 ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order"); *see also* Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 194 (1997) (expressly rejecting the dissent's contention that the *Associated Press* tolerance for speech-affecting regulation is warranted only when the regulation is an economic regulation generally applicable to all industries).

oriented. Rather, it is designed to reallocate expressive opportunities.[104] With speech interests on both sides, this reallocation unavoidably pits proprietors' speech rights against public speech values.[105] In the end, the question that must be resolved is whether the benefits to First Amendment interests that are expected from the redistribution justify the burdens on First Amendment rights. Courts are understandably reluctant to short-circuit this inquiry by defining access and ownership regulations out of First Amendment scrutiny. If "defined in," the regulations will survive only if First Amendment values can overcome the constitutional trump of First Amendment rights. The binary categorical approach of current First Amendment methodology is a lose-lose for communications pluralists. They cannot define regulation out of the First Amendment arena and must do battle within asserting soft values against hard rights under the weight of intermediate-plus scrutiny.

III. COPYRIGHT POLICY AND FREE SPEECH

Copyright policy, like communications policy, intervenes in speech markets to enhance communicative opportunities. Copyright regulates speech by preventing users "downstream" of the original author from using and adapting the author's expression without consent. This regulation, the Court has held, is designed "to *promote* the creation and publication of free expression."[106] In its dual function as a speech generator and speech suppressor, copyright works like communications regulation to reallocate speech entitlements.[107] A property right in

104. *See* Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1085-88 (1999).

105. Indeed, these interests are sometimes co-dependent. As Jerome Barron recognized, access to a broadcast channel or cable system is valuable because these outlets have aggregated the audience. Barron, *supra* note 1, at 1653 ("The test of a community's opportunities for free expression rests not so much in an abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact."). It is the aggregated audience, more than the transmission path, that is the scarce resource necessary for effective speech. Given this, the value of access regulation will depend on the success of the proprietor in exploiting his speech rights.

106. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); *see also* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

107. Copyright pluralists do not deny this. *See, e.g.*, Baker, *supra* note 16, at 931 ("[Copyright] is designed to promote the very content . . . that it also suppresses."); 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, 3 (2000) (copyright "encourage[s] speech by the people it protects").

expressive works reallocates entitlements from the public to the copyright owner; exceptions to copyright protection move the entitlement the other way.[108]

In debates over the proper scope of copyright, it is the pluralist who invokes First Amendment rights to defeat regulation protective of copyright owners.[109] The pluralist seeks reduced copyright protection to protect the speech rights of downstream users. The proprietor, by contrast, urges courts to view copyright protections as mere economic regulation that, far from threatening speech rights, actually furthers the First Amendment interest in speech production.[110] Although pluralists in copyright as in communications invoke the First Amendment values of a robust and diverse speech environment,[111] the pluralist copyright arguments are actually closer to those of communications proprietors. Both seek to exploit binary First Amendment categories to "define in" access and ownership regulation to stringent First Amendment review.

In theory, copyright pluralists should have an easier time achieving their goals. The rhetoric of First Amendment rights is more muscular than the rhetoric of values, and copyright pluralists deploy them both. The failure of this double-barreled argument to persuade courts to limit copyright undoubtedly has several causes.[112] One is the rigidly

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108. *See* Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 134-35 (1997); *see also* Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 15 (1997) (arguing that fair use redistributes the value of copyright from one class of speakers to another); *see generally* Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium"*, 89 MINN. L. REV. 1318, 1342-47 (2005) (arguing that copyright debates turn on a contest of baselines between broad user rights or secure intellectual property rights); David McGowan, *Some Realism About the Free-Speech Critique of Copyright*, 74 FORDHAM L. REV. 435, 457-64 (2005) (arguing that the copyright conflict between upstream and downstream creators is a conflict of co-equal speech interests) [hereinafter McGowan, *Free-Speech Critique*]; David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 284-86 (2004).

109. *See, e.g.*, Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83, 85, 95-97 (2002).

110. *See, e.g.*, Redish & Kaludis, *supra* note 104, at 1097-1100.

111. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 582 (1985) (Brennan, J., dissenting) (excessive copyright protection chills "debate[s] on public issues [that] should be uninhibited, robust, and wide-open") (internal quotations omitted); Chemerinsky, *supra* note 109, at 83 ("The First Amendment seeks to maximize the dissemination of information.").

112. Most critics focus on courts' tendencies to treat copyright and other forms of intellectual property like tangible property and accord them excessive protection. *See, e.g.*, Michael D. Birnhack, *Copyright Law and Free Speech After* Eldred v. Ashcroft, 76 S. CAL. L. REV. 1275, 1318-19 (2003) (criticizing "proprietary conception of copyright law"); Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 4 (2004) ("One of the most revolutionary legal changes in the past generation has been the 'propertization' of intellectual property.").

categorical approach to First Amendment review that has hurt communications pluralism. Courts will be reluctant to define copyright as a content-neutral speech regulation, subject to intermediate-plus scrutiny, so long as that classification creates a presumption of invalidity and makes it difficult to account for the speech interests on both sides.

A. Copyright as Economic Control

When the government enforces copyright law, it empowers copyright owners to limit the expression of those who would "speak" the words and images under copyright. As Professor Paul Goldstein observed in one of the first articles to probe the tension between copyright and the First Amendment, copyright "[d]ispensed by the government . . . constitutes the grant of a monopoly over expression."[113] Particularly because copyright owners can readily obtain injunctive relief to stop infringing uses, scholars have likened copyright to a prior restraint on speech—the speech control long considered most odious to First Amendment rights.[114]

And yet the courts have by and large not considered copyright controls to be speech regulations under the First Amendment. Jed Rubenfeld has written that "[c]opyright law is a kind of giant First Amendment duty-free zone. It flouts basic free speech obligations and . . . routinely produces results that, outside copyright's domain, would be viewed as gross First Amendment violations."[115] The Supreme Court's most recent examination of copyright's effect on free speech was more nuanced, with the Court conceding that certain expansions of copyright law might trigger rigorous First Amendment review, but confirming the general copyright exception.[116]

Copyright proprietors thus have had the doctrinal wind at their backs and can litigate from a "mere economic regulation" position that communications pluralists covet. Commentators have chronicled the steady march of copyright law towards greater and greater protection over the course of the twentieth century.[117] This pro-proprietor speech

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113. Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 984 (1970).

114. *See* Lemley & Volokh, *supra* note 20, at 169-170.

115. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 3 (2002).

116. *See* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) ("We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.' But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.") (citations omitted).

117. *See, e.g.*, Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001); Netanel, *supra* note 20, at 17-24.

regulation is then given the benefit of mere rationality review when it comes under First Amendment attack. Courts view copyright as a specialized economic regulation consistent with the conventional view that copyright exists to provide incentives for creation.[118] Accordingly, litigants can easily characterize highly protective copyright law as a reasonable attempt to structure the market for expressive works to ensure optimal levels of expressive contribution.

Whenever the government structures marketplaces, of course, it can misallocate resources. In the case of copyright, such a misallocation could deprive the public of access to expressive works without any associated gains in production. Striking the right balance is the holy grail of copyright, the pursuit of which courts have decided is the job of Congress, not to be questioned too vigorously by the judiciary.[119] We see this sort of deference on display in the Supreme Court's most recent confrontation with the tension between copyright and free speech. In *Eldred v. Ashcroft*, the Court found the retroactive extension of the copyright term to be "a rational enactment," even though Congress's economic rationale was quite sketchy.[120] The Court did not believe itself to be "at liberty to second-guess congressional determinations and policy judgments [on the matter], however debatable or arguably unwise they may be."[121]

In the battles over copyright law, like communications law, the charges of Lochnerism fly. If one views copyright law as mere economic regulation, then successful First Amendment challenges to copyright statutes indeed look like Lochnerism.[122] Pluralists, it might be said, are seeking to use the Constitution to remake policies well within the legislative domain. Legal realists might dispel the shadow of *Lochner* by

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118. "The economic philosophy behind [copyright] . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of Authors . . . ." Mazer v. Stein, 347 U.S. 201, 219 (1954). This view is grounded in the language of the Constitution's Copyright and Patent Clause, which gives Congress the power to "promote the progress of science . . . by securing [to Authors] for limited times . . . the exclusive right to their . . . writings." U.S. CONST. art. I, § 8, cl. 8.

119. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.").

120. *Eldred*, 537 U.S. at 208.

121. *Id.*

122. Paul M. Schwartz & William Michael Treanor, Eldred *and* Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2334 (2003); McGowan, *Free-Speech Critique*, *supra* note 108, at 462 (stating that the "claim that the free-speech critique is a type of modern 'Lochnerism'" is "quite accurate").

emphasizing that while the *Lochner* Court invalidated legislation that protected the little guy,[123] copyright regulation protects large corporate owners of film, music, and literary libraries.[124] This point resonates with the politics of recent copyright reform, discussed more below, but fails to recognize that the little guy—the author—is also a principal beneficiary of copyright protection[125] and that the big guy will often be a downstream user.[126] In the end, it is only by defining copyright out of economic regulation and into speech regulation that copyright pluralists can escape the cloud of Lochnerism.

B. Copyright as Editorial Control

It is the goal of copyright pluralists to unsettle the traditional view of copyright as mere economic regulation with little adverse impact on speech rights. They have argued that the speech rights of downstream users are impermissibly squeezed as copyright expands. Access to expressive works is denied at the same time that digital technologies afford users greater flexibility to create new speech from copyrighted expression in the form of mash-ups, remixes, and what Jack Balkin calls "cultural bricolage."[127] In this effort, copyright pluralists, like communications proprietors, have worked at the borders of the First Amendment to "define in" to the zone of constitutional protection what might have been thought to lie without.[128] They hope that by defining copyright law into the category of suspect speech regulation, courts will subject it to a presumption of invalidity.

This approach to the copyright-free speech nexus is relatively new. The first copyright scholars to probe the potential First Amendment limits of copyright concluded that copyright and speech rights were largely consistent so long as copyright incorporated speech-sensitive

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123. Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 109-16 (1993).

124. *See* Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 932 (1999).

125. *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 232 (1994) ("[C]opyright developed in the eighteenth century as a market alternative to royal sources of centralized influence.").

126. *See* McGowan, *Free-Speech Critique*, *supra* note 108, at 463 (noting that the downstream users of copyrighted works in recent contested cases have included the Houghton Mifflin Company and the Walt Disney Corporation).

127. Balkin, *supra* note 22, at 12 (defining cultural bricolage as the use of "cultural materials that lay to hand").

128. *See, e.g.*, Rubenfeld, *supra* note 115, at 26-27 (arguing that copyright, unique among property rights, imposes liability for speech much as the right against defamation).

limitations.[129] These limitations included the unavailability of copyright for ideas and facts,[130] and the permissibility of fair use copying of copyrighted expression.[131] Where internal limits on copyright were not capacious enough to protect speech rights, these scholars concluded that there should be a First Amendment exception to copyright.[132] As copyright protections grew stronger and longer, copyright pluralists saw copyright exacting an ever larger price on free speech.[133] Instead of conceptualizing First Amendment exceptions to copyright, pluralists now conceive of copyright itself as an exception to the First Amendment.[134] Accordingly, they argue, copyright regulations should be viewed skeptically either under a strict scrutiny[135] or intermediate-plus scrutiny standard.[136]

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129. Tushnet, *supra* note 16, at 540 ("For nearly two centuries . . . courts and scholars did not think of copyright as posing any problems for free speech, in part because the First Amendment lacked its current scope and in part because copyright law rarely affected ordinary uses of copyrighted works.").

130. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1189-93 (1970); Goldstein, *supra* note 113, at 1017-20; Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 289-99 (1979); *see also* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("'[I]dea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act 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) (internal citation omitted)).

131. *See* Goldstein, *supra* note 113, at 1020-22; Denicola, *supra* note 130, at 293-99. For an excellent discussion of the First Amendment—copyright conflict and a critical history—see Birnhack, *supra* note 112, at 1280-92.

132. *See* Nimmer, *supra* note 130, at 1197 (stating that free speech rights should allow copying of expression, even if not fair use, where such copying provides "a unique contribution to an enlightened democratic dialogue"); Goldstein, *supra* note 113, at 994-95 (advocating for a First Amendment limitation on copyright much like the First Amendment limitation on enforcement of defamation law created by *New York Times v. Sullivan*).

133. *See, e.g.*, Baker, *supra* note 16, at 906; Netanel, *supra* note 20, at 5; Tushnet, *supra* note 107, at 2-7; Lemley & Volokh, *supra* note 20, at 165-69; Diane Leenheer Zimmerman, *Information As Speech, Information As Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 674–92 (1992); 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, 393-94 (1989).

134. Netanel, *supra* note 20, at 4-13.

135. *See, e.g.*, Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697, 710 (2003) (because copyright "rules are facially content-based and leave judges and juries with broad latitude to evaluate the content of the speech, it seems to me that they should be treated like normal content-based speech restrictions are treated"). *See also* Lemley & Volokh, *supra* note 20, at 186 ("Copyright liability turns on the content of what is published.").

136. *See* Chemerinsky, *supra* note 109, at 93-94; Netanel, *supra* note 20, at 47-59. Others say that it is sometimes content-neutral and sometimes not; *see, e.g.*, Rubenfeld, *supra* note 115, at 48-

The pluralists brought this argument to the Supreme Court in *Eldred*[137] with a First Amendment challenge to the Sonny Bono Copyright Term Extension Act.[138] This 1998 law extended the copyright term by twenty years and applied retroactively to copyrighted works about to fall into the public domain.[139] Petitioners urged the Court to subject the retroactive application of the law to *Turner* scrutiny as a content-neutral regulation of speech.[140] Writing for the Court, in a 7-2 decision, Justice Ginsburg refused to treat copyright law as a speech regulation subject to serious First Amendment scrutiny.[141] At the same time, the Court acknowledged more clearly than it ever had that copyright did in fact raise First Amendment concerns. The way the Court handled the speech interests on both sides of the copyright question casts doubt on the utility of a categorical First Amendment approach to the pluralist agenda.[142]

C. Speech Interests on Both Sides

The *Eldred* petitioners acknowledged that copyright, like communications regulation, "tries to balance free speech interests 'on both sides of the equation.'"[143] It is from this premise that they sought *Turner* review of the Copyright Term Extension Act, arguing that copyright regulation, "like all regulation that allocates the right to speak

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49 (stating that when copyright law sanctions simple piracy, it does not "turn on any exercise of imagination and is not content-based").

137. Eldred v. Ashcroft, 537 U.S. 186, 218-19 (2003).

138. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat. 2827, 2827-29 (1998) (extending by twenty years the copyright term for new and existing works). Petitioners also alleged that the CTEA violated the Copyright Clause of the Constitution. *See Eldred*, 537 U.S. at 193.

139. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat. 2827, 2827-29 (1998).

140. *Eldred*, 537 U.S. at 218. *Cf.* CBS v. EchoStar Commc'ns Corp., 265 F.3d 1193, 1210-11 (11th Cir. 2001) (copyright law is a content-neutral speech regulation); Satellite Broad. & Commc'ns Ass'n v. FCC, 275 F.3d 337, 355 (4th Cir. 2001) (continuing discussion of content-neutral nature of copyright law).

141. *Eldred*, 537 U.S. at 221. Justice Ginsburg is generally sympathetic to First Amendment claims and, indeed, dissented in the *Turner* decisions on the grounds that the cable must-carry regulation should be subject to strict scrutiny as a content-based regulation. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 234-35 (1997) (Ginsburg, J., joining in dissent) (finding the law to violate the First Amendment under appropriate level of strict scrutiny review).

142. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001) (rejecting arguments that the copyright law violates the First Amendment by forbidding downstream users from circumventing copy protection technologies to access speech that might constitute fair use).

143. Brief for Petitioners at 39, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618) (quoting *Turner II*, 520 U.S. at 227 (Breyer, J., concurring)).

among speakers, . . . must be justified under intermediate review."[144] Much like communications proprietors, copyright pluralists argued that when speech values conflict with speech rights, speech rights should win.[145] As Fred Yen has written, "the First Amendment is not neutral about the choice between encouraging a speaker and silencing a speaker."[146] It favors the right to speak. Given traditional doctrine's hostility to speech regulation, whatever its goals and effects, the critical question is whether what is being regulated is protected speech.

The *Eldred* Court, faced with the binary choice between speech and economic regulation, chose to "define out" and defer to Congress rather than "define in" and second guess. To characterize copyright as speech regulation would have called into constitutional doubt too much copyright law.[147] Indeed, absent any clear limiting principle, it is hard to see why such a "defining in" would not dismantle copyright law entirely. Once dealt the blow of intermediate-plus scrutiny, copyright regulation would teeter; questions of the balance between speech rights and speech values, or the speech interests on both sides, would have only the diminished force of rebuttal. Notably, even dissenting Justices Stevens and Breyer declined to apply *Turner* scrutiny, finding instead that Congress had acted irrationally.[148]

The reality is that copyright regulation, like communications regulation, lies somewhere between a speech regulation and mere economic regulation. As a speech-motivated intervention into speech markets, copyright deserves a hard constitutional look, but not necessarily the skepticism that is appropriate for a governmental effort to suppress speech without offsetting speech benefits. A strategy that seeks to define media policies in or out of the ambit of First Amendment concern is unsuited to the complexity of the interests at stake. *Turner* intermediate-plus scrutiny proceeds as if governmental allocation of

144. *Id.*

145. Yen, *supra* note 20, at 690.

146. *Id.*

147. *See* Eldred v. Ashcroft, 537 U.S. 186, 221-22 (2003) (expressing concern that Petitioners' position would result in the invalidation of past copyright term extensions and to term extensions that are prospective only in nature).

148. Both Justices Stevens and Breyer used the rationality standard to invalidate retroactive application of the CTEA under the Copyright Clause. *Id.* at 222-24 (Stevens, J., dissenting); *id.* at 242-67 (Breyer, J., dissenting). Justice Breyer concluded that the law could not "be understood rationally to advance a constitutionally legitimate interest." He relied on his understanding of "the Copyright Clause, read in light of the First Amendment." *Id.* at 266-67. This is the approach Goldstein proposed, urging that the First Amendment be used not only to carve out exceptions to copyright, but to inform the application of copyright doctrines like fair use in a way that enhances access. *See* Goldstein, *supra* note 113, at 1011-14.

speech entitlements was not inevitable and often desirable. *Eldred* rationality review proceeds as if speech allocations were not in fact series of reallocations. Neither approach reflects the full spectrum of First Amendment values that Jerome Barron elucidated forty years ago and that lights the pluralist agendas today.

IV. THE CLASH IN PLURALIST ARGUMENTS

We have seen above that communications and copyright pluralists have tried with limited success to exploit First Amendment categories, supporting deferential review of communications regulation and stringent review of copyright regulation. Beneath the surface of these strategies are disagreements about the relative importance of First Amendment rights versus values, and positive liberties versus negative liberties. These tensions are likely to become more apparent as the issues that concern communications and copyright pluralists converge and their strategies evolve.

On issue convergence, consider the position of net neutrality proponents who insist that regulators prohibit broadband providers from favoring some streams of Internet content over others. In other words, they seek an access requirement for the benefit of Internet content providers. Proponents include those who are longtime communications pluralists[149] and copyright pluralists.[150] Broadband providers

149. *See, e.g.*, Petition to Deny, In re AT&T Inc. and BellSouth Corp. Applications for Transfer of Control, WC No. 06-74 (F.C.C. June 5, 2006) (seeking network neutrality conditions on merger), *available at* http://www.mediaaccess.org/filings/ATTBellSouthPetitionToDeny.pdf; *Competition and Convergences: Hearing Before the S. Comm. on Commerce, Science, and Transp.*, 109th Cong. 46-51 (Mar. 30, 2006) (Statement of Dr. Mark Cooper, Director of Research, Consumer Federation of America) (supporting network neutrality legislation); Comments of United Church of Christ, Office of Commc'n, et al. at 17, In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (arguing for open access to broadband conduits), CC Docket No. 02-33 (F.C.C. May 3, 2002), *available at* http://www.mediaaccess.org/filings/UCCetalComments.pdf.

150. *See, e.g.*, Tim Wu, *Why Have a Telecommunications Law? Anti-Discrimination Norms in Communications*, 5 J. TELECOMM. & HIGH TECH. L. 15, 16 (2006) (proposing a presumption that views information networks as a form of public infrastructure to guide the future of telecommunications law); Tim Wu, *The Broadband Debate, a User's Guide*, 3 J. TELECOMM. & HIGH TECH. L. 70 (2004) (exploring a reconciliation of the broadband debate using the network neutrality principle as a starting point); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141-42 (2003) (discussing network neutrality and its role in the "open access" debate); Ex parte Letter from Tim Wu, Associate Professor, Univ. of Va. Sch. of Law and Lawrence Lessig, Professor of Law, Stanford Law Sch., to Marlene H. Dortch, Secretary F.C.C. (Aug. 22, 2003), CS Dkt. No. 02-52, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514683884 (commenting on the Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798 (2002)). *See also* Mark A. Lemley &

(communications proprietors) have just begun to formulate their First Amendment arguments against this policy, and they are very familiar. In objecting to a proposal that wireless broadband providers be subject to "open access" requirements for the benefit of all content providers, Verizon Wireless relied in part on its First Amendment rights as a carrier.[151] It characterized broadband providers as speakers and relied on *Turner* to argue that FCC-mandated open access is presumptively unconstitutional. Had *Eldred* gone the other way, the case would support the proprietors' argument that Congress had failed to meet its high burden of proof in justifying regulation that trenches on the speech rights of some to promote the speech production of others.

More interesting are the ways in which emerging strategies within each of copyright and communications pluralist agendas challenge pluralists to harmonize their constitutional approaches.

A. New Directions in Media Policy

There is no law of nature that says communications pluralists have to pursue their objectives through regulation, asserting First Amendment values, while copyright pluralists take their cause to court, asserting First Amendment rights. Indeed, we can begin to see a shift in these strategies. Two examples will suffice: the communications pluralists' embrace of license-free (largely unregulated) spectrum[152] and copyright pluralists' embrace of new copyright law in the form of compulsory licenses.[153]

1. Communications Commons

One of the top goals of communications pluralists today is spectrum policy reform. Here, pluralists argue not for the regulation of existing communications networks, but for new networks that support

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Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001) (discussing the threat that the practice of bundling has on open access to the Internet).

151. Verizon Wireless Letter, *supra* note 25, at 12-15. The FCC adopted certain open access, or what it called "open platform," provisions with respect to a small portion of the wireless spectrum that will be auctioned to licensees in 2008. *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order, FCC 07-132, at 79 (Aug. 10, 2007), http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-132A1.pdf (adopting "requirements for open platforms for devices and applications" on one commercial spectrum block in the 700 MHz Band).

152. *See* Werbach, *supra* note 26, at 865.

153. *See* Netanel, *supra* note 16, at 381.

additional communicative opportunities.[154] Specifically, pluralists have petitioned the government to get out of the business of licensing spectrum and, instead, to make more spectrum available on an unlicensed basis.[155] Such unlicensed spectrum could then be used freely as a communications commons by anyone, subject only to reasonable technical restrictions.[156] The "communications commons" objective is substantially deregulatory.[157] In a commons, government would have substantially less control over who carries speech over the air—the government intervention that is in some sense the original First Amendment sin of communications law.[158]

Let us suppose that the FCC, instead of expanding unlicensed spectrum use, went in the other direction by issuing licenses for exclusive use of what had been unlicensed spectrum. The unlicensed user who has lost wireless access might well invoke his First Amendment right against a regulation that withdraws from him an important channel of communication. Now it is the communications proprietor and prospective licensee who must argue that the law is merely an economic regulation reallocating speech rights from one set of users to another. Now the communications pluralist stands in the shoes of the copyright pluralist, arguing for the presumptive invalidity of a law that abridges speech rights. Because spectrum usage decisions invariably prevent some from speaking, a regulation that prohibits unlicensed users from accessing spectrum can be seen as a (content-neutral) restriction of speech.[159]

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154. *See generally* JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 245-57 (2005).

155. *See* Werbach, *supra* note 26, at 865.

156. *See, e.g.*, *id.*; Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J.L. & TECH. 25, 82–83 (2002); Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 394 (1998) ("Providing an appropriate regulatory space for unlicensed wireless operations is the only available option for allowing the development of unowned information infrastructure.").

157. To be sure, some regulation is necessary to set standards and eligibility requirements, and to deal with disputes. *See* Ellen P. Goodman, *Spectrum Rights in the Telecosm to Come*, 41 SAN DIEGO L. REV. 269, 403-04 (2004) (identifying points at which the FCC will need to step into commons management); *see also* Philip J. Weiser & Dale N. Hatfield, *Policing the Spectrum Commons*, 74 FORDHAM L. REV. 663, 688-94 (2005) (discussing the continuing role of the FCC in regulating a spectrum commons).

158. For free speech objections to broadcast regulation, see Mark S. Fowler and Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 209-10 (1982) (arguing against the constitutionality of broadcast regulation); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 991-92 (1989) (criticizing "reduced first amendment protection[s] for broadcasting").

159. For an argument like this, see Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 6 (2002) (arguing that where

Pluralists making a *Turner*/*Eldred* style argument to defeat spectrum licensing might win, but it is unlikely. Any such "defining in" to speech regulation would subject the FCC's historic spectrum management role to rigorous constitutional scrutiny. Courts would be understandably reluctant to take this step. Moreover, to the extent that solicitude for First Amendment claims in telecommunications can be explained by a Lochneresque respect for property rights, the creation of new property rights through licensing would not raise the same First Amendment ire. Whatever their chances, would this be a fight pluralists would want to win? Spectrum rights can be reallocated for or against commons use and pluralists would dislike being on the government's side of a First Amendment claim that it had unlawfully reallocated spectrum from licensed to unlicensed uses. The stakes in the First Amendment classification game are just too high.

Spectrum usage decisions, like all government allocations of communicative opportunities, implicate speech interests on both sides. A decision to leave spectrum idle, while reducing opportunities for new entrants at a particular moment, may also enhance the communicative potential of existing or future spectrum users by limiting harmful interference or avoiding conflicts. A decision to provide exclusive rights to spectrum will deny access to commons users, but might encourage rights-holders to invest in communications networks to create more communicative capacity.[160] Any system of assigning spectrum rights privileges some spectrum users over others—namely those who are most likely to accumulate communicative resources given the allocative structure. Predictive judgments about whether this privilege is warranted by the expected effect on speech opportunities are just the sort that

government's spectrum usage decision results in "waste" or non-use, it should be seen as a speech regulation subject to heightened First Amendment scrutiny). *See also* Comments of Cory Doctorow, Electronic Frontier Foundation in Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, at 3, F.C.C. Docket No. 02-328 (Apr. 16, 2003) (arguing that more unlicensed spectrum will advance First Amendment goals consistent with spectrum policy's balance of "the restriction of access to spectrum—which is a proxy for speech, since it is an effective medium of expressive communication—with the need to preserve orderliness in the airwaves so that harmful interference is minimized").

160. *See, e.g.*, Gerald R. Faulhaber & David J. Farber, *Spectrum Management: Property Rights, Markets, and the Commons*, *in* RETHINKING RIGHTS AND REGULATIONS: INSTITUTIONAL RESPONSES TO NEW COMMUNICATIONS TECHNOLOGIES 193-94 (Lorrie Faith Cranor & Steven S. Wildman eds., 2003); Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": An Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 566 (2001); Pablo T. Spiller & Carlo Cardilli, *Towards a Property Rights Approach to Communications Spectrum*, 16 YALE J. ON REG. 53, 59-61 (1999).

Congress made in enacting the cable must-carry law.[161] Judicial review of such judgments over the past decade cautions against argues against pluralist endorsement and further development of *Turner/Eldred* categorical reasoning.

2. Compulsory Licenses

Just as communications pluralists may shift strategies to advocate for stricter review of media regulation in future cases, it is just as likely that copyright pluralists will turn the other direction. Copyright regulation need not always result in substantial increases in the copyright owner's ability to lock up communicative resources to the detriment of downstream users. Frustrated by the failure of the copyright pluralist agenda in the courts, several copyright pluralists have advocated regulatory approaches to enlarge downstream access to copyrighted works.

One such proposal is that Congress expand the use of compulsory licenses to afford public access to copyrighted works.[162] The justification for existing compulsory copyright licenses is that downstream users face high transaction costs in clearing the rights to perform songs or to retransmit broadcast signals.[163] The licenses ease the logistical difficulties of gaining access to content that in all likelihood the copyright owners would voluntarily provide. In justifying the proposed additional compulsory copyright licenses, commentators shift focus from the costs of transactions to copyright owners' propensity to deny

161. *See* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 665-66 (1994) (plurality opinion).

162. *See, e.g.*, WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199-258 (2004); Netanel, *supra* note 16, at 381, Rubenfeld, *supra* note 115, at 57-58.

163. *See* Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2668-69 (1994) ("[C]onventional justification [for] compulsory licensing provisions [relies] on the basis of transaction costs."). High transaction costs justify a proposed copyright reform being considered in Congress which would afford greater access to "orphan works." *See Orphan Works: Proposals for a Legislative Solution: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 109th Cong. 2 (2006) (statement of Sen. Hatch, Chairman, Subcomm. on Intell. Prop.). These are copyrighted works whose authors cannot readily be located. Copyright users, and the Copyright Office, have proposed a compulsory license of sorts that would allow downstream users to copy and make derivative works of the orphan work without the author's permission, subject to requirements that they attempt to secure such permission and pay a reasonable fee for such use should the author surface. *See generally* U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 7, 127 (2006), *available at* http://www.copyright.gov/orphan/orphan-report-full.pdf.

access altogether.[164] The purpose of the proposed statutory interventions, unlike the existing compulsory licenses, would be to override the copyright holder's refusals to license in the interest of promoting First Amendment values.

If copyright enjoins the downstream user from speaking, a compulsory license flips the injunction by preventing the copyright holder from controlling distribution of her work. In challenging the regulation, the aggrieved copyright holder might well bring a First Amendment claim that this is a compelled speech regulation.[165] Consider the downstream user's exploitation of the author's copyrighted work—in a commercial or in pornography, for example—in a way that the author would not have permitted. The author would contend that her right to license, or refuse to license, her speech is an autonomy interest that copyright protects at least for her lifetime (plus) when that autonomy interest is strongest.[166] The compulsory license, while it does not compel her to speak, forces an association between her and the downstream user's speech that she resists.

In concluding that copyright furthers First Amendment values, the Court provided some support for this contention, albeit in the context of an author who had not yet published his work. The First Amendment, the Court said, "'shields the man who wants to speak or publish when others wish him to be quiet'" while copyright protects "'a concomitant freedom *not* to speak publicly, [a freedom] which serves the same ultimate end as freedom of speech in its affirmative aspect.'"[167] To be sure, the autonomy interest in not having *someone else* speak your words

164. *See, e.g.*, FISHER, *supra* note 162, at 165; Neil Weinstock Netanel, Speech at the Hofstra Law School Symposium: Reclaiming the First Amendment: Constitutional Theories of Media Reform (Jan. 19, 2007).

165. Quite plausibly, there is a Fifth Amendment takings claim. Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (finding that the Government's attempt to create a public right of access went so far beyond ordinary regulation or improvement as to amount to a taking).

166. Many scholars have observed the ways in which authors use the power of copyright to encourage approved uses of their work and prevent unapproved ones. Some are approved based on moral rights or personhood theories of the artist. *See, e.g.*, Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 335 (1988); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968 (1982). Whatever the propriety of authors' use of copyright for non-economic purposes, it seems indisputable that authors in fact have powerful interests in controlling perceptions of their work and will use copyright to do so. *Cf.* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1361 (2004) (describing how almost all authors releasing works under a Creative Commons copyright license require attribution as a condition of use); Greg Lastowka, *Digital Attribution*, 87 B.U. L. REV. 41 (2007).

167. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (quoting Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (N.Y. 1968)).

publicly cannot be as strong as the interest in not having your words spoken publicly at all. But such an autonomy interest is not so weak as to resist all judicial consideration.[168]

The copyright pluralists, faced with such a claim, would have a reasonably good argument that government permission to speak others' words does not amount to compelled speech because it does not "[m]andat[e] speech that a speaker would not otherwise make."[169] Interestingly, this argument that A has no First Amendment right to be protected from B's speaking A's words is the corollary to Justice Ginsburg's conclusion in *Eldred* that B has no First Amendment entitlement to speak A's words.[170] To define compulsory licensing out of the compelled speech doctrine is in some measure to retreat from the *Eldred* project of defining copyright into speech regulation. One again has to wonder about the wisdom of binary First Amendment categories that, by dividing government interventions into economic and speech regulation, shortchange the complexity of speech interests on both sides of the regulation.

B. Distinguishing Copyright and Communications Regulation

Distinctions between copyright and communications regulation do not dissolve the conflict between pluralist perspectives on First Amendment review of media policy.

Political economy furnishes one way to distinguish communications and copyright regulation. Several scholars have suggested that copyright regulation should be viewed more skeptically than communications regulation because copyright law historically has

168. Here I am framing this interest in post-publication alteration of one's work as a speech right. It is more commonly viewed as a moral right, rarely explicitly recognized in the Copyright Act. *See* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 2-3 (1985). Moral rights have been recognized in works of visual art whose creators sometimes have the right to prevent adulteration or destruction. 17 U.S.C. § 106(a) (2000); *see also id.* § 110(4) (giving the owners of nondramatic literary and musical works the right to prevent what would otherwise be exempt non-profit performances of their work).

169. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988) (striking down state law requiring professional fundraisers to disclose to potential donors the percentage of funds raised that go to charities). The essential First Amendment harm of compelled speech is that the government has forced an individual to express viewpoints that she does not espouse. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 713-17 (1977) (striking down requirement that New Hampshire motorists bear "Live Free or Die" motto on license plates); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943) (striking down requirement that students recite the pledge of allegiance to the United States flag).

170. Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

been the product of one-sided legislative battles.[171] On the side of expanding copyright protections are the Hollywood studios, the music industry, the software industry, and other powerful industrial content producers.[172] Until recently, the copyright pluralists who opposed the new copyright laws were represented by poorly funded librarians and consumer rights groups.[173] The public's interest in relatively permissive downstream use of copyrighted works was simply too diffuse to bring to bear in the legislative process that produced copyright regulations.[174]

By contrast, as the political economy story might go, those who seek to overturn communications access and ownership restrictions are the very network proprietors who fought unsuccessfully to block such restrictions in the legislature or agency.[175] There is no process failure here. Network proprietors are simply trying to achieve through the courts what they could not achieve in Congress or at the FCC.[176]

The problem with this argument is that it dies with the imbalance in power. Well-organized and focused corporate entities affected by media regulations have an advantage over individuals, but not so over other comparably powerful corporate entities whose interests are aligned with the downstream copyright user or the public. Over the past several years,

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171. LITMAN, *supra* note 16, at 144 ("Copyright legislation written by multiparty negotiations is . . . overwhelmingly likely to appropriate value for the benefit of major stakeholders at the expense of the public at large."); Christina Bohannan, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 568 (2006) ("As a result of special-interest capture, the Copyright Act confers overly broad rights to copyright owners at the expense of the public interest in having access to creative works."). Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 531-32 (2000) (discussing the problems with intellectual property law from a public choice theory perspective).

172. *See, e.g.*, BENKLER, *supra* note 6, at 413-14.

173. *See* LITMAN, *supra* note 16, at 122; *see also* S. REP. NO. 105-25, at 43 (1998) (statement of Peter Jaszi, Digital Future Coalition).

174. For those who view the First Amendment as a guarantor of positive liberties of access to communicative resources, there is a natural affinity to political process arguments. *See, e.g.*, Netanel, *supra* note 20, at 63 ("[T]he First Amendment must ensure that systemic political infirmities have not skewed public discourse and shortchanged the underrepresented public interest in expressive diversity.").

175. *See, e.g.*, Baker, *supra* note 16, at 949 ("Media enterprises' challenges to structural or economic media regulations always involve situations where their interests already have been strongly advanced in the legislative arena. They are seeking a second bite.").

176. Yochai Benkler, *Property, Commons, and the First Amendment: Towards a Core Common Infrastructure*, White Paper for the First Amendment Program, Brennen Center for Justice at New York University School of Law 39 (Mar. 2001), *available at* http://www.benkler.org/WhitePaper.pdf ("Corporate interests in communications and media markets are relatively well defined. There is either a small number of affected actors, all of whom are well represented and understand the implications of proposed legislation on their private interests . . . . On the other hand, laws whose burden will likely fall on individuals have no similar systematic means of representing the interests of the burdened parties.").

commercial interests have found that copyright pluralism advances their business aims and have lobbied against copyright expansion.[177] In particular, hardware and software manufacturers whose customers exploit copyrighted works have resisted Hollywood's attempts to gain increased control over such works in both legislative[178] and judicial arenas.[179] Technology companies like Intel and Microsoft have similarly allied themselves with unlicensed spectrum users and against entities that seek exclusive control of the spectrum.[180] Moreover, as Lior Strahilevitz points out, the profusion of speakers that copyright pluralists seek to protect are endowed with the means to a new politics.[181] Just as the blogosphere is changing electoral politics,[182] it is likely to change legislative politics in ways that lessen the imbalance of power between corporate haves and public have-nots.[183]

In search of relevant differences between communications and copyright regulation that could reduce First Amendment tensions, we turn next to the status of the rights-holder. Communications regulation has traditionally targeted large corporate entities, whereas copyright

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177. *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 533-34 (1999) (describing opposition of digital technology industry to copyright interests of content providers).

178. *See, e.g.*, *Broadcast and Audio Flag: Hearing Before the Comm. on Commerce, Sci., and Trans.*, 109th Cong. 52 (2006) (statement of Gary J. Shapiro, President/CEO, Consumer Elecs. Ass'n) (arguing against legislation that would provide greater copy protection for audio content); *Digital Content and Enabling Technology: Satisfying the 21st Century Consumer: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. 18 (2006) (statement of Blake Krikorian, CEO, Sling Media) (arguing for a generous interpretation of what kinds of digital downstream uses should constitute fair use of copyrighted materials); *Orphan Works: Proposals for a Legislative Solution: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. 14-15 (2006) (statement of Thomas C. Rubin, Assoc. Gen. Counsel, Microsoft Corp.) (supporting legislation that would give downstream users more latitude to use copyrighted works whose owners could not easily be located, known as orphan works).

179. *See, e.g.*, Brief for Electronic Frontier Found. et al. as Amici Curiae Supporting Defendant-Appellee at 28-30, Perfect 10, Inc. v. Google, Inc., 2007 WL 1428632 (9th Cir. July 20, 2006) (Nos. 06-55405, 06-55406, 06-55425, 06-55759, 06-55854, 06-55877) (arguing that non-permissive display of thumbnail pictures in search results should be considered fair use); Brief for Consumer Electronics Assn. et al., as Amici Curiae Supporting Defendant at 12-14, Atl. Recording Corp., et al. v. XM Satellite Radio Inc., 2007 WL 136186 (S.D.N.Y. July 17, 2006) (No. 06 Civ. 3733) (arguing that non-permissive copying and playback of radio programming should be considered fair use).

180. *See* Werbach, *supra* note 26, at 898 (citing Intel as support of unlicensed uses).

181. *See* Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 581 (2003).

182. *See* JOE TRIPPI, THE REVOLUTION WILL NOT BE TELEVISED: DEMOCRACY, THE INTERNET, AND THE OVERTHROW OF EVERYTHING 227-33 (2004).

183. NUECHTERLEIN & WEISER, *supra* note 154, at 245-57.

regulation burdens all speakers who would make unauthorized uses of copyrighted works. Particularly if one believes that the purpose of the First Amendment is to further individual expressive autonomy, the speech rights of an individual like Eric Eldred seem stronger than those of a corporate entity like Time Warner.[184] Ed Baker is the most artful exponent of an autonomy-based theory of the First Amendment, specifically the Amendment's Speech Clause.[185] Baker would tolerate significant "speech" regulation (copyright and communications) of commercial enterprises, which speak to sell, but much less regulation of individuals, who speak for expressive purposes.[186] If the commercial enterprises are members of the media, regulation might be less tolerable not because of any speech interests the media entity has, but because the instrumental purposes of the Press Clause might demand more government restraint.[187]

The essential insight of this theory that not all speech is of equal First Amendment concern is correct, and should powerfully inform judicial review of media regulation. As I have argued, the dichotomous choice between speech regulations subject to a presumption of unconstitutionality and economic regulation subject to the opposite presumption impedes the calibration of First Amendment value.[188] The question is whether the replacement of one inflexible categorical rule—speech reallocations are presumptively unconstitutional—with another—only speech reallocations that burden individual noncommercial speech are presumptively unconstitutional—permits adequate consideration of the speech values at issue.

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184. Eric Eldred runs an online service that provides free book downloads. *See* http://www.ibiblio.org/eldritch/; *see also* Birnhack, *supra* note 112, at 1278-80.

185. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194-206 (1989) [hereinafter BAKER, HUMAN LIBERTY] (privileging individual self-expression over commercial entities' speech-related activity conducted in pursuit of profit); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 6-9 (1976) [hereinafter Baker, *Commercial Speech*].

186. *See* Baker, *supra* note 16, at 901 ("[T]he Speech Clause's protection of individual liberty guards a person's right to engage in the activity of communicating, not a right to profit from or receive economic return for the activity.").

187. "Congress shall make no law . . . abridging the freedom of speech, *or of the press*." U.S. CONST. amend. I (emphasis added). *See* C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 156-57 (2007) ("Unlike an individual whose autonomy should be inviolate, the rationale for constitutional protection of the press—of media entities—lies instrumentally in their service to democracy."); BAKER, HUMAN LIBERTY, *supra* note 185, at 225-49 (stating that the Press Clause serves the structural purposes of protecting sources of information from government influence and subjecting government to the watchdog function of the press); Baker, *Commercial Speech*, *supra* note 185, at 30-34.

188. *See supra* Part II.

There is cause for skepticism. As Baker concedes, the new dichotomy does not work for the regulation of media entities. Such, because it implicates instrumental First Amendment concerns as opposed to individual liberty interests, is subject to a different analysis.[189] Since most communications regulation concerns the speech interests of media entities, an autonomy-based dichotomy is beside the point. More fundamentally, even where the categories apply, the approach may be chimerical. Many speech reallocations will have broad coverage. A copyright regulation like the CTEA, for example, equally burdens for-profit corporate, for-profit individual, nonprofit corporate, and non-profit individual use of copyrighted works.[190] Eric Eldred was an individual seeking to make noncommercial use of the protected speech, but he could as well have been a commercial filmmaker. Certainly the destiny of a copyright rule of general applicability should not turn on who brings the constitutional challenge.

Communications regulations may also burden individuals (or their non-profit collectives) alongside of corporate entities. In *Turner*, for example, cable programmers joined cable operators in challenging the must carry law.[191] The government affairs cable network CSPAN, which is organized as a nonprofit organization, serves the expressive interest of its CEO and founder, Brian Lamb, in addition to its press function.[192] CSPAN has long argued that must carry regulations reallocate speech opportunities away from it and to commercial broadcasters.[193]

The autonomy-based preference for individual expression over corporate speech products demands the very kind of searching inquiry that application of binary First Amendment categories—speech or economic regulation—disfavors. One sees this in the distinction that Yochai Benkler, drawing on Baker's theory, attempts to make between copyright and communications regulation.[194] A copyright law "that

189. *See* Baker, *Commercial Speech*, *supra* note 185, at 29-30.

190. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, tit. I, 112 Stat. 2827 (1998).

191. The programmers' First Amendment claim was that must carry made it more difficult for them to gain carriage on scarce cable channel capacity. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 634-35 (1994).

192. C-Span.org, Company/Corporate Information, http://www.c-span.org/about/company/index.asp?code=COMPANY (last visited Aug. 12, 2007).

193. *See generally* Reply Comments of the C-Span Networks, 66 Fed. Reg. 16533 (Dec. 22, 1998) (codified at 47 C.F.R. pt. 76) (arguing that the adoption of must carry regulations will greatly decrease the public's access to C-Span and similar networks).

194. *See generally* Benkler, *supra* note 176 (distinguishing copyright regulations, such as the Copyright Term Extension Act of 1998, and their effects, from other, more general, communications regulations).

prohibits an individual from expressing him or herself personally or politically so as to increase the speech capacity of a commercial mass media outlet," he writes, "is not equal in the eyes of the First Amendment to a [communications] law that requires a large commercial mass media company to make available resources—like cable channel capacity—to a non-commercial political group."[195] This is so because corporations do not bear "moral claims of autonomy to freedom of expression."[196] Note the specialized conditions that Benkler builds into the case for the regulations he supports: (1) access to communicative resources must be claimed by an individual, (2) for noncommercial uses, as against (3) a large "commercial mass media company."[197] Very few media laws will satisfy these conditions, with most reallocating speech opportunities more ambiguously between commercial and noncommercial or corporate and individual speakers.[198]

An autonomy-based evaluation of speech interests deployed as a threshold sorting mechanism cannot resolve the doctrinal tensions in the pluralist free speech agenda. If applied rigidly, it will sort out of serious constitutional review media laws that do in fact trench on individual noncommercial speech, while sorting in (and tipping the scales heavily against) laws that reallocate individual speech rights only slightly or incidentally.

V. ANOTHER APPROACH TO SPEECH REALLOCATIONS

Reclaiming the First Amendment for media policy, specifically for the pluralist agenda, will require a departure from the application of inflexible First Amendment categories. An approach that over-emphasizes the distinction between economic and speech regulations undermines the sensitive balancing of interests that ought to precede and inform these distinctions where speech interests lie on both sides of government interventions in speech markets.

First Amendment review of media regulation suffers from many of the same problems that beset commercial speech jurisprudence. Here too

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195. *Id.* at 8.

196. *Id.*; *see also id.* at 8, 35-39 (distinguishing between the first order First Amendment claims of individuals and the second order, instrumental claims of corporate entities).

197. *Id.* at 8.

198. Net neutrality regulations are a good example. *See supra* note 25. Such regulations burden large broadband operators for the benefit, arguably, not only of individual speakers, but also and perhaps primarily large application providers like Google. *See generally* Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847 (2006) (discussing how regulation of bandwidth-intensive activities would benefit both low-volume and high-volume users).

the Court has sought the shelter of deceptively dichotomous categories (commercial and noncommercial speech; truthful and false speech) to avoid a clear reckoning with competing values.[199] In this context, Justice Rehnquist—no great fan of muddy standards[200]—criticized the Court's approach, observing that there "are undoubted difficulties with an effort to draw a bright line between [protected and unprotected speech], and the Court does better to face up to these difficulties than to attempt to hide them under labels."[201] The problem with the lines is not that they "waver[]", he went on, but that they are "simply too Procrustean to take into account the congeries of factors which I believe could . . . properly influence a legislative decision with respect to commercial advertising."[202]

What media pluralists want is a jurisprudence of positive liberties that values not only the rights of speakers to speak, but also the public interest in a rich speech environment with abundant speech opportunities. As Chris Eisgruber has noted, this kind of jurisprudence must recognize the complex speech effects of laws that serve to reallocate speech opportunities.[203] The constitutional approach will have to "be thoroughly pragmatic . . . [in its] effort to say how much of a burden on liberty is 'too much' within a framework that both treats every burden as a cause for constitutional regret and simultaneously acknowledges that some burdens will inevitably exist."[204] Jerome Barron recognized the need for such a pragmatic approach in 1967, but the

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199. Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 156-57.

200. Kathleen M. Sullivan, Foreword, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 80-83 (1992).

201. Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 787 (1976) (Rehnquist, J., dissenting).

202. *Id.* Justice Rehnquist's criticism of deceptively clear speech categories is echoed in Steven Shiffrin's article, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1212-16 (1984) (supporting the balancing of multiple factors in commercial speech cases); *see also* Robert M. O'Neil, Nike v. Kasky—*What Might Have Been . . .* , 54 CASE W. RES. L. REV. 1259, 1273-74 (2004) (criticizing commercial speech doctrine for forcing a choice "between the two poles" of commercial and noncommercial speech, creating "a disjunction which artificially compels courts to choose one extreme or the other, with drastic consequences, when in fact the real-world spectrum of corporate communications is far more varied and complex"). For a contrary view, see Baker, *Commercial Speech*, *supra* note 185, at 45-47 (criticizing the use of balancing in free speech jurisprudence as unprincipled and susceptible to judicial whim).

203. Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Law*, 2 J. TELECOMM. & HIGH TECH. L. 17, 19-21 (2003).

204. *Id.* at 29-30; *see also* Moran Yemini, *supra* note 25 (arguing against a "bilateral" approach to First Amendment review of media regulations).

development of a suitable framework was waylaid by the technological determinism of *Red Lion*, which relieved pluralists from making their constitutional case. Intermediate level scrutiny does in theory, and has outside of media policy, structured nuanced First Amendment decision-making.[205] As discussed above, *Turner* intermediate-plus scrutiny holds less promise for the sort of speech allocations media policy makes.

A. Justice Breyer's Balancing

We see in some of Justice Breyer's First Amendment opinions the beginnings of a more pragmatic and contextualized review of laws that implicate speech interests on both sides.[206] Writing of his technique in the context of campaign finance reform, where the "basic democratic objectives" of the First Amendment "lie on both sides of the constitutional equation,"[207] Justice Breyer argues that the Court should not apply "a strong First Amendment presumption that would almost automatically find the laws unconstitutional."[208]

Justice Breyer's *Turner* concurrence itself was clearly attuned to the speech interests on both sides of the case.[209] This sensitivity emerged more clearly the same year in *Denver Area Educational Telecommunications Consortium v. FCC*, which involved statutory provisions designed to screen children from "indecent" cable programming.[210] The federal government, in earlier legislation, had mandated that cable operators grant access to independent programmers through "leased access channels," and to local government and nonprofit community groups through "public access channels."[211] The legislation

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205. *See* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 300-01 (1998) (describing intermediate scrutiny, with approval, as "a paradigmatic balancing approach" that does not pre-determine the outcome of the case); *see also* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992) ("'Intermediate scrutiny' . . . is an overtly balancing mode.").

206. *See generally* Barron, *supra* note 62 (discussing with approval Justice Breyer's approach generally in First Amendment cases); Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 157-64 (discussing with approval Justice Breyer's approach to reconciling privacy and speech interests).

207. BREYER, *supra* note 15, at 48. These objectives "include protection of the citizen's speech from government interference . . . [and] promotion of a democratic conversation." *Id.*

208. *Id.*

209. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 227 (1997) (Breyer, J., concurring) (recognizing that "important First Amendment interests" exist "on both sides of the equation" and require a "reasonable balance between potentially speech-restricting and speech-enhancing consequences").

210. 518 U.S. 727, 733 (1996).

211. *Id.* at 732-34.

challenged in *Denver Area* allowed cable operators to ban indecent programming from these channels.[212] These provisions presented unusually difficult First Amendment problems because, although content-based, they were merely permissive and clearly involved the reallocation of speech opportunities that the government itself had created.[213]

Had the First Amendment calculus implicated only the government's interest in protecting children from indecent programming and the editorial freedom of the independent programmers, municipalities and community groups, the case would have presented a conventional content-based regulation. But the regulation also directly implicated the speech interests of the cable operator. Did the permissive regulations take away editorial freedom from leased and public access channel users or did they simply return editorial freedom to cable operators—freedom the Court had accorded full First Amendment protection?[214] If viewed as a reallocation of speech rights away from access channel users, the regulations could be categorized as speech regulations and rendered presumptively unconstitutional.[215] If viewed as a restoration of previously reallocated speech rights back to cable operators, the regulations could be defined substantially out of First Amendment review.[216]

The traditional categorical method of First Amendment review, Justice Breyer wrote, "lack[s] the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect."[217] Treating the regulations as presumptively constitutional ignores the possibility of private censorship when a monopoly communications provider controls access to information.[218] Treating them as presumptively unconstitutional ignores the speech interests of

212. *Id.* at 752-60.

213. A third provision, which required cable operators to "segregate and block" programming on leased channels, was a fairly straightforward content-based speech regulation that the Court struck down under the strict scrutiny test. *Id*. at 755.

214. *See supra* notes 56-60 (discussing the role of cable television providers as content editors).

215. *See Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 795-97 (Kennedy, J., concurring in part and dissenting in part).

216. *See id.* at 816-17 (Thomas, J., concurring in part and dissenting in part).

217. *Id.* at 740 (majority opinion).

218. *See id.* at 776-77 (Souter, J., concurring) (expressing concern about "the ability of individual entities to act as bottlenecks to the free flow of information").

the cable operator.[219] Justice Breyer shred these categorical boxes in order to account for the full array of speech interests involved.[220] In the end, the plurality gave more weight to the speech interests of the public access channel users than to the leased access channel users based on differences in their speech, governance, and history.[221]

We see a similar balancing tack in Justice Breyer's concurring opinion in *Bartnicki v. Vopper*.[222] Here, radio journalists innocently obtained a recorded mobile phone conversation of an elected official that had been illegally intercepted by a third party. The question in the case was whether enforcement of the federal wiretap law, which criminalizes broadcast of the conversation, violated the First Amendment. The majority decision took a conventional categorical approach: It defined the broadcast into the zone of protected speech, thereby making the regulation presumptively unconstitutional, and struck it down.[223]

Justice Breyer treated the privacy interest protected by the wiretap law as a "constitutional interest" related to the system of free expression, since expectations of privacy foster private speech.[224] When there are competing First Amendment interests "on both sides of the equation, the key question becomes one of proper fit" between speech benefits and burdens.[225] Rather than defining the regulation in or out of presumptive invalidity, Justice Breyer engaged in a fact-specific balancing of the speech interests in publication and in private conversation, concluding that the interest in publication triumphed because the speech involved was of especial public importance.[226]

A similar approach emerges from Justice Breyer's First Amendment opinions in non-media contexts, most recently in a case about public employees' free speech.[227] There is a presumption that public employees enjoy constitutional protection against retaliation for

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219. *See id.* at 747 (majority opinion); *id.* at 822-24 (Thomas, J., concurring in part and dissenting in part).

220. For approving analyses of Breyer's opinion, see Barron, *supra* note 62, at 829-45; OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 22-23 (1996).

221. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 741-46, 760-66 (Breyer, J., concurring).

222. 532 U.S. 514, 536-41 (2001) (Breyer, J., concurring).

223. *Id.* at 517-18.

224. *Id.* at 536.

225. Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 227 (1997).

226. *Bartnicki*, 532 U.S. at 536-38 (Breyer, J., concurring). The recorded conversation involved a public official's threats of physical violence against a union negotiator. *Id.*

227. Garcetti v. Ceballos, 126 S. Ct. 1951, 1957 (2006).

statements they make as citizens on "matters of public concern."[228] At the same time, because the government has a strong interest as an employer in disciplining employees for speech-related activity that interferes with their jobs, the government may rebut this presumption if it can show that its reasons for treating the employee differently from any other member of the public outweigh the employee's speech interests.[229] In *Garcetti v. Ceballos*,[230] the Court was asked to determine whether a deputy district attorney's statement questioning the legitimacy of a search warrant was presumptively entitled to First Amendment protection.

Justice Kennedy's majority opinion used traditional categories to define the employee's speech out of protected speech on the grounds that the employee was speaking pursuant to his official duties, and not as a citizen.[231] This definitional move is similar to the majority's in *Eldred*: define speech out of presumptive protection lest too much speech be drawn into the gravitational force of the First Amendment.

Justice Breyer's dissent rejected this move. He acknowledged that "judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently depending upon the general category of activity."[232] But this scrutiny should be conducted both *before* and after the activity is assigned a degree of First Amendment protection based on the facts of the case. In this case, he argued, the speech *was* entitled to the presumption of protection because the speaker had unusually strong interests in the particular expression and the government had unusually weak interests.[233]

228. Connick v. Myers, 461 U.S. 138, 145-47 (1983).

229. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (stating that the judge must "balance . . . the interests" of the employee "in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

230. *Garcetti*, 126 S. Ct. at 1951.

231. *Id.* at 1960.

232. *Id.* at 1973 (Breyer, J., dissenting).

233. *Id.* at 1974 (asserting that the government had a smaller stake in regulating attorney speech that is already "subject to independent regulation by canons of the profession" while the attorney had a greater interest because of his special "constitutional obligation[s]" to communicate exculpatory information); *see also* Randall v. Sorrell, 126 S. Ct. 2479, 2485 (2006) (invalidating a state electoral contribution limit because the benefits of the limit were disproportionate to the harm to political activity).

What is it that Justice Breyer's approach to speech reallocations achieves that *Turner* intermediate-plus scrutiny does not?[234] It is able to assess a media law's speech effects before prejudging its likely constitutionality. In other words, it declines to shift the burden of proof to the government as soon as the plaintiff has successfully identified a speech interest, no matter how slight. Any form of intermediate scrutiny treats the speaker's interest as invariant; it assesses the strength of the government's interest only after a presumption arises as to the constitutionality of the regulation.[235] Breyer's approach is sensitive not only to the strength of the government's interest in reallocating speech opportunities, but also to the magnitude of the speech interests being reallocated.[236] While any kind of intermediate scrutiny weighs the strength of the government's interest in enhancing speech opportunities, it typically fails to calibrate the relative magnitude of the speaker's interests in speaking.

B. Beyond Balancing

The chief criticism of Justice Breyer's approach is that it is susceptible to an unconstrained, ad hoc balancing of multiple factors.[237] It is well known that balancing approaches often suffer from lack of

234. In cases that do not involve speech reallocations, Justice Breyer has not innovated, but relied on traditional First Amendment standards of review. In some cases, he has urged that speech regulation be upheld, but only because it passed muster under a strict scrutiny standard of review. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 689 (2004) (Breyer, J., dissenting) (urging that the Child Online Protection Act, which prohibited the online circulation for commercial purposes of obscene material to children, be upheld); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 847 (2000) (Breyer, J., dissenting) (urging that law requiring cable operators to fully scramble or block sex programming for non-subscribers be upheld).

235. For a criticism of the commercial speech doctrine and the *Central Hudson* intermediate scrutiny test for commercial speech regulation, see Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser"*, 55 VAND. L. REV. 693, 744-45 (2002).

236. The failure of intermediate scrutiny techniques to account for speaker interests is one reason Mitchell Berman endorses a "true balancing approach" for commercial speech review as opposed to intermediate scrutiny. Hefinds "a hint" of such an approach in *City of Cincinnati v. Discovery Network, Inc.*, which struck "down a city ordinance that barred commercial newsracks from public sidewalks while permitting noncommercial ones, . . . because the city has not carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition." Berman, *supra* note 235, at 745 n.170 (internal quotation marks omitted).

237. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 217-18 (2003) (asking "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives [considering] the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that, in relation to that objective, is out of proportion").

clarity and transparency.[238] One needs to be especially careful balancing interests in First Amendment cases given the importance of the individual rights at stake and the possibility of governmental ruses that dress up speech suppressive laws as speech enhancements.

At the same time, we should also recognize that the traditional scrutiny-based approach to First Amendment problems offers no sanctuary from the subjectivity of balancing. Initial determinations of what is speech regulation and what economic regulation, of what is content-based and what content-neutral, are themselves highly contestable.[239] In free speech jurisprudence, as in other areas of the law, crystalline rules seduce with a clarity they cannot deliver.[240] Steven Shiffrin reminds us that balancing is really "nothing more than a metaphor for the accommodation of values."[241]

Capturing the sensitivity and flexibility of Justice Breyer's heightened scrutiny approach, while making it more transparent and disciplined, will take some work. This work should begin, in the first instance, by disqualifying cases that provide less justification to depart from the traditional levels of scrutiny. Content-based regulations, or regulations that are implemented for a purpose unrelated to speech enhancement, fall into this category.[242]

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238. *See generally* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term, Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (discussing the various tests developed by the Supreme Court, including the balancing tests); Sullivan, *supra* note 200 (discussing the rules developed by the Supreme Court and the motivations behind them). For criticism of balancing in First Amendment cases, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-95 (1987).

239. Justice O'Connor dissented in both *Turner* cases with three of her brethren on the grounds that the must carry requirements were content-based. *See* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 676-77, 680-82 (1994) (O'Connor, J., dissenting); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180, 229 (1997) (O'Connor, J., dissenting). In *Turner II*, she argued that a majority of the Court shared that view because Justice Breyer's concurrence, which provided the fifth vote, suggested that the content of local broadcast stations was relevant to Congress's adoption of must carry rules. *See id.* at 234. *See generally* Baker, *supra* note 3 (discussing "content-based" regulations); Stone, *supra* note 37 (discussing "content-neutral" regulations). *See also* Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 850 (1994) ("[R]ules are based on and incorporate intuitive judgments, often the very balancing they were meant to replace.").

240. *See, e.g.*, PHILLIP E. AREEDA, 7 ANTITRUST LAW VOL. 408, 436 (1986) (observing that the per se and reasonableness inquiries in antitrust law actually form a "continuum," with the central inquiry in all cases being "'whether or not the challenged restraint enhances competition.'" (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104, 109-10 (1984))).

241. Shiffrin, *supra* note 202, at 1249.

242. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 204-05 (2003).

Justice Breyer's balancing approach was inapposite, therefore, in *United States v. American Library Ass'n*.[243] In that case, public libraries challenged a statutory requirement that, as a condition of receiving certain federal funds, they filter Internet access to protect minors from obscene and like material.[244] The majority upheld the regulations as an appropriate exercise of the government's spending power.[245] Justice Breyer, in his concurrence, treated the law as if it, like those at issue in *Bartnicki* and *Denver Area*, implicated speech interests on both sides. He opposed the interests of patrons denied access to certain material[246] with those of libraries in exercising selection or editorial choices.[247] This formulation is puzzling in light of the fact that the libraries and their patrons were on the same side of the case. The libraries objected to government intrusion on their editorial choices *for the sake* of their patrons.[248] If this was a First Amendment case at all (rather than a Spending Clause case), it was a conventional one fit for the application of traditional categories. It did not involve speech interests on both sides, nor was the government allocating speech rights among speakers in a content-neutral manner.

As to the cases of media regulation that do involve speech reallocations, where there truly are speech interests on both sides, the question is whether the government intervention is actually pro-speech or anti-speech in ways that are constitutionally meaningful. In lieu of an open-ended balancing test, it should be possible to structure the analysis by shifting the burden of proof to challenger or defender of the media regulation depending on the likely impact of the rule.

Antitrust law uses this technique to analyze whether a restraint of trade is pro-competitive or anti-competitive. The traditional dichotomy between rule of reason and per se standards in antitrust is loosely analogous to that between rational basis and higher level First Amendment review in media law. Just as intermediate-plus or strict

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243. *Id.*

244. *See id.* at 198-99, 201-02.

245. *See id.* at 211-12.

246. *See id.* at 216 (Breyer, J., concurring) ("The Act directly restricts the public's receipt of information."). The Court has long treated individuals' interest in receiving information as a First Amendment right. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); Reno v. ACLU, 521 U.S. 844, 874 (1997).

247. *Am. Library Ass'n, Inc.*, 539 U.S. at 217 (Breyer, J., concurring) ("To apply 'strict scrutiny' to the 'selection' of a library's collection . . . would unreasonably interfere with the discretion necessary to create, maintain, or select a library's 'collection.'").

248. To be sure, the libraries, as government entities, are not First Amendment speakers, but then they have no editorial rights to be used against them to reduce scrutiny of a content-based regulation.

scrutiny review treats a speech regulation as presumptively unconstitutional, the per se rule treats certain restraints of trade as anticompetitive under the Sherman Act.[249] By contrast, like rational basis review, the rule of reason presumes other restraints to be benign unless plaintiff can show as part of its prima facie case sufficiently severe anticompetitive effects.[250] If plaintiff can show that the challenged conduct falls into a per se category, he will win.[251] Failing this, he will bear the burden under the rule of reason of proving as part of the prima facie case that defendant has market power and the challenged conduct has anticompetitive effects.[252]

Courts have tired of this traditional dichotomy, finding that the per se rule can too quickly invalidate efficient restraints while the rule of reason may impose too heavy a burden on the plaintiff to invalidate inefficient restraints. The modern trend is to look at restraints of trade along an analytic continuum in terms of their effects on competition.[253] Courts have structured this continuum by shifting the burdens of proof.[254] In cases where a restraint is ordinarily fit for the per se rule, but it has significant pro-competitive effects, courts have avoided the sledgehammer effect of the per se rule by applying a "quick look" review.[255] Quick look is also used in cases that would ordinarily go straight into rule of reason review, but the challenged conduct seems sufficiently anti-competitive that courts want to relieve the plaintiff of its heavy burden until the defendant proves that the conduct is actually pro-competitive. Thus, quick look imposes on the plaintiff the initial burden

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249. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940). Unlike strict scrutiny in First Amendment law, this is not a rebuttable presumption of illegality.

250. *See, e.g.*, Chicago Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).

251. *See* WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK 175-85 (2002) (practices subject to the per se rule include horizontal price fixing, vertical minimum price fixing, horizontal market allocations, and certain group boycotts).

252. *Id.* at 185-211.

253. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999) (rejecting the traditional binary antitrust analysis, in favor of an analytical approach that is "meet for the case, looking to the circumstances, details, and logic of a restraint."); *see generally* Steven Calkins, California Dental Association*: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495, 497, 550 (2000) (discussing and applauding the Court for advocating a "sliding scale" of antitrust analysis).

254. *See* AREEDA, *supra* note 240, at 427-28 (approving of a more flexible analysis of restraints of trade and reliance on burden allocations).

255. *See* Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 509-10 (4th Cir. 2002) ("Sometimes, the anticompetitive impact of a restraint is clear from a quick look, as in a *per se* case, but procompetitive justifications for it also exist . . . . For these cases, abbreviated or quick-look analysis fills in the continuum between *per se* analysis and the full rule of reason.") (internal quotations omitted); *see also* James A. Keyte, *What It Is and How It Is Being Applied: The "Quick Look" Rule of Reason*, 11 ANTITRUST 21, 24 (1997).

of showing that the challenged conduct presents a strong likelihood of anticompetitive harm.[256] Then the burden shifts to the defendant to advance a pro-competitive justification for the conduct.[257] The case will then go into per se or rule of reason review.[258] Quick look has not only affected the allocation of burdens, but has also in some cases expanded the range of substantive considerations courts will take into account in valuing the challenged practice.[259]

Binary First Amendment doctrine, like binary antitrust doctrine, too often has an all or nothing quality that moves cases into overly stringent or unduly searching categories of review.[260] Shifting burdens of proof could be used to navigate the continuum between speech and economic regulation in which media laws are often situated. Indeed, the very factors that commentators have used to distinguish communications from copyright regulation could structure a form of quick look in media law review. Where, for example, a regulation trenches on speech interests at the core of First Amendment concern, the government should bear a heavy burden in defending the regulation as speech enhancing. If, however, the plaintiff's speech interests are more attenuated, the plaintiff should bear the heavier burden.

Viewed this way, the must carry regulations at issue in *Turner* were constitutional not because the government overcame a presumption of invalidity, but because there should be no presumption of invalidity. A quick look analysis would have revealed that the cable operators' speech interests were attenuated and, therefore, that intermediate-plus scrutiny was inappropriate. The challenger of content-neutral structural regulations would then bear a heavy burden that it could not meet. *Eldred* presents a more difficult case because the strength of the plaintiff's speech interests is less clear. Here especially, a quick look would have been useful in flushing out the Court's reasoning. It would

256. *Cal. Dental Ass'n*, 526 U.S. at 774-76.

257. *See, e.g.*, Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999) ("To avoid examining the relevant market, market power, and anticompetitive effect in all cases in which conduct does not clearly fit within a *per se* category, the Supreme Court has sanctioned an intermediate inquiry, known as 'quick look,' if the conduct at issue is a 'naked restriction.'").

258. HOLMES, *supra* note 251, at 185.

259. *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 670 (3d Cir. 1993) (effects of defendants' actions in fixing the amount of student financial aid on racial and economic diversity justified application of "quick look" rather than the per se standard for price fixing). *But see* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1021-22 (10th Cir. 1998) (stating that salary caps on basketball coaches opened opportunities for younger coaches "may have social value apart from its affect [sic] on competition, [the court] may not consider such values unless they impact upon competition").

260. *See supra* notes 194-98 and accompanying text.

have forced the Court to consider Eldred's speech interests before deciding how heavy a burden he should bear in challenging the CTEA. Instead, by categorizing the CTEA as an economic regulation subject to minimal scrutiny, the Court never assessed the strength of Eldred's interests (except with throwaway lines that you have no right to speak another's words). Such a quick look would not necessarily change the outcome of the case, but it would have forced the Court to confront the burden of proof issue as a function of the underlying speech values involved.

VI. CONCLUSION

Media pluralists and proprietors have fought each other into doctrinal corners in an effort to deploy, or defend against, First Amendment attacks on government interventions in speech markets. Where one side sees "mere economic regulation," the other sees a flagrant free speech violation. Media pluralists make both arguments, swapping sides with proprietors depending on the regulation at issue. They argue one position to uphold communications regulation and another to overturn copyright regulation. This internal conflict becomes more apparent and troubling as pluralists find new legal strategies to open access to communicative resources.

Forty years ago, Jerome Barron argued for a media law that accounted for conflicting speech values. The First Amendment rights of speakers, he suggested, should be balanced against listeners' First Amendment interests in a robust speech environment. *Red Lion* short-circuited Barron's fruitful inquiry, asserting the importance of listener interests, but only in the presence of spectrum scarcity. *Red Lion*, with its mistaken technological determinism, enabled pluralists to advance a broadcast policy agenda without testing a constitutional theory that takes seriously the speech interests implicated by media regulation.

A more flexible and context-sensitive approach to media policy review promises to be more hospitable to the full range of speech interests implicated by government interventions in media markets. Such an approach also allows pluralists to harmonize their constitutional positions with respect to First Amendment rights and values, public interests and private liberties. Justice Breyer's approach to content-neutral regulation of speech, where there are speech interests on both sides of the regulation, provides a basis on which pluralists might build a new, coherent strategy with respect to communications and copyright regulation. Such an approach would recognize that this regulation

typically reallocates speech entitlements in a manner that is neither purely economic or speech suppressive. The regulation merits scrutiny, but also considerably more deference than the *Turner* standard accords.