ESSAY

First Amendment Limits on Copyright

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INTRODUCTION

The Constitution specifically authorizes Congress to provide for copyrights.1 A copyright grants its holder the power to stop other people—noncopyright holders—from saying certain things or distributing certain messages. A legislative grant of this private power to stop speech on the basis of its content is in overt tension with the constitutional guarantees of speech and press freedom. New York Times Co. v. Sullivan2 makes clear that the First Amendment not only prohibits many direct governmental restrictions on people’s speech, but also applies to at least some government grants of authority to private persons to restrict another person’s speech. What the government cannot do directly it sometimes cannot do indirectly either.

Private power founded on general legal rules that themselves do not refer to speech pose a different issue. These rules often provide constitutionally permissible ways for private parties to limit other people’s speech. Granting private property holders power to limit other people’s speech, for example, while the others are on the property holders’ land, usually does not offend the First Amendment.3 Much more constitutionally problematic are laws directed at speech, for example, laws that give private persons power specifically over other people’s speech. These laws are aimed at creating in one person property or personal interests specifically in the speech choices of other people. This problematic territory comprises primarily First Amendment limitations on tort law, for example, in the defamation or privacy context, where the defamed or privacy-seeking person asserts a right to restrict others’ speech choices. This territory could also easily encompass some constitutional limits on the enforcement of contractual agreements to restrict speech4

1. U.S. CONST. art. I, § 8, cl. 1, 8 (“The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).
4. For example, CBS claimed that its primary reason not to broadcast an interview with a former tobacco executive, Jeffrey Wigand, describing apparent perjury of top tobacco executives in congressional testimony was its potential liability for inducing a breach in the silence provisio in Wigand’s separation agreement with the tobacco company. First Amendment concerns, however, could lead a court to find the contractual term contrary to public policy and to refuse to impose tort liability. Alan E. Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 CORNELL L. REV. 261, 264-65 (1998); see also Bill Carter, Tobacco Company Sues Former Executive over CBS interview, N.Y. TIMES, Nov. 22, 1995, at A14. But see Cohen v. Cowles Media
or on statutes that prohibit further communication of illegally obtained information.\textsuperscript{5} Copyright similarly empowers one private party to limit another's speech. It potentially allows one private party, \( A \), to tell another, \( B \), that she cannot say (or publish or distribute) specific content, for example, because \( A \) has already said it (in a manner that was fixed in a tangible medium) or has bought the right to say it from someone who had already obtained the copyright. This Essay explores the constitutionality of granting this power.

As an amendment to a document that previously had authorized legislation creating copyrights, the First Amendment could be read to nullify the prior grant the way the Thirteenth Amendment entirely takes away any earlier implicit authorization of state power to establish slavery. This view of the First Amendment entirely displacing the earlier text is universally rejected, I think properly, as to copyright.\textsuperscript{6} Still, the First Amendment generally limits prior constitutional grants of power. The Constitution provides that “Congress shall have Power . . . To regulate Commerce” just as it shall have the power to provide for copyright.\textsuperscript{7} Clearly, however, Congress cannot use the commerce power to forbid interstate commerce in books. Likewise, the First Amendment can reasonably be seen as limiting (although not eliminating) congressional power to grant exclusive rights to author’s expressions.

In any event, no analytic conflict exists between the First Amendment and the grant of legislative power to Congress. To say “Congress shall have power to . . . ” is uniformly understood to mean that it has the power to do something only by constitutionally

\textsuperscript{5} Bartnicki v. Vopper, 532 U.S. 514 (2001). Publication damages as an enhancement of liability for a nonspeech tort also raises this issue of private power over speech. See Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 518-19 (4th Cir. 1999) (rejecting enhancement and, thus, limiting private power over speech).

\textsuperscript{6} Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000). Taken out of context, some lower court statements might be read to go further and say that the First Amendment imposes no limit on Congress’s authority to grant rights in intellectual property. See Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001) (“[We] held in United Video that copyrights are categorically immune from challenges under the First Amendment.”); Reimerdes, 82 F. Supp. 2d at 220 (“[T]he Supreme Court . . . has made it unmistakably clear that the First Amendment does not shield copyright infringement.”). Nevertheless, the Court should be understood as finding only that those valid First Amendment claims presented to it have so far been adequately accommodated by doctrines internal to existing copyright doctrine. The current situation in copyright is arguably most analogous to obscenity law before Roth v. United States, 354 U.S. 476 (1957), or libel law before New York Times Co. v. Sullivan, 376 U.S. 254 (1964); namely, the Court has not fully grappled with the extent of First Amendment limits in this area.

\textsuperscript{7} U. S. Const. art. 1, § 8, cl. 1, 3, 8.
permissible means. The language, "Congress shall make no law . . .
abridging the freedom . . ." identifies one of the impermissible
means. The extent or scope of permitted authority (e.g., the con-
gressional authority to secure rights for authors) is simply what is
left after the impermissible means are eliminated. Of course, specif-
ying what means are impermissible in this context requires a care-
ful consideration of the meaning and function of the First Amend-
ment.

This hierarchical way of reading the two clauses, although
possibly the most obvious, is not the most common. The classic
commentators on the First Amendment and copyright found a pre-
sumptive conflict between the two constitutional provisions and
then proceeded to recommend resolution by a policy-informed bal-
ancing. At least initially I want to resist that balancing approach.
Conflicts between constitutional provisions should not be found too
quickly. A point made by Hans Linde in a different context de-
scribes the view this Essay will test. In the face of assertions that
free press and fair trial guarantees conflict, Linde observed that
both claimants have claims only against the government. Although
honoring freedom of press might make it more difficult (even im-
possible) for the government to conduct a fair trial, Linde points out
that the two rights cannot conflict since both right claimants assert
only that the government not do something: prosecute without a
fair trial or abridge press freedom. If the government cannot con-
duct a fair trial while fully respecting freedom of the press, itself a
doubtful proposition, then the government cannot prosecute. The
situation is no different from the government not being permitted to
prosecute if the only way it was able to secure the evidence neces-

8. See, e.g., Paul Goldstein, Copyright and the First Amendment, 70 COLUM. L. REV. 983,
988 (1970) (recommending a balancing approach and formulating two "accommodative princi-
ples"); Meville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free
Speech and Press?, 17 UCLA L. REV. 1180, 1184 (1970) (recommending a form of "definitional
balancing"). Nimmer clearly placed considerable weight on the copyright side of the balance,
arguing that the First Amendment "does not legitimize wholesale amputation in vital copy-
right areas" or a subsidy to copiers "at the expense of authors." Nimmer, supra, at 1200, 1203.
Of course, the subsidy language already assumes the legitimacy of the legislatively created property
claim. From a starting point of free speech, copyright could be seen as creating a subsidy for
authors at the expense of would-be speakers. In any event, these balancing or accommodation
methodologies can be contrasted with Thomas Emerson’s "full protection" theory, or the
approach explored in this Essay. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION

9. See Hans Linde, Fair Trials and Press Freedom—Two Rights Against the State, 13

10. Justice Brennan thought it clearly false. See Neb. Press Ass’n v. Stuart, 427 U.S. 539,
588 (1976) (Brennan, J., concurring in the judgment).
sary for the trial was by violating the Fourth or Fifth Amendments.\textsuperscript{11}

Even if there is no logical conflict, the implications of full protection of First Amendment rights may turn out to be extraordinarily destructive of the typical functions of copyright. Likewise, our societal commitment to using copyright to support a better information environment may be deeply held. If these both turn out to be true—and for purposes of this Essay I concede the second—a balancing accommodation may be the only appropriate response. Nevertheless, it is wrong to assume this conflict from the start. An unwavering commitment to the First Amendment requires that the first question be: What scope does a strict interpretation of the First Amendment leave for copyright grants?\textsuperscript{12} Only if the answer is that this interpretation really leaves too little scope to be acceptable should a commentator proceed to advocate accommodations or balancing.

Of course, the permissible scope of copyright within a full protection theory obviously must depend on the appropriate conception of the First Amendment. Without defending the underlying theory here, the primary contribution of this Essay will be to try to work out the implications of what I consider normatively the most defensible and often the most descriptively accurate conception of the First Amendment—an approach I have discussed extensively in earlier writings.\textsuperscript{13}

Both this First Amendment theory and this assumption that full protection should provide at least the beginning point of discussion diverge from the classic treatments of First Amendment and copyright. The earlier theorists relied upon a relatively undeveloped marketplace of ideas theory of the First Amendment.\textsuperscript{14} More-

\textsuperscript{11} There are many reasons why a government, because of the necessity of recognizing constitutional rights, will be unable to conduct a fair trial. For example, if the crucial evidence in a case was obtained by an illegal search or if it turns out that the only way to get crucial evidence would be to torture the accused, the proper result under the Fourth and Fifth Amendments is to dismiss the charges instead of having a trial.

\textsuperscript{12} At the end of her review of an increasingly expanded realm of copyright propertyization of expression, Diane Zimmerman called for a new approach, suggesting that "we need to start consistently from the other end, and approach all of these information cases with the question, what room is left for private property rights after we have attended to the claims of free speech?" Diane Leenheer Zimmerman, Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights, 33 WM. & MARY L. REV. 665, 740 (1992). Her advice is adopted here.

\textsuperscript{13} See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

\textsuperscript{14} Goldstein treats the First Amendment as basically a public interest in access to ideas and information or, as he states the standard at one point, "free trade of ideas is compelled by First Amendment policy." Goldstein, supra note 8, at 1022. Although Nimmer identified the
over, in some cases, their assumptions about the First Amendment appeared to be mere window dressing; their accommodation seemed driven more by a notion of the needs of a copyright system than by any careful consideration of the requirements of the First Amendment. Still, from the perspective of their marketplace of ideas theory, the theorists could be right to recognize that any copyright protection involves at least some restriction on the First Amendment; any copyright claim prevents communication of some content that contains ideas. Given this inherent conflict, balancing would seem to be the only plausible response.  

Alternatively, if the commentator emphasizes that a marketplace of ideas only protects communication of facts and ideas, there may be no conflict, at least given existing copyright law. The law distinguishes uncopyrightable facts and ideas from copyrightable expression. Copyright assertedly does not limits ideas within the marketplace at all but only particular expressions of those ideas. Thus, within a marketplace of ideas theory, this idea/expression dichotomy, although often difficult to draw in practice, at least conceptually eliminates the asserted conflict between the two constitutional provisions. A recent marketplace of ideas theorist, emphasizing the ways the speech markets fail, adopts this view and responds by recommending such a balancing approach. 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 (2000).

15. A recent marketplace of ideas theorist, emphasizing the ways the speech markets fail, adopts this view and responds by recommending such a balancing approach. 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 (2000).

16. This view is commonly asserted in court opinions, although never with any self-conscious reflection about the view’s implicit reliance on one specific, contested theory of the point or nature of speech freedom. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985); Eldred v. Reno, 239 F.3d 372, 375-76 (D.C. Cir. 2001); United Video, Inc. v. FCC, 890 F.2d 1173, 1191 (D.C. Cir. 1989). Although the constitutional conclusion would presumably change if Congress tried to statutorily tamper with the current rule that facts and ideas do not enjoy copyright protection, this view quite logically led a lower court to hold that “copyrights are categorically immune from challenges under the First Amendment.” Eldred, 239 F.3d at 375. Interestingly, Justice Brennan, who was once the most articulate defender of a marketplace of ideas theory of the First Amendment, but who eventually adopted an individual liberty theory (at least as a supplement that had absolute force when implicated), used this distinction to distinguish the restraints implicit in copyright, noting that “copyright laws, of course, protect only the form of expression and not the ideas expressed.” New York Times Co. v. United States, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring).
case, that sometimes the idea cannot be disentangled from the form of the expression. The medium being the message, that is, the idea being intimately tied with its expression creates some inherent conflict between protecting freedom within a marketplace of ideas and protecting a realm of property in expression. Those commentators who see this as only an occasional state of affairs often hope to resolve the conflict by placing discrete limits on copyright—either in the form of constitutionally inspired “fair use” defenses or through a more explicit First Amendment privilege—that would allow the public to receive all ideas.

This view of the First Amendment, usually implicitly assumed rather than argued for, does not distinguish between the source of the speech, whether individual or the press, but merely treats speech as providing fodder for the marketplace of ideas. I have argued elsewhere that this marketplace of ideas theory is fundamentally unsound both normatively and descriptively. Instead, the First Amendment should distinguish the Speech and Press Clauses. Freedom of speech protects a broad realm of individual expressive liberty. Speech freedom is an embodiment of one of the most fundamental human values, the right of an individual to make her own choices about the values she expresses. This notion of speech freedom emphasizes the normative requirement that the state respect a person’s autonomy and not make paternalistic decisions about what she can express. This is the free speech right that Justice Brennan has described as “inviolate;” the free speech right

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17. In Cohen v. California, 403 U.S. 15 (1971), the Court gave two grounds for its decision. As noted above, the Court stated that “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.” Id. at 26. The Court, however, relied most heavily on First Amendment protection of individual liberty, asserting that the First Amendment “put[s] the decision as to what views shall be voiced largely into the hands of each of us.” Id. at 24. Noting that the “emotive function of speech . . . may often be the more important element . . . ,” the Court further emphasized that “the Constitution leaves matters of taste and style so largely to the individual.” Id. at 24, 25.

18. See Harper & Row Publishers, 471 U.S. at 563 (noting that “some of the briefer quotes from the memoir are arguably necessary adequately to convey the facts . . . [and are] so integral to the idea expressed as to be inseparable from it”).

19. See Denicola, supra note 14, at 304-06 (favoring a First Amendment privilege to avoid distorting the fair use doctrine, which usually should not apply when the use could injure the property holder economically).


22. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 585 (1980) (Brennan, J., concurring) (“[F]reedom of expression is made inviolate by the First Amendment . . . .”); see also First
that an earlier Court explained protected the child who refuses to salute the flag.\textsuperscript{23} That is, the Constitution requires respect for individual autonomy and mandates protection of individual speech choices.

In contrast, the press is typically a corporate entity, an institutional structure involving multiple people. Such entities are not intrinsically valuable. Their value lies in their instrumental service to human flourishing. Press freedom is not itself a direct human value, although it may make absolutely essential contributions to human values, including the values of freedom and democracy (and, combined with democracy may even provide the best guarantee that people will not be left without basic necessities such as food).\textsuperscript{24} In this view, freedom of the press should be interpreted in light of its vital, constitutionally protected, but merely instrumental role.

The press's democratic role is central and is the feature that most merits constitutional protection. Although this role could be understood narrowly, under a reasonable conception of participatory democracy,\textsuperscript{25} a free press should be understood to provide a nongovernmentally-controlled source of information and vision that people can enjoy and use in their lives. As such, constitutional protection serves roughly the same values as does copyright law or any other aspect of properly designed, governmental media policy. The two, however, serve these values in different ways. Intelligent media policy often requires the government to intervene appropriately. The Press Clause advances these interests by protecting the press from inappropriate government interventions.\textsuperscript{26} Two observations can be made quickly. First, the precise content of the Press Clause—as well as the appropriate form of media policy—should reflect a persuasive elaboration of the values they serve, especially the highly contested notion of democracy. Second, a need for government intervention could be established by combining an understanding of the relevant constitutional values with a critical as-

\textit{Nat'l Bank}, 435 U.S. at 804-05 (White, J., dissenting) (describing "the use of communication as a means of self-expression, self-realization and self-fulfillment . . . and" as "what some have considered to be the principal function of the First Amendment").


\textsuperscript{26} I do not rule out the possibility that the Press Clause affirmatively mandates some government policies or that the differences between ruling out policies and mandating them will always be clear. The point in the text, however, is generally consistent with case law in this country. Some other democracies, however, read freedom of the press to have more affirmative content.
essment of the workings of a purportedly unregulated market. Given the likely need for interventions as well as for constitutional protection against improper government interventions, it should not be surprising that judicial invalidations of “censorial” media policies are common while invalidations of noncensorial media “structural” policies are rare.

This Essay examines separately the implications of the Speech Clause and the Press Clause for determining the permissible and appropriate extent of copyright. Of course, the two clauses in the end may be doctrinally related in several different ways. They might impose the same limits on the copyright power, reinforcing each other; or they might impose different limits, in which case these limits would most likely be additive. Unless either the Speech or Press Clause is interpreted affirmatively to require behavior by the government rather than merely negatively to limit it, conflict between the requirements of the two clauses would be conceptually impossible. Still, in addition to being specific legal constraints on government, both clauses embody more general values that are often affirmatively pursued legislatively. This pursuit could be described as the affirmative First Amendment.\textsuperscript{27} In this affirmative aspect, the two clauses might suggest conflicting policy decisions or even constitutionally informed policy choices that conflict with a specific constitutional restriction—for example, a copyright rule that plausibly promotes a more robust media that conflicts with an individual autonomy right.\textsuperscript{28}

II. SPEECH CLAUSE LIMITS ON COPYRIGHT

Freedom to speak presumptively means freedom to say absolutely anything one wants without any limit on content. (Limitations of time, place, and maybe manner purportedly pose very different issues\textsuperscript{29} and are often permitted.) Moreover, this freedom

\textsuperscript{27} Emerson, supra note 8, at 627-716.

\textsuperscript{28} Although my analysis is different, and in the end I find no conflict between the affirmative policies reflecting the values of the two clauses, my analytic strategy is similar to that of Neil Weinstock Netanel. See Neil Weinstock Netanel, Market Hierarchy and Copyright in Our System of Free Expression, 53 Vand. L. Rev. 1879 (2000).

\textsuperscript{29} The obvious argument concerning time, place, and manner regulations (or content-neutral regulations generally) is that the government must be able to use its resources to serve public purposes. To do so effectively often will require restricting activities, including expressive activities, that interfere with these governmental uses and, therefore, time, place, and manner restrictions on expressive conduct must be allowed. The purpose of these permissible time, place or manner regulations, however, is never to bar expressive choices—their concern is not with the communicative impact of the expression (its content) but only the activity of expression. Moreover, some “zoning” in the form of time, place, and manner regulations might be allowed to fur-
normally allows the speaker to address anyone she can get to listen and maybe to approach the other person in order to speak,\textsuperscript{30} at least until that other person indicates that she is uninterested. An (impermissibly) broad version of copyright overtly limits this right. Even if the original text were written by someone else, a person may want to quote the poem privately to her beloved or publicly at the protest rally,\textsuperscript{31} to give another person a copy that she has made of a meaningful piece of writing, or to sing the song or perform the play “owned” by another, or even to write down or copy the expression for her own personal use.\textsuperscript{32} These are uses a person may want to make of someone else’s expression, some of which are currently covered by copyright law and some of which are not. In each case, however, the Copyright Clause might be read to authorize legislation that makes these acts into illegal copying. Legislation that did this might even provide for the “speaker” being sent to jail.\textsuperscript{33} In each case, however, the individual’s expression constitutes speech from the perspective of the First Amendment. Absent some special additional factor, any full protection First Amendment theory should hold unconstitutional any such copyright-based restriction on her expression.

\textsuperscript{30} But see Hill v. Colorado, 530 U.S. 703, 726-28 (2000) (upholding restraint on knowingly approaching a person to speak for particular purposes when close to an abortion clinic).

\textsuperscript{31} Under existing law, the first poetry reading presumably is not forbidden while the second may implicate copyright holders’ public performance right. 17 U.S.C. § 106 (2000). However, this Essay is concerned with both the reason why Congress could not constitutionally forbid the first, and why any existing restriction of the second should be held unconstitutional.

\textsuperscript{32} Although a marketplace of ideas theory emphasizes the relevance of speech to listeners, speech has many solitary or noncommunicative uses. These range from keeping a diary or singing in the shower to personal note-taking. From an individual liberty or autonomy theory of free speech, there is no conceptual problem with seeing these uses of speech as protected. Copyright law illustrates that sometimes government wants to deny protection to such individual uses. Cf. Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1994) (holding that the copying of protected work in order to create a personal library constitutes copyright infringement).

\textsuperscript{33} In 1997, Congress adopted the No Electronic Theft Act to amend the Copyright Infringement Act, 17 U.S.C. § 506(a) (2000), establishing criminal penalties in some cases of copyright infringement where the defendant had no interest in and did not receive any commercial gain from the copying, thereby reversing United States v. LaMacchia, 871 F. Supp. 35 (D. Mass. 1994).
Admittedly, this part argues for broader limitations on Congress's copyright lawmaking power than normally thought required by the First Amendment. The above claim of unconstitutionality may seem dramatic. Nevertheless, in actual effect, at least prior to the digital age, copyright owners rarely invoked rights to restrict usages that this part claims are protected by the First Amendment. Copyright has never included a right to stop private "performances," for example. Until recently, whether because of the "fair use" doctrine or because of copyright holders' lack of interest in enforcement, I suspect that few noncommercial copyings or even the noncommercial public performances hypothesized above have been subject to litigation.\(^34\) Traditionally, copyright legislation did not even apply to these personal uses.\(^35\) This may be changing, however. Efforts to establish the illegality of private copying have become a major project of industry-based holders of copyright.\(^36\) Here, the constitutional reach of an individual's right of free speech could become a major issue. Still, if my sweeping claim about the First Amendment right to speak is not to be understood as requiring a rejection of all copyright protections (and be summarily rejected for that reason), it is useful to consider when people's presumptive constitutional right to speak does not apply.

Most importantly, the 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. True, generally the law permits a person to engage in an activity for money if it allows the activity at all. However, laws

\(^34\) Of course, threats of enforcement or fear of enforcement can create a substantial deterrent effect. Threats of suit by copyright owners can operate to stop copying that could be defended, but only at considerable expense and risk. However, I know of no evidence that such suits and consequent deterrence of legal speech were common until recently in noncommercial contexts.

\(^35\) In his historical review, Professor Patterson observes that federal statutory copyright was originally designed only to protect an "exclusive right to reproduce the work for sale"—that is, an "economic right . . . to print, publish, and sell." Lyman Ray Patterson, Copyright in Historical Perspective 194, 215 (1968) (emphasis added). In drawing lessons from this history, Patterson argues for limiting the "publisher's protection [to protection] against economic competitors [which] would constitute a recognition of the right of the individual to make whatever use of a copyrighted work he desires, except for competing profits." Id. at 228. The economic role of copyright was, as Patterson would again limit it, to protect against economic competition rather than, as industry now wishes, to provide for maximum economic exploitation. Id. Patterson observes that the Court rejected a common law right of copyright by implicitly answering "no" to its rhetorical question: "Is there an implied contract by every purchaser of his book, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents." Id. at 209 (quoting Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834)).

against prostitution make clear (putting aside possible equal protection challenges to prostitution laws) that this is not always so. Similarly, a person may have a constitutionally protected right to vote, but no right to accept payment in exchange for her vote. A person may be free to own and to give to another cultural artifacts containing eagle feathers, but not free to sell the objects. At least in the post-Lochner world, constitutionally protected liberty does not normally encompass a right to be free of constraints in market transactions. Although doctrinally less clear, a nonlawyer or non-doctor should have a free speech right to give away her amateur legal or medical advice or views, at least if her manner of doing so would not cause the recipient to confuse her for a licensed lawyer or doctor, but no free speech right to charge for individualized provision of these views. Indeed, charging (or presenting herself as a licensed professional) could be legally prohibited as practicing law or medicine without a license. Of course, this claim concerning the absence of a right to sell one’s speech is only a claim about the protection offered by the Speech Clause. An entirely separate question, considered in the next section and answered in the affirmative, is whether the Press Clause protects charging for expression if the expression is offered to a general public in the form of a publication or, maybe, a lecture, song, or performance.

Freedom to act (e.g., to speak) and to alienate (e.g., to provide another with your communication) are direct aspects of personal liberty. In contrast, market transactions are exercises of power over other people. Even given that the exchanges are voluntary on both sides, each side gets the other to do something that the other would not want to do except for the other’s instrumental use of the exchanged item (money, object, or commodified performance).

37. Andrus v. Allard, 444 U.S. 51, 65-66 (1979). More generally, the point is that goods not only have value outside their exchange or market value but that sometimes commodifying the good can reduce its human value. See generally MARGARET JANE RADIN, CONTESTED COMMODITIES (1996).

38. The proposition in the text is uncontroversial; the controversial issue is whether the distinction between economic liberties and personal liberties, including freedom of speech, can be given a principled basis. See C. Edwin Baker, Property and Its Relation to Constitutionally Protected Liberty, 134 U. Pa. L. Rev. 741 (1986) (offering a purported principled argument for the distinction).

to get them to do so.\textsuperscript{40} In an exchange, one person gets another to act not by persuading her that her act in itself is desirable (which is the way an exercise of protected expressive liberty typically gets the other to act) but by offering payment. The seller instrumentally uses an object, performance, or money as power over the buyer given the buyer’s preferences, views, or values, not as persuasion that changes or adds to the buyer’s views or values. These transactions are presumptively subject to legislative control, which properly determines the socially desirable forms of private instrumental power.\textsuperscript{41}

Thus, my claim is that speech freedom is a liberty—not a market—right. Freedom of speech gives a person a right to say what she wants. It does not give the person a right to charge a price for the opportunity to hear or receive her speech. Of course, if the reason the government restricts the market transaction is to reduce robust and diverse communications or to censor speech freedom, as opposed to being a means to serve some legitimate policy (e.g., preventing medical malpractice or advancing the economic interests of a copyright holder), the restriction would presumably conflict with speech freedom.\textsuperscript{42} Some marketing rights also may be integral to freedom of the press, but I will put that possibility aside until the next section. Nevertheless, a prohibition on a person’s \textit{commercial} use of another’s copyrighted material, unless the rule is adopted for constitutionally impermissible reasons, should not be seen as an abridgment of her \textit{speech} freedom.\textsuperscript{43} That is, copyright does not abridge the Speech Clause when it restricts copying or distributing for commercial purposes.

Historically, recognizing a First Amendment freedom to engage in noncommercial copying, performance, or distribution would have left by far the largest portion of the economic value of the “authored” content in the hands of the copyright holder, thus ade-

\textsuperscript{40} It may be objected that my claim is often but not necessarily true. But in cases where the party’s behavior would have resulted independently of this instrumental use of the exchanged item, the regulation or prohibition of the exchange would not prevent the independently valued behavior—it merely would prevent the exchange aspect.

\textsuperscript{41} Baker, \textit{supra} note 38, at 810.

\textsuperscript{42} See \textit{United States v. O’Brien}, 391 U.S. 367, 377 (1968) (holding that the validity of a regulation that restricts a nonverbal expressive act normally requires that the “government interest [be] unrelated to the suppression of free expression”).

\textsuperscript{43} This tracks central elements of copyright law in at least its early historical forms in this country. See L. \textsc{Ray Patterson} & \textsc{Stanley W. Lindberg}, \textit{The Nature of Copyright} 195-96 (1991). Thus, Patterson argues that copyright should be understood as not limiting “personal uses” at all, while “fair use” properly applies not to personal use but to uses by a market competitor. \textit{Id.} at 193-96.
quately serving the primary function of copyright recognition—to provide incentives for creation and distribution of quality communications. Legal encroachments on this personal freedom are largely a product of twentieth-century copyright law.\textsuperscript{44} Surely the benefits of providing protection merely against commercial copying adequately justify having a constitutional grant of legislative power to create copyrights. Thus, there is no necessity, internal to copyright, to interpret the legislative power more broadly in a manner that would authorize violations of the Speech Clause. Whether particular circumstances, of which the new digital environment is by far the most important, put strains on this conclusion is a separate issue that I tentatively address below.\textsuperscript{45}

The broad free speech claim is that copyright restrictions on noncommercial copying and distribution of copyrighted works are unconstitutional. The expressive liberty protected by the First Amendment encompasses \textit{copying} as a way of receiving or preserving personal access to speech and \textit{distributing} copies as a means of communicating to others what the distributor wants to communicate.\textsuperscript{46} Both because this claim about expressive liberty may have moved too fast and because the digital environment may justify rethinking some free speech conclusions, I will evaluate a counterargument to my constitutional conclusion and consider two contexts in which its applicability may be called into question. In the end, I reject the counterargument, tentatively agree with the propriety of restrictions in the first, limited context, and indicate a degree of doctrinal and theoretical uncertainty about practices involved in the second context.

\textsuperscript{44} \textit{Id.} at 195-96.
\textsuperscript{45} \textit{See infra} Part II.C.
\textsuperscript{46} In many ways, this is the converse of \textit{West Virginia State Board of Education v. Barnette}, 319 U.S. 624 (1943). There the individuals did not want to identify themselves with particular speech content formulated by someone else and, thus, wanted to remain silent. \textit{Id.} at 629-30. In the case of individually chosen distribution of speech formulated by someone other than the distributor (namely, the copyright holder), the opposite is the case: she does want to identify herself with someone else's speech. In both cases, the First Amendment should protect the person wanting to choose the communication to which she asserts allegiance or agreement.
III. THREE POSSIBLE COPYRIGHT-RELEVANT RATIONALES FOR RESTRICTING SPEECH FREEDOM

A. No Right to Use Another’s Property

Someone defending a largely unrestricted domain for copyright might argue: People have an undoubted right of free speech, but this right clearly does not extend to a right to stand on someone else’s property to speak. Although a person can always communicate her thoughts using her own expressive formulations, when she uses another person’s words for her expressive purposes, and when that word combination is legally recognized as the other’s property, her action is like speaking while standing on the other’s land—or worse, it is like stealing the other person’s Mercedes. The First Amendment does not protect such disregard for another’s property.

Two responses, the first doctrinal and the second more theoretical, answer this argument. First, in the copyright context, the First Amendment claim is not that one private person, a speaker, has a right to use the copyright holder’s property. Rather, the claim is about starting points. The question is whether the First Amendment restricts the government’s authority to recognize something as a stick within some piece of property.47 This is why the First Amendment critique of copyright invokes New York Times Co. v. Sullivan48 as the most relevant analogy. That case shows that, at least sometimes, the First Amendment does restrict the government’s authority to recognize private rights in speech content. The Court held that Sullivan had no right to stop or receive damages for the New York Times’s false speech about him (assuming the falsehood was made without “actual malice”). Doctrinally, the First Amendment restricts the government’s power to recognize one party’s (e.g., the libeled person or the copyright holder) private property in someone else’s (e.g., the libeler or the purported copyright infringer) speech content.

47. The common failure to see this may reflect the tendency of some defenders of an extensive scope for copyright to unreflectively presuppose a natural law property right in expressive creations despite the clarity of the constitutional language and the Court decisions emphasizing that copyright is recognized for pragmatic reasons serving the public interest in a robust communications sphere. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 545 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). Interestingly, the best interpretation of John Locke, the theorist most often invoked to support a natural law theory of intellectual property, may show that he would recognize no such natural right. Seana Valentine Shiffer, Lockean Arguments for Private Intellectual Property, in NEW ESSAYS IN THE POLITICAL THEORY OF PROPERTY 138 (Stephen R. Munzer ed., 2001).
Creating property in land has only an incidental effect of limiting someone else's speech. Its purpose is not to restrict speech. Rather, it only restricts speech to the extent that it gives a person the power to keep someone off her land, thereby potentially silencing the person who wants to stand on the owner's land to deliver her harangue. The power the law gives the property owner does not turn on the content of the other's speech. In contrast, defamation and copyright present relevantly similar contexts. For both, the legal restriction directly and specifically aims at controlling speech—either false, negative speech (defamation) or already-said speech (copyright). Doctrinally, both are content-based limitations on speech.\(^{49}\)

The law bars a person from saying, duplicating, or distributing some specific content that she wants to say, duplicate, or distribute. Unlike the land owner who can throw off her land any speaker or nonspeaker she chooses irrespective of the intruder's speech content, the person claiming libel or copyright violation must identify specific offending speech content of the defendant before invoking the law. The person is told, "You can speak but you must say something else!" Doctrinally, strict scrutiny might apply,\(^{50}\) although I agree with Justice Kennedy that normally censorious content-based legal restrictions on individual speech that do not fall into any unprotected category are, without more, unconstitutional.\(^{51}\)

In any event, it is doubtful that the market incentive concerns behind copyright are the type of compelling governmental interests that cannot be served by less restrictive means. In other words, copyright should flunk strict scrutiny at least if the strict scrutiny language is to be taken seriously.\(^{52}\)

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49. This conclusion is taken up much more extensively below. See infra text accompanying notes 79-117.

50. Interestingly, Justice Brennan's opinion in Sullivan, like Justice Rehnquist's opinion in Hustler Magazine v. Falwell, 485 U.S. 46 (1988), explained why the First Amendment protected the speech. Sullivan, 376 U.S. at 289-70. Having done that, neither opinion exhibited any concern with whether the admitted state interests outweighed the speech right, as would be required if the Court was "balancing," considering "accommodations," or engaging in "strict scrutiny." Instead, both opinions merely concluded that, given that the law restricted important First Amendment protected speech, the state law must fall. Hustler Magazine, 485 U.S. at 50-51; Sullivan, 376, U.S. at 289-70.


52. I have criticized the descriptive accuracy and normative appeal of a strong presumption against content-based regulation. C. Edwin Baker, Turner Broadcasting: Content-Based Regulation of Persons and Presses, 1994 SUP. CT. REV. 57. This critique, however, does not deny the invalidity of content-based limitations on the speech choices of individuals.
More theoretically, one person’s use of land (or other material goods) for her purposes can interfere with another person’s use of the same land. The legal order necessarily provides some basis for resolving this potential conflict. Strength or force, first come, agreement or custom, greatest need, and/or greatest merit are possible bases for resolution—but so too is private property. A government choice to delegate decisionmaking to a single person is often sensible, although it is not an inevitable choice. For example, the government could recognize a commons or some form of collective ownership in some or all land. Moreover, such a decision to recognize private property in land or objects has nothing to do with trying to stop speech, even if stopping some speech will be one of its consequences (and even though this choice, like each of the others, is also likely to facilitate some speech that would not occur under an alternative choice about how to allocate authority). Any legal regime relating to land, wealth, or other objects that cannot be used by two people for conflicting purposes at the same time will deny speech opportunities to some persons, although normally not the same persons in each regime. In other words, some form of ordering is necessary and any form of ordering will have at least the incidental effect of limiting some speech. There is no way not to restrict speech.

This ordering quality of land and material objects does not apply to so-called intellectual “property.” Intellectual property’s commonly observed public goods quality—namely that use of intellectual property is “nonrivalrous”—means that neither creating a monopoly in one person, even if economically justified, nor creating any other legal allocation is conceptually necessary. Law must determine the method for identifying who gets to make a decision about the use of a particular piece of land or an object at any particular time, but need not decide who gets to say or print particular words. Nothing conceptually prevents everyone, without conflict, from saying the same thing, even at the same time (although it might get quite noisy!). This fact makes the possibility of a First Amendment challenge to legislative or common law property rights that restrict speech much different in the cases of intellectual and physical property. At most, a person might generate an (almost inevitably losing) O’Brien-type challenge to content-neutral rules limiting her use of someone else’s land or material objects for her

speech. In contrast, recognizing monopoly rights to say and communicate (distribute) particular word combinations (or their derivatives) that an original author first fixed in a tangible medium directly, and conceptually unnecessarily, and hence probably unconstitutionally, restricts other persons' speech choices. Of course, significant policy arguments may support recognizing private property rights in both cases. But in the case of intellectual property, the lack of necessity and the direct targeting of speech should combine to be constitutionally fatal to the legal restriction when it abridges speech freedom. The practical arguments purportedly favoring the property rule need fare no differently than they do in any cases where speech freedom is restricted for instrumentally valuable reasons.

B. Intentional Harms Without Mental Intermediation

Assume, possibly for the reasons described above, that free speech principles generally require that a person be able to use other people's copyrighted content within her personal, noncommercial expressive activities. That conclusion does not end the story. Particular individual uses of copyrighted material might still be denied protection just as other particular speech acts, like perjury, fraud, making disruptive noise at a meeting, or speech constituting a criminal attempt, do not receive protection. Identifying these uses must proceed by looking at particular contexts and seeing whether and why protection should be denied. Since endless possible contexts could be examined, the observations here will inevitably be incomplete. Nevertheless, to be illustrative, in this section I consider one, and in the next section consider a second, slightly different, stylized, noncommercial use of speech. Each involves problems that, even if they posed some threat to copyright holders' commercial interests in the predigital, pre-online world, could be much more serious in the digital online environment.

55. I use "speech act" merely to refer to a particular instance of speech. This usage should not be confused with a tradition of distinguishing expression and action, with the First Amendment only protecting the former. Elsewhere, I have argued that many of the conclusions within this tradition, especially as elaborated by Thomas Emerson, are correct but that the distinction itself is misleading, largely indicating the conclusion rather than aiding the analysis. Baker, supra note 13, at 70-73.

Moreover, each involves situations where the First Amendment expressive claim might be especially weak.

First, suppose that someone ideologically opposes property in intellectual content or dislikes a particular copyright holder. For these or other reasons, she might take direct action, copying and making freely available someone else's copyrighted content specifically in order to undermine its commercial value. Perhaps, her expressive act may even be considered political—she expresses her opposition to intellectual property. In any event, the copier has merely engaged in expression or communications and she generally has a First Amendment right to express either opposition to intellectual property or even her dislike of a particular person. The question is whether she has a right to express those attitudes in this way, with this behavior. That her behavior clearly does and is intended to express values or a viewpoint is never sufficient to justify constitutional protection. The means matter. A person can express negative views about the President, but not by assassinating him. Unlike publicly tearing up one's copy of the Constitution in "eloquent protest to a decision of [the Court],"57 a murder, even though expressive, receives no protection from the First Amendment. One consideration that may determine whether nonverbal expressive behavior is protected concerns how it achieves its expressive effect—or, relatedly, why the government prohibited the expressive behavior. The same point applies to verbal behavior. How verbal behavior achieves its effect can determine whether it is protected. A person can permissibly use the persuasiveness or charm of her own words to undermine another speaker's expressive efforts. On the other hand, the First Amendment does not protect her undermining the other's speech by shouting so loudly and repetitively that the audience cannot hear.

Communications protected by the First Amendment generally operate through what might be called "mental intermediations." Rather than achieving their goal by making sufficient noise to drown out the other's speech or by ruining the other's solitude, their goal is achieved only through the expression being comprehended by the other. Protected expression also typically has a second quality. The communication is consistent with respect, not necessarily for the listener's character—the speaker can say that the listener is a low-down, no-good scoundrel—but with recognition of or respect for the listener's agency. The speaker assumes that the

listener can intelligibly assimilate the message, can comprehend the information or attitude of the communicated message, and will then react accordingly. Trying to achieve one's goal by informing (even if the information concerns the speaker's contempt for the recipient), by pleasing, by comforting, or by convincing the recipient are all means consistent with viewing the other as an agent whose autonomy the expressive act respects, at least in form. The other can accept or reject, can be moved or repulsed by, can say "yes" or "no" to the message.

A longer discussion would be needed to justify the claim, but the failure to have this quality of respecting the listener's agency is central to why intentional falsehoods, designed instrumentally to get behavior from the listener that the speaker expects the listener would not choose if the listener were properly informed, are generally not protected by the First Amendment. With lies, the speech operates by tricking the other, purposefully undermining the other's capacity for successfully autonomous acts. The lie treats the other purely instrumentally. Although both persuasion and lies aim at influencing the listener's behavior or attitudes, the first does so while respecting, and the second by purposefully manipulating and undermining, the other's autonomy. First Amendment respect for autonomy generally requires protection of the self-expression that the speaker views as a substantive embodiment or enactment of her values—including her expressions of hostility as well as affection. But even more overtly than the case of lying, the First Amendment does not typically protect even expressive activities where the activity achieves the speaker's goals through means independent of any message that the speaker wants to express or communicate.

In distributing copies for the reasons hypothesized above, the "speaker" hopes to achieve her desired result of injuring the copyright holder or the copyright system not by informing or convincing the recipients of anything, that is, not through mental intermediations. Rather, the desired result, economic injury to the

58. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). Brennan explained the point more fully in Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (describing the "lie" as "an effective political tool," but arguing that "the known lies as a tool is at once at odds with the premises of democratic government and with the orderly manner in which . . . change is to be effected"); see also IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 48 (L. Beck trans., 1969), quoted in David Strauss, Persuasion, Autonomy and Freedom of Expression, 91 COLUM. L. REV. 334, 354 n.60 (1991). This point covers many categories of doctrinally unprotected speech—perjury, false advertising, fraud. The speaker's lack of respect for listener autonomy is central to why a properly delineated category of blackmail is unprotected. See BAKER, supra note 13, at 60-65.
copyright holder, is achieved directly through substitution of the "free" copy for the copyright holder's marketed version. This activity of "injuring" is most analogous to constitutionally unprotected lying or to making noise as a method of disrupting a meeting in that these activities are entirely unconcerned with convincing the recipient of something that the speaker believes. Although a speaker's "persuasion" of listeners not to purchase the commodified speech in general nor the particular commodified speech of the disliked author achieves the same injury, the difference in means is what causes this second method of causing injury to merit protection. The first act is analogous to torching the other's store; the second is analogous to a negative book review. In labor terms, the first is analogous to blocking access, the second to informational picketing. Of course, eliminating the need for people to go to the "copyright owner" in order to access the content may also be the effect of someone adopting the other's communications as her own preferred message and distributing it. Still, expressive liberty requires that this use of copyrighted speech be protected. The crucial difference is that the copier's aim or purpose in these protected cases operates through trying to be persuasive, not through directly injuring someone's economic position. In many ways, defamation is analogous. The injury may be the same whether it results from an unprotected lie or a protected mistake. In the case of the mistake, however, the speaker was honestly trying to achieve her aims through being informative or persuasive, not through using a tool to manipulate the listener.

C. The Moral Economy of Speech

Assume that a person makes multiple copies and noncommercially distributes them widely, but without any interest in injuring either the copyright holder or the copyright system. She has no particular opposition to copyright owners or to particular authors and publishers making money on the copyrighted material. Thus, this is not like the person in prior subsection. Her goals do not involve intentionally destroying other's (economic) opportunities. Slightly different motivations for her behavior might be distinguished. She might distribute carefully selected content because it effectively or conveniently expresses something that she wants other people to know. Alternatively, like a librarian, she might instead distribute copies of many copyrighted items, even ones that she does not herself inspect, because she wants people to have broader access to whatever cultural or communicative materials the world has to offer. Finally, a third possible motivation operates on
the border between commercial and noncommercial. A person (or a
corporate entity) might freely distribute others’ copyrighted content
because its wide availability will enable her to obtain some eco-
nomic advantage. For example, wide distribution of communica-
tions could enable the distributor to make money through selling
services or machines related to the distributed content. This inter-
est was the original business plan of the early commercial actors
engaged in radio broadcasting. Radio manufacturers broadcast (or
paid for the broadcast) of music with the hope that its (free) avail-
availability would lead people to buy radios. I will put this third possi-
blility aside, however. I doubt that narrowly crafted regulation of this
essentially commercial behavior—as opposed to restricting the pro-
tected right of recipients to access or even retain copies of the mate-
rial thus distributed—poses any serious constitutional problems.59

On first analysis, making expression available out of a desire
that others see, hear, or view it is merely an exercise of communi-
cative freedom—the speech activity that the First Amendment pro-
tects. Speakers often try to widely distribute expressive content to
which they are committed. Even when the person makes multiple
copies available without endorsing (or maybe even inspecting) the
content, the activity and motivation resembles those which lie be-
hind either governmental or private benevolent support for free
public libraries. The distributor-copier substantively values her
communications activity. Although these communicative activities
could reduce the economic gain to the creator or copyright owner,
the degree of reduction is an empirical matter. Historically, the ex-
 pense of making copies and of distributing them may have resulted
in this noncommercial activity being self-limiting. Even without
legal prohibitions, this type of noncommercial distribution probably
only caused marginal injuries to copyright owners’ economic inter-
ests.

This self-limiting quality of distributing copies may apply
much less in the virtually costless world of making digital copies
available online. Obviously, this new situation poses empirical
questions. History warns that the damage to commercial interests
may turn out to be much less than originally feared. In the past,
media enterprises worried that the ease of VCRs, audiotape copy-
ing, and photocopying (or even the existence of public libraries)

59. I move quickly here because I do not want to divert the discussion into a full analysis of
the Napster litigation. A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). Nev-
ertheless, these comments suggest a view that Napster’s behavior may be properly subject to
legal control but not on the basis that the court of appeals found persuasive.
would undermine the value of various domains of copyright. The reality has been much less dramatic. Sometimes, new, threatening technologies turned out to be beneficial to the rights-holders by creating new marketing opportunities. Resistance to online receipt of communication products among some people, a culture of voluntary payments, or entirely new strategies for exploiting intellectual creations may prevent the feared result—the demise of an economic incentive for the commodified distribution of intellectual products. Even with such a demise, however, the doomsday forecast of a collapse of economic support for creative talent may not pan out. For instance in music, new methods of distribution may merely reconfigure which musical talents are most advantaged—possibly creating a broader and more egalitarian distribution of rewards for musicians as the changed environment results in payment coming largely through means other than sale of copies, especially through payments for live performances. In fact, if digital distribution results in less money being spent on the services of middlemen and if people continue to spend roughly the same amount on cultural products, the resources going to cultural creators and performers as a group could increase greatly. Still, the possibility looms large that unregulated copying in the digital world will eliminate the vast bulk of the economic value of whole categories of copyrighted material.

Of course, the First Amendment claim being considered is a normative one. The claim is that copyright protection should not be allowed to interfere with substantively valued (noncommercial) speech. On the analysis above, the noncommercial copying and distributions should apparently be permitted despite its incentive consequences within the digital world. Still, in characterizing a practice, there is always a question of when a change in degree amounts to a change in relevant kind.

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60. I thank Yochai Benkler and Diane Zimmerman for observations on this point. See also John Perry Barlow, The Economy of Ideas, WIRED, Mar. 1994, at 85, 127-28. Note that the result might also be, in some contexts, to reduce the inefficient incentives of an existing a winner-take-all-type market—namely, an economically wasteful attempt of too many talented people trying to become a star musical performer. See generally Robert H. Frank & Philip J. Cook, The Winner-Take-All Society (1995); Michael Madow, Private Ownership of Public Image: Popular Culture and Publicity Rights, 91 CAL. L. REV. 125, 205-25 (1953). However, the effects on professional talent in some arenas of the creative world, most obviously those that do not produce performance income or its equivalent, may be more dire, while in other arenas of the music industry, new opportunities for creative successes become available. Certainly, there is no natural scheme that demonstrates why those advantaged under the current regime merit more concern than those that would be advantaged in an alternative legal/market structure.
Whether the drastic reduction in the costs of communication should have constitutional implications is curiously unexplored terrain. Arguably, the "moral economy" of speech freedom developed in, and has relied upon, contexts where costs existed for the speaker in some very rough approximation to the costs the speaker normally imposed directly on others by her expressive activity. Although the First Amendment protected the speaker's right to go door-to-door despite the "cost" (in terms of time or annoyance to the householder), householders were somewhat "protected" from an excess of burden due to the speaker's "cost" (in terms of time and effort). The cost of paper, ink, and postage continue to limit even mass mailings. These costs gave some grounds to expect that the right of free speech would not be too greatly "abused." Listeners would not be overly burdened very often. Of course, listeners may be inconvenienced when large numbers of people around the country are so seriously dissatisfied with existing conditions that they are willing to put lots of time, effort, or other resources into protest communications—but in such circumstances, any democratic commitment suggests that it is socially desirable that their dissent be registered effectively and dramatically despite the burden it places on audiences. If, however, these facts about costs change dramatically, maybe free speech principles should adjust. In fact, precisely this adjustment may already be at work in a number of so far unrationaized doctrinal areas.

Consider, first, 1,000 people scattered around the city, leaning on lamp posts and each holding a picket sign with a message of protest or support for some political candidate; next, consider the same signs attached to 1,000 lamp posts in roughly the same locations. The impact on "aesthetics" within a community of these two expressions should be, at any given moment, basically the same (unless the viewers do not like the looks of protestors, in which case the first is the bigger aesthetic problem). However, the cost (in dollars or in time and commitment) to the communicators of having such a sign appear for twenty-four hours a day for many days at numerous locations is substantially different depending on whether the signs need to be held by a cadre of individuals or are attached to lamp posts. A rough democratic or egalitarian relation between the number of signs held and the number of people committed to holding the signs supports the free speech right in the first case but provides a much weaker argument for being able to post the signs.

Even if freedom of speech is understood to mean that members of the community who do not wish to be bothered are required to bear the cost of receiving the speech when the signs are hand held, it is less clear that it should mean this when the burden is more one-sidedly placed on the recipients. Thus, the Court has upheld some bans on posted signs.\textsuperscript{62} Or consider phone solicitation. Free speech probably protects, maybe subject to time or manner regulations, the right to solicit people in the home over the phone. But is it so obvious that this right applies to calls made by a calling machine that, once programmed, can call thousands of people without further speaker involvement?\textsuperscript{63}

These examples illustrate that a hazy moral economy may be implicit in traditional notions of speech freedom, which under prior technological conditions did not need articulation. The Court has often invalidated regulations aimed at reducing or eliminating a cost the speech imposed on nonspeakers—like rules against leafleting where the leafleting causes litter\textsuperscript{64} or rules against door-to-door solicitation even though the solicitation annoys many of its targets.\textsuperscript{65} Nevertheless, maybe these constitutional holdings apply only if the speech itself costs the speaker something (in effort or money) that is not dramatically less or different (in terms of use of time, effort, resources, etc.) than the costs the speech imposes on listeners or on the community.

The distinction above may be comparable to a distinction between behavior that affects the world "additively" and "determinatively." The social and cultural world properly reflects the aggregation of the behavioral choices valued by its members. This anarchic summation of unregulated individual choice describes an implicitly democratic conception of culture. Behavioral "voting" allows each person's vote to have a small effect on the final result. In this way,

\textsuperscript{62} See Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984). Although this analysis provides a possible explanation of the case, my comments should not be taken as an endorsement of the decision. The dissent was quite persuasive both about how to evaluate Los Angeles's commitment to its aesthetics justification and about the importance of this form of inexpensive communication for those who are comparatively poor. The later point is one powerful reason to conclude that the considerations discussed in this subsection do not justify a First Amendment doctrinal change.


\textsuperscript{64} Schneider v. Irvington, 308 U.S. 147 (1939).

\textsuperscript{65} Martin, 319 U.S. at 141.
it treats people much more fairly and equally than does majority rule, where choices of up to fifty percent of the “voters” potentially have no effect. The argument for unregulated behavioral choice, however, is much weaker where the private decision of one or a few persons “controls” the social world available to others.\(^{66}\) One argument for market regulation reasons that effective competition typically compels all competing firms to introduce money-saving (that is, “efficient”) practices in response to their introduction by a competitor. During the New Deal period, this observation led policymakers (and eventually the Court) to accept the need for federal regulation of various market-oriented practices. Otherwise, the drive to the bottom would lead each state to adopt regulations most beneficial to the financial success of its businesses even though people would much prefer regulation and would willingly pay the higher prices if it did not undermine the viability of local business. In this context, a single state’s decision to reject a generally desired economic regulation would determine the result—it would pressure other states to conform due to an unwillingness to undermine local firms’ competitiveness. Essentially, the claim is that democratic creation of the social world ought to occur primarily through individual choices that are anarchically or culturally aggregated. But if the choice of one or a few would control or determine the environment for everyone else, honoring democratic choice requires collective (typically governmental and ultimately majoritarian) decision-making.

When the cost of a communicative practice falls virtually to zero, individual choices can have huge consequences independent of any costs borne by the speaker. When these consequences reflect the persuasiveness of the content, this result is as it should be under a regime of discursive freedom. But when huge consequences reflect the mechanics of the communication process, and when the cost to the speaker bears virtually no relation to the costs imposed on those harmed, it is not clear why society cannot choose to favor the parties harmed over the party speaking. The traditional “moral economy of speech” no longer applies. Protecting “costless” expression is no longer the material context in which traditional free speech doctrine developed. For this reason, the structural situation created by the new digital technologies might provide a ground for regulation. If unrestricted multiple copying and distribution by one

\(^{66}\) I have discussed this distinction in various places, most recently in C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979 (1997).
person is virtually costless and occurs under circumstances where the activity destroys virtually all market power of copyright holders and if most people approve of the existence of copyright holders having some market power, perhaps, regulation is in order. I am uncertain. Likewise, whether this situation justified modifications of First Amendment doctrine is unclear. The issue merits more attention.

Without resolving the issue discussed above, several relevantly different cases might be distinguished. First, if a widespread, free, noncommercial distribution is part of a “string” discourse in which different people continually add to and thereby transform the content, the determinative versus additive argument hardly applies. The purported infringers’ use involves more significant costs, in terms of reading and thinking about content’s inclusion in the discourse string, borne by the person who originally copies and by the usually limited number of recipients and added discussants who participate in this discrete discourse. Moreover, although the reduction of value to copyright holders may be real, the particularized nature of the copying limits the negative effect on typical commercial communicative activities—e.g., newspaper publishing. Possibly the most probable empirical prediction is that people who access this compilation and discrete discourse do so not to get the original copyright holder’s creation more cheaply but because they value this enhanced discourse. Second, arguably the same conclusion applies even to massive noncommercial digital “mailings” (and remailings) of specific materials individually chosen by a person who wants to spread the content because of her commitment to or approval specifically of what is said or of how it is expressed (good language, good lyrics, good visuals). Although this case is more doubtful, at least this person is willing to accept the cost to her reputation created by burdening people uninterested in receiving her digital mail.

Third, the person who makes available large amounts of more or less indiscriminately chosen content for virtually costless copying (or other use) by other persons acts less like a speaker and more like a new kind of library—say of a “Napster” variety. Given that free digital libraries, with the help of search engines, can be universally available and easily accessed, the “determinative” versus “additive” argument seems relevant. The person who copies ar-

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guably “determines” that all other people can have free access. Of course, traditional libraries provide content in a somewhat analogous way. However, each geographically located, paper-text library effectively serves a limited number of people. The library market can itself be profitable for copyright holders. Each library must purchase the copyrighted material, sometimes even multiple copies of especially popular materials. Moreover, libraries only undermine the nonlibrary market for the material to a limited degree. Many people desire to own a published copy and, in fact, the library may be a cog in the social process that encourages a desire for books in general and sometimes for particular books that the library highlights.

Of course, allowing free digital libraries to post copies of materials without permission from copyright holders may be wise social policy. Constitutionally, however, protecting an individual’s choice to post wholesale without permission seems less a matter of speech and more a matter of one person choosing to restructure the social world into a free access rather than a market-based environment. Although the lobbying power of the copyright holders can be troubling, the choice of whether or not to allow this sort of copying may still be a matter appropriate for legislative policy resolution—as, I will suggest in the next section, is often true for the evaluation of copyright rules under the Press Clause.

From these examples, a first cut at free speech limits on copyright might be the following: (1) a person has a right to engage in copying for her own use and for individualized noncommercial distribution; (2) she also has a right to distribute broadly at least if the copied speech is embodied in a communicative activity that is different than or goes beyond the use of the original author or publisher—a “transformative” use; (3) but this right to noncommercial use does not include a right to copy for the purpose of injuring a particular copyright holder or undermining the intellectual property system; and (4) a much closer case is where copying and distribution, even if itself an aspect of the copier’s communicative goals, has the likely consequence of largely destroying, not merely

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68. See generally JESSICA LITMAN, DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET (2001).

69. Of course, there is a right to injure by using quotations that reduce demand for the original work because of the surrounding content created by the copier, such as a negative review illustrated by the quotations.
reducing, the market for authorized copies of the copyrighted material.\textsuperscript{70} In this fourth case, limitations on copying may be appropriate, but the First Amendment issue is not entirely clear. Theory and prior doctrine appear to support the use. Still, this conclusion may have been based on a moral economy that is less persuasive as applied to a digital world. In sum, the question of how the free speech claim should fare in the digital context of relatively costless copying and universally available distribution needs more theoretical consideration.

IV. COPYRIGHT AND THE PRESS CLAUSE

The Press Clause protects the media for instrumental reasons: narrowly stated, to serve democracy or, more broadly, to provide an independent source of vision and information needed to promote a freer, more diverse, more robust, and more fulfilling society. This protective role of the Press Clause might be conceived as merely the negative, government-restrictive side of the rationale that also leads to the affirmative constitutional grant of authority to “promote the Progress of Science and useful Arts.” Of course, the Press Clause also encompasses more sharply defined concerns related to predictable threats to this affirmative policy goal. Still, given this congruence in ultimate aim and symmetry in mandate, limits on government imposed by the Press Clause should only rarely, if at all, conflict with legislation authorized by the Copyright Clause. If a copyright rule really impaired the media as an independent source of vision and information, it is doubtful that the rule would really be “promoting the progress of science and the useful arts.”

\textsuperscript{70} Copyright expansionists sometimes assert that the purpose of copyright is to protect against any significant reduction in the market for a copyrighted material. This view is inconsistent with the Copyright Clause and the early history of copyright. In any event, the premise of this Essay is that copyright can legitimately protect a market in the copyrighted work only to the extent that the protection does not infringe upon First Amendment rights. Often the most economically or otherwise most effective way to pursue some significant social goal is to restrict speech. However, the longstanding First Amendment response is that the social goal must be pursued, often less effectively, by means that do not aim specifically at restricting speech. See, e.g., Martin v. Struthers, 319 U.S. 141, 143-44 (1943); Schneider v. New Jersey, 308 U.S. 147, 160-61 (1939). Thus, in the context of invalidating a conviction for desecrating a United States flag, the Court explained that though the government’s end of “preserv[ing] the national flag as an unalloyed symbol of our country” was legitimate, it was “not the State’s ends, but . . . its means,” restricting the expression at issue, to which the Court objected. Texas v. Johnson, 491 U.S. 397, 418 (1989). Thus, the question of the content and extent of First Amendment rights becomes crucial.
Nevertheless, the comparatively greater specificity of the Press Clause's limits on government justifies examination to see whether it helps identify impermissible uses of the copyright power. But what limits does the Press Clause impose? Any notion that the Press Clause broadly prohibits all government regulation of the press is a nonstarter. Everything from labor law and antitrust law to contract and property rules amount to government regulation or intervention into an otherwise anarchic world. 71 Although a claim that the Press Clause prohibits media-specific regulation would be more plausible, that view too must be rejected. Ubiquitous media-specific regulation is often at least useful, if not necessary, to enhance the functioning of the press. Such regulation has been common since Congress, in the eighteenth century, enacted especially favorable provisions for mailing newspapers.

As a third try, consider a strong presumption against media-specific regulation—it must pass some sort of heightened scrutiny. Now the discussion is moving into a descriptively plausible realm, possibly with the quarrel being over precisely how strict the scrutiny should be. Turner Broadcasting Systems 72 apparently suggests use of the O'Brien 73 test. As a generic doctrinal approach, however, a presumption against media specific regulation seems questionable. To paraphrase Justice Black, 74 it would be strange that the First Amendment, which manifests concern for an effective and free press, would place obstacles in the way of laws—arguably including copyright laws—needed for such a free press to flourish. Rather, the need for beneficial government interventions is predictably great and urgent: to serve democracy's needs for both pluralistic diversity and common discourse that are uncorrupted by either government or market competition. 75 If this is right, judicially imposed burdens

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71. Even though the argument is theoretically a nonstarter, corporate lawyers did not refrain from making it. See Associated Press v. United States, 326 U.S. 1, 7, 20 (1945) (rejecting claim that the Press Clause insulates the press from application of antitrust laws); Associated Press v. NLRB, 301 U.S. 103, 132 (1937) (rejecting claim that the Press Clause insulates the press from application of labor laws).
73. See 391 U.S. 367 (1968).
74. "It would be strange indeed ... if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." Associated Press, 326 U.S. at 20. However, Justice Black continues with a sentence that could be taken to suggest the propriety of limits on copyright: "Freedom of the press from governmental interference under the First Amendment does not sanction repressio of that freedom by private interests." Id.
on legislative attempts to improve the communications order are problematic. At least after the broader, media/civil-liberties coalition has won the cases involving overt censorship (an endeavor that requires continual efforts and that may include attacks on the censorial aspects of copyright), the main parties asserting rights will be media enterprises that are often more interested in profits than in either artistic or journalistic merit. Leaving a relatively loose, empirically sensitive judicial standard to be manipulated and abused in the hands of corporate media lawyers and sympathetic judges is a very questionable strategy for obtaining a freer and better press.

Much better would be a requirement that a challenger identify precisely the evils that purportedly exist in some government regulation, not a general demand that all regulation be justified to skeptical judges after having already been justified before a legislative body in which media interests were inevitably well represented. Thus, possibly as a first draft, consider as the constitutional principle: The government cannot censor the press; nor can it adopt structural rules that purposefully undermine or sacrifice the independence of the press or its capacity to perform its constitutional role(s).

This judicial standard—or Press Clause theory and doctrine more generally—could be applied to specific copyright issues. However, despite earlier assertions about the commonality of aims of Copyright and the Press Clauses, it may be useful first to examine the consistency of copyright as a general category with a robust free press. (If not consistent, given widespread popular acceptance of at least some copyright protections, the pressure would be overwhelming to craft some sort of "accommodation"—which in fact has been the recommendation of most scholars who have considered the relation of the First Amendment and copyright.76 Accommodation, however, fits poorly with a commitment to full protection adopted as the starting analytic position in this Essay.) Obviously, the authorized affirmative purpose of copyright—which could be described as a purpose to promote an independent sector of intellectual content creation—is fully consistent with and arguably is roughly the same value as underlies the Press Clause. So all might be expected to be for the good. Consistency exists on the level of ends.

Evil, however, can also exist in the choice of means. The method by which copyright serves its proper goals might be charac-

76. See supra note 8.
terized as censorship. Copyright operates by allowing private parties (i.e., copyright holders) to enlist the government to stop some press entities from publishing or broadcasting some content of their choice. As in the case of the individual speaker discussed above, at least at first glance nothing could be more censorious than to tell a publisher: "You cannot write that—you must write or say something else!" To put the claim in traditional doctrinal terms: copyright appears to be content-based suppression of speech—a characterization that currently seems to lead to almost automatic invalidation. 77 Either this characterization must be rejected, 78 the constitutional objection to content discrimination must be modified, or copyright must be seen as in tension, maybe in conflict, with the Press Clause.

V. QUESTIONABLE CONTENT-BASED REGULATION?

Although the answer is not without doubt 79 and, in fact, I will later suggest that different conclusions are likely to seem persuasive depending on the theory of the First Amendment a commentator adopts, 80 my claim is that copyright laws involve content-based suppression of speech in the simplest and most direct sense. Looked at from the perspective of the speaker, copyright restricts and is directed at restricting her choice of content. If content must be examined to determine if a law is violated then the law is content-based. Copyright infringements depend on the content of what the copier copies. A transgression occurs only if the speaker's (that is, the copier's) content duplicates someone else's "owned" content.

77. Cf. Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 196 (1983) ("[E]xcept when low value speech is at issue, the Court has invalidated almost every content-based restriction that it has considered in the past quarter-century.").

78. The categorization of whether or not a law is content-based is consistently controversial. Often, Justices who vote to uphold a law find it content-neutral while other Justices in the same case who would strike it down make a good (to my mind persuasive) case that it is content-based. See, e.g., Turner I, 512 U.S. 622, 623, 677-80 (1994); Hill v. Colorado, 530 U.S. 703, 723, 742-43 (2000); cf, Stone, supra note 77, at 251 ("The content-based and content-neutral concepts are not self-defining. . . . Careful scrutiny. . . . reveals an almost bewildering array of easily masked analytic refinements and distinctions.").


80. See infra text accompanying note 117.
Justice Brennan states a clear version of the traditional rule: "[A]ny restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it." 81 Similarly, in finding that a ban on editorializing by noncommercial broadcast stations was a content regulation, Brennan explained that to determine "whether a particular statement by station management constitutes an editorial . . . enforcement authorities must necessarily examine the content of the message." 82 Or, according to a standard formulation of the test for the only other alternative: "[C]ontent-neutral restrictions limit expression without regard to its content. They turn neither on their face nor as applied on the content or communicative impact of speech." 83 Essentially, the law is presumptively invalid when the means the government uses to advance its aims—presumably even good, nonspeech suppressive aims—is to suppress communications on the basis of its content.

Moreover, even if someone were to argue that copyright is not facially based on content, a second way a law can be content-based is if the concern motivating the law involves concerns about content. 84 Quite clearly the whole (constitutional) purpose of copyright involves the judgment that copyright leads to the creation and distribution of content that people value and that society is left with less valuable media content without the law—that is, copyright has a content-based purpose, specifically good or more valued content.

The Gay Olympics case might be cited to support a contrary view: namely, that copyright rules should be treated as content-neutral. 85 The Court upheld the congressional grant to the U.S. Olympic Committee of sole power to approve any use of the word "Olympic" for commercial or promotional purposes. (Interestingly, this legislative distinction between commercial and noncommercial purposes roughly conforms to this Essay’s conclusion that restrictions on noncommercial individual uses would violate the Speech Clause but regulation of commercial uses may be permissible, with

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84. See, e.g., Turner I, 512 U.S. 622, 642-43 (1994) ("But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing . . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.").
the ultimate conclusion depending on whether the purpose of regulating the commercial use runs afoul of the Press Clause.) In an appropriate context, I would prefer to criticize that holding. However, even accepting the Court's opinion, reliance on it for understanding copyright as content-neutral is unjustified. The majority never said a single word about whether the challenged act or its application was content-based or content-neutral. The majority did not address the dissent's analysis of this point. Instead, the majority simply argued that the case primarily concerned commercial or promotional uses of the term and that the law applies primarily to commercial speech. It cited the 

97 Central Hudson test, which the Court uses to evaluate and potentially approve not only content-based but even explicitly viewpoint-based regulations of commercial speech, thereby implicitly suggesting that the case may involve content discrimination but that the discrimination was not problematic in these circumstances. It noted that the statute does not apply to most noncommercial advocacy expression that uses the term “Olympics.” Finally, as to those noncommercial uses to which the law does apply, the Court invoked the unfair competition rationale of International News Service v. Associated Press. In other words, the majority decision is wholly consistent with the majority believing the intellectual property that the statute protected was content-based, but nevertheless constitutional because it involved commercial speech and a narrow analogy to unfair competition. Although the Court clearly operated on the unreflective assumption that trademark and copyright are generally constitutional, it nowhere implied that trademark and copyright are content-neutral laws. Thus, in any exploration of copyright that attempts to go back to basic principles, the case should be taken as irrelevant for the doctrinal question of what is meant by content-based regulation.

Three, somewhat related, claims might be invoked to resist the conclusion that copyright is constitutionally problematic as content-based regulation. Arguably, a regulation is not problematically content-based: (1) if its apparent focus on content involves only a concern with “secondary effects”; (2) if the law's “purpose” is good—that is, if the law is not based on the government disagreeing with, disparaging, or wanting to suppress some identifiable message or

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86. S.F. Arts & Athletics, 483 U.S. at 536 n.14.
87. Id. at 540.
89. S.F. Arts & Athletics, 483 U.S. at 536-37 nn.15, 16.
90. 248 U.S. 215 (1918).
suppress speech on some identifiable subject (which presumably copyright does not have such a bad purpose91); or (3) if the statute’s goal and most likely “effect” is good—that is, if its effect is actually to promote content that the statute apparently suppresses.

(i) The secondary effects analysis is routinely criticized. It purportedly leads to bad results and introduces tremendous doctrinal confusion.92 Still, as long as accepted, someone might claim that it can be applied to copyright. The claim would be that the government’s concern is only with the negative effect of potential copyright infringements on the original authors’ incentive to create, not with the purported infringer’s communication; and that this effect of the infringing content is a secondary effect unrelated to any government interest in the message contained in the infringing work. However, this argument has plausibility only due to the confused state of the secondary effects doctrine.

Possibly the closest analogy went the other way, striking the law as content-based rather than upholding it because the interest was only in secondary effects. The “Son of Sam” law struck down in Simon & Schuster, Inc. v. New York Crime Victims Board93 is in interesting ways the mirror image of a copyright law. While copyright protects the authors’ financial interests in their works, the “Son of Sam” law, designed ultimately to provide compensation for crime victims, operated more immediately to deny certain authors (namely, criminals) profits from writings describing their crime. The state asserted no interest in restricting particular content.94 The government could claim that its interest centered not on the message but only on the revenue produced—a secondary effect of the speech. The regulated speech held the capacity to provide revenue to serve as compensation, in Simon & Schuster, for crime victims or, in copyright, for incentives for authors. Even though the “Son of Sam” law burdened the criminal author and copyright rewards the author, burdening only the infringing publisher, both laws were adopted to advance these desirable “secondary” effects, not to suppress content. Nevertheless, the Court had no trouble

91. This characterization could be challenged. Someone might understand copyright law as premised on a romance with the author as an original creator and hence see the copyright as attempt to suppress expression that implicitly makes a contrary statement about the author’s role. See generally James Boyle, Shamans, Software, and Spleens: Law and the Construction of the Information Society (1996).
94. Id. at 118. The Court rejected this assertion as an adequate justification for the content discrimination. Id. at 119-21.
finding the “Son of Sam” law unconstitutionally content-based. If anything, copyright is doubly content-based. First, like the law in *Simon & Schuster*, its application requires examination of content. Second, the ultimate concern of copyright is also the content-based desire to promote the creation and distribution of presumably quality or “desired” content rather than the merely amateur communications that people would generate without an expectation of the economic rewards of ownership. That is, copyright is a policy designed to promote the first rather than the second type of content.

Despite confusion about the secondary effects doctrine and possible inconsistency in its usage, let me suggest a tenable way to understand it. Where the “harm” or “benefit” occurs only through an audience mentally assimilating the message, a facially content-based regulation is concerned with communicative content, not with secondary effects. When the harm occurs or at least can occur independent of anyone assimilating the message, the harm is a secondary effect. This interpretation treats as secondary effects the type of harms that concern the government in its time, place, and manner regulations (which are typically unconcerned with any mental assimilation of speech content)—and thus arguably explains why “secondary effects” are subjected to the same analysis as time, place, and manner regulation. It also explains the examples the Court gave in *Boos v. Barry*, and its discussion there of its earlier use of a secondary effects doctrine of *Renton v. Playtime Theatres*. In *Boos*, the Court explained that the “justifications [of the regulation of the location of adult theatres in *Renton*] had nothing to do

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95. As I read *Hill v. Colorado*, the Court interpreted the statute to restrict everyone from approaching someone arriving at an abortion clinic if the approach was to “engage in protest, education, or counseling” no matter what the content of their protest or educating speech. 530 U.S. 703, 720 (2000). Under the Court’s view, the statute not only applies regardless of the viewpoint expressed or the subject matter of the speech (e.g., to counsel about the need to provide earthquake relief in Turkey), but in addition, the statute picked these speech activities without any concern with the content of the speech. Rather, these activities of protesting, education, and counseling were picked on the basis of the reasonable legislative judgment that, when an approaching speaker has one of these purposes, her noncommunicative conduct, independent of the content she wishes to communicate, is more likely to be experienced as harassing and a nuisance. *Id.* at 719-20. That is, the statute protects against “potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range . . . .” *Id.* at 718 n.25 (emphasis added). The Court purportedly believed that the law was directed at these harms related to the physical approach and other predictable noncommunicative behavior, not at harms related to the content, and that the law had no objective of regulating content even as a means. I am inclined to think that, if the majority was right in its characterization of the law, which seems highly implausible, then a secondary effects analysis could support its holding.


with [the] speech," that the goal had "nothing to do with the actual films being shown . . . ." The Court distinguished between, on the one hand, a concern with movie theatres' effect on the surrounding community (a secondary effect) and, on the other, a concern that depends on the movies' effect on its viewers or on their subsequent behavior, for example, psychological harm to or violent incitement of viewers (implicitly, a primary effect). Thus, in Renton, the Court implicitly believed the justification for zoning applies even if all the viewers sleep through the movie. The justification, instead, relates to attracting people to the neighborhood due to those types of movies being shown even though these people (as well as the moviegoers themselves if they are asleep) may never see the movies whose content makes the ordinance applicable. Simply put, there is no government concern with people's assimilation of the content of the communication.

If this understanding is right, copyright is not aimed at bad secondary effects. Copyright's policy concern arises only because the audience of purported infringers see or hear—mentally assimilate—the infringing content. If they did not—if they used the infringing material to wrap fish—the receipt of the infringing content would not (negatively) affect the market for the original content. The feared "harm" in the copyright context is that if the audience assimilates the infringing content, then they will be less likely to make a duplicative purchase from the copyright owner. The justification is concerned with the speech content and with people assimilating it; the government wants to reward the content's original creator, presumably in order to promote creation and distribution of such quality (economically valued) speech content.

(ii) In Hill v. Colorado, the Court upheld a statute that prohibited a person from approaching within eight feet of a person who was within 100 feet of a health care facility if the approach was for the purpose of engaging in various specified speech activities. The

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98. Boos, 485 U.S. at 320.
99. Id. at 321. Quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976), the Court in Renton referred to "those [restrictions] that 'are justified without reference to the content of the regulated speech.' " Id. at 320. Confusion in the secondary effects analysis occurs because someone might think that anytime the regulation was justified not by the government's dislike of the message, but with a concern with its consequences, the justification concerned a secondary effect. Such an interpretation would apply to a concern with the psychological harm to or incitement of the viewer (Renton) or with American relations with foreign governments that were angry at the United States because of the demonstrations (Boos). Since the Court has clearly rejected this reading of secondary effects, "justified without reference" must mean that the justification must not involve either the fact or consequences of people understanding the message.
Court emphasized that "[t]he principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message . . . ."\textsuperscript{100} The concurrence similarly argued that "key to determining whether [the Colorado statute] makes a content-based distinction . . . lies in understanding that content-based discriminations [are presumptively bad] because they . . . [disparage or suppress] some messages."\textsuperscript{101}

The dissent is arguably persuasive on multiple levels. It is easy to conclude that the Court not only was wrong to uphold the statute but was also wrong to believe the statute, which protected those entering an abortion clinic from being approached by those engaged in "oral protest, education, or counseling," neither did nor was intended to suppress or disparage certain messages within that context. Still, assume that the Court was right on these empirical issues. The majority's doctrinal claim that content discrimination does not exist without government opposition to the message may have been neither necessary nor even its best First Amendment argument for its holding.\textsuperscript{102} If accepted as a good statement of content discrimination law, however, the Court's conception of the "principal inquiry" undermines the characterization of copyright as content-based and clearly challenges my earlier characterization of content discriminations. At best, I would be able to claim a lack of clarity in the area.

As noted, the view in \textit{Hill} is not the only understanding of content discrimination. For example, in \textit{Turner I}, neither the dissent, which thought that the "must-carry" rules were content-based, nor the majority, which rejected that conclusion, thought "disagreement with [some] message" was needed to make the law content-based. The Court in \textit{Simon & Schuster} nowhere suggested that the content picked out by the statute represented messages about which the government disapproved or wanted to disparage. It is far from obvious that New York opposed speech that described past criminal behavior. In fact, the Court was even more explicit. In response to the claim that "discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas," the Court said: "This assertion is incor-

\begin{footnotes}
\item\textsuperscript{100} \textit{Hill}, 530 U.S. at 719 (emphasis added) (quoting Ward v. Rock Against Racism, 291 U.S. 781, 791 (1989)).
\item\textsuperscript{101} Id. at 735.
\item\textsuperscript{102} A better basis for the holding would be to characterize the law, given its interpretation by the Court, as justifiable because it was aimed at "secondary effects." \textit{See supra} note 95.
\end{footnotes}
rect; our cases have consistently held that "[i]llicit legislative intent is not the "sine qua non" of a violation of the First Amendment. Simon & Schuster need adduce 'no evidence of an improper censorial motive.'" 103

Thus, I hesitantly suggest that the Court in Hill is wrong (or at least inconsistent) to look for government disagreement with the message as a general test for determining whether a statute is content discriminatory. Rather, it would be right to hold that such disagreement is a sufficient but not necessary condition of a law being content-based. As suggested by the dissent in Hill, the majority's criterion might be more relevant for a different issue: to determine whether a statute that on its face does not require any examination of content should nevertheless be considered content-based because of its purpose. 104 Precedent amply supports this more limited use of the majority's inquiry. 105 This was precisely the relevant inquiry for evaluating the facially neutral law in Ward v. Rock Against Racism, 106 the main case that the Court in Hill cited for its criterion. 107 This is also the issue effectively made pivotal under O'Brien for

104. 530 U.S. at 741 (Scalia, J., dissenting).
105. Two informative points about the history of the Court's formulation, "because of disagreement with the message" or "content," are particularly interesting. First, although many laws are struck down as content-based discrimination, this formulation has only been used by the Supreme Court in ten free speech cases (according to my LEXIS search). Of these, all but Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) (involving an injunction that prohibited picketing activity within certain zones surrounding an abortion clinic), upheld the challenged law or regulation, suggesting that this formulation is used only when the Court wants to find that the law is not content-based. In fact, even in Schenck, although a portion of the law was invalidated, the Court did not find the law to be content-based and invalidated it on other grounds. Second is the context of its usage. Except for its original use in a case that the plurality characterized as involving secondary effects, Young v. American Mini Theatres, 427 U.S. 50 (1976), the next four cases all involved laws that were content-neutral on their face (assuming this is a fair characterization of Turner I). See Schenck, 519 U.S. 357 (1997); Turner I, 512 U.S. 622 (1994); United States v. Kokinda, 497 U.S. 720 (1990); Ward v. Rock Against Racism, 491 U.S. 781 (1989). Then, the formulation was used in several cases where the Court wanted to uphold government subsidy or expenditure programs, which might be described not as cases where the law was content-neutral but as cases showing that content concerns are often permissible in subsidy or expenditure contexts. See Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997). That gets us to Hill v. Colorado, 530 U.S. 703 (2000), where the majority was obviously straining to uphold the law. Of course, not too much should be made of this history. The Court may have been making similar doctrinal points in other cases but using different formulations of its test. Still, this history should warn against making too much of this language as a general test of when content-based regulation has occurred.

106. 491 U.S. at 791.
107. 530 U.S. at 719, 736-37. This is the relevance that Justice Scalia's dissent gives to these criteria, namely that they were a means to find a content basis of a law that was in addition to, not in place of, whether the law was facially content-based. See id. at 747.
laws that do not facially involve an examination of content or even of speech. In contrast, laws that facially make content crucial have been considered content-based without more—without even being plausibly aimed at speech with which the government disagrees. Going back to Mosley,\textsuperscript{108} the foundational case for the content discrimination doctrine, the Court explained that "[t]he central problem with Chicago's ordinance is that it described permissible picketing in terms of its subject matter."\textsuperscript{109} In Mosley, as in most subject matter discrimination cases, the unconstitutional content discrimination did not involve any apparent governmental desire to suppress the disfavored speech. In Mosley, all speech other than speech about a labor dispute was suppressed—but surely the government does not "disagree" (\textit{Hill}) with all messages other than those related to labor-management disputes. In \textit{League of Women Voters}, the government did not disagree with all editorials that the noncommercial stations might broadcast.\textsuperscript{110} If this critique of the dicta in \textit{Hill} is right, then copyright is not automatically saved by an absence of government disagreement with the disfavored (infringing) message anymore than the law in \textit{Simon \& Schuster}, \textit{Mosley}, or \textit{League of Women Voters} was. Copyright is content-based because it suppresses the infringer's speech on the basis of the speech having the same content (or, in copyright terms, sufficiently analogous content) as that created by the copyright holder.

(iii) A third argument for viewing copyright as not content-based discrimination is quite curious. Eventually I will reformulate it, not as a reason for changing the content-based characterization, but as a rationale for removing the characterization's critical sting in some contexts. The argument relates to a unique aspect of copyright's justification for barring "infringing" content. Usually, a regulation that suppresses content manifests an implicit view that, at least in the given context, the less of the restricted type of speech the better.\textsuperscript{111} Although the Court often talks of content discrimination, many unproblematic government activities discriminate, that is, differentiate, among contents in order to promote "good" content. Consider public school textbook decisions, public library purchases, or NEA arts funding. Arguably the First Amendment is best under-

\textsuperscript{108} Police Dep't of Chi. v. Mosley, 408 U.S. 92 (1972).
\textsuperscript{109} Id. at 95. The Court continued: "Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign." Id. (emphasis added).
stood to distinguish between content suppression and content promotion,\textsuperscript{112} condemning only the former.\textsuperscript{113} Of course, the point in objecting to the Hill formulation was that suppression is bad even if there was no hint that the government disagreed with the message being suppressed. Thus, in cases such as Mosley, where the state obviously did not disagree with all or most of the messages that were prohibited bases for picketing, given that people generally have the right to use streets and sidewalks for expressive purposes, the content-based discrimination was used overtly to suppress speech on the basis of content. Copyright might at first seem like it is on the wrong side of this line—it suppresses the infringer’s chosen content; this is precisely why I argued that it infringes the non-commercial speakers’ free speech rights. Nevertheless, copyright differs from typical cases of content suppression. It is designed to promote the very content—but not the same speaker—that it also suppresses. It suppresses content as a means of promoting the original creation, and presumably the subsequent commercial distribution, of the same content. Its aim is to have more of the content that, in relation to some speakers, it also suppresses. The question becomes whether this good end, more specifically, this speech-promotion end, should change the analysis?

The answer might be “no.” When the government suppresses speech, the purported reason is virtually always to serve a good end. The First Amendment is generally understood to forbid the suppression of content not just as an end but also as a means of furthering good ends, presumably even in furtherance of the good end of promoting more expression. Although criticism of the result in Buckley v. Valeo\textsuperscript{114} is rampant and although I too have rejected the case’s outcome,\textsuperscript{115} as a general matter I continue to agree with the


\textsuperscript{113} The O’Brien test requires that the government interest be “unrelated to the suppression of free expression.” 391 U.S. at 377.

\textsuperscript{114} 424 U.S. 1 (1976) (striking down limitations on campaign expenditures). This is also illustrated by the Court’s unwillingness to accept the “silencing” arguments that have been popular among academic commentators. Compare Am. Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (striking down an Indianapolis ordinance banning pornography), aff’d, 475 U.S. 1001 (1986), with Catherine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1 (1985) (critiquing pornography in part because of its effect of silencing women). See also Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431 (critiquing racist speech in part because if its silencing effects); Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation, 56 Tenn. L. Rev. 291 (1989).

Court's central claim that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Suppressing speech is not generally a permissible way to promote speech. Of course, this assertion would be wrong in certain contexts. At a town meeting, for example, the government can limit the time any particular participant gets to speak so that there will be time for other speakers—as well as rule some speakers out of order because the content of their speech is not germane to the topic under discussion. Still, as a general principle the government should not be permitted to adopt laws aimed at suppressing First Amendment freedoms, either as an end or a means, even if the purpose is good (as there will always be an argument that it is), including for the good purpose of promoting speech overall or improving the quality of public discourse.

This assertion of a general principle may have been too hasty. The deep instinct of some commentators not to find copyright a form of content discrimination and the Court's own conflicting messages about content discrimination should give one pause. My suggestion is that in part the conflicting impulses reflect the logic of different understandings of the basis of the First Amendment. If "what is essential is not that everyone shall speak, but that everything worth saying shall be said," then the constitutional concern should only be with overall suppression of particular content. More generally, in a marketplace of ideas theory, the limitation on someone's speech, even on the basis of content, should be irrelevant as long as that content is likely to be made effectively available to the public. Moreover, if the suppression increases the likelihood of the availability of speech with that content, as copyright purportedly does, then, from a First Amendment perspective, the suppression is not only permissible but desirable. In contrast, if the constitutional concern is with individual liberty, that liberty is abridged whenever a law tells a person that she cannot say what she would choose. When prevented from speaking because of the content of her speech, the law has targeted and abridged her expressive liberty even if it has done so for some other, presumably good, end. If these claims are right, then someone who adopts an expressive liberty understanding of the First Amendment will follow the dominant doctrine in this area and find any limitation on a person's speech

116. Buckley, 424 U.S. at 48-49.
based on content to be content-based and at least constitutionally problematic. In contrast, someone who (consciously or unconsciously) adopts a marketplace of ideas or related understanding of the First Amendment is likely to be attracted by the view of content discrimination offered by Hill. More generally, this market-based theorist would find no objectionable content discrimination if the purpose and overall effect is not to suppress but to promote content. These alternative conceptions of content discrimination raise the interesting possibility considered in the next section.

VI. CONTENT DISCRIMINATION AND THE PRESS CLAUSE

Remember the claim that the Speech and Press Clauses have different functions. Given that the Speech Clause is concerned with individual liberty, it would follow that when copyright regulations come up against an individual’s freedom to speak, the conclusion should be that the regulation unconstitutionally regulates content. In contrast, the Press Clause is instrumentally concerned with providing the public with a robust range of expressive content—roughly a marketplace of ideas concern. Thus, when the Press Clause comes up against a content-based rule that is effectively designed to provide for more or better creation and distribution of vision and information, the Press Clause analysis should not object. Two characterizations are possible here. Either the Press Clause analysis could assert that this is not content discrimination or, arguably better, it could hold that this overt content discrimination is benign and constitutionally unproblematic.

In decisions involving media structural regulation, the Court has allowed the government to restrict corporate media entities’ speech (or otherwise regulate media operations) in order to promote more valuable or more endangered expressive content. These

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118. This part draws heavily on Baker, supra note 52.

119. Media law is riddled with access and “must-carry” rules that have this quality. These laws restrict or burden the media owners’ ability to speak by mandating use of their facilities by others, typically out of a belief that the others will bring perspectives otherwise underrepresented within the communications mix. See, e.g., Turner II, 520 U.S. 180 (1997); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); CBS v. FCC, 453 U.S. 367 (1981); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); see also Children’s Television Act of 1990, 47 U.S.C. § 303a, 303b (1994). Although sometimes not explicitly content-based, media-specific structural rules in the print arena have also aimed at promoting a more diverse and robust communications realm—that is, they aim to promote content that the government fears would otherwise be endangered. These laws range from postal subsidies to the Newspaper Preservation Act or to requirements that advertisements be identified as such and ownership information be published in the paper. Lewis Pub’l Co. v. Morgan, 229 U.S. 288 (1913). The most dramatic sacrifice of an entity’s speech freedom (the owner’s control over speech) in order to
holdings clearly seem inconsistent with the Court’s unwillingness to *Mosley* allow the government to promote favored content, even of a subject matter sort. Note, however, that the *Mosley* case occurred in a context, picketing before a school building, where *individuals* wanted to express themselves and, thus, the Speech Clause analysis was appropriate. Despite Court protests to the contrary (e.g., in *Turner I*\(^1\))\(^\text{120}\)\(^\text{1}\), surely these approved regulations in the media context have been concerned with content. The government properly promotes the availability of content categories to which it believes the public should have better access. The government’s usual means are to regulate uses of newspaper, broadcast, or cable facilities owned by private communications enterprises. The result, in effect, is often that less communicative space—less broadcast time or cable carriage capacity—is available for the owner to present content that it chooses. Importantly, however, the speech that the government inevitably and knowingly disadvantages (e.g., speech of or chosen by the media enterprise) is not disadvantaged out of any disagreement with the speech or even desire to restrict that speech. Rather, like the speech of a would-be copyright infringer, speech is disadvantaged only as a consequence of promoting speech that the government thinks would otherwise be underproduced and distributed. Again, as with copyright laws, the government hopes that the regulations make more or better diverse content more available. *Mosley* would, but on one reading, *Hill* would not find this to be constitutionally problematic content discrimination.

The analogy of these media regulation cases to copyright is overt. Copyright, like most structural media policies, restricts some speech by some speakers—the would-be copyright infringers—to favor other speakers, the copyright owners, in the hopes that this will produce a better overall realm of diverse and valued communications. The hope is that copyright will even lead to more creation and distribution of precisely the (infringing) speech content that

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\(^{120}\) Despite the majority’s claim that the “must-carry” rules were not concerned with content, the explicit statements in the law, quoted by the dissent, suggest that the dissent got the better of this argument. Where the dissent went wrong was in concluding that this content concern should make the law constitutionally problematic. See Baker, *supra* note 52.
copyright law suppresses. In substance, the government concludes that the professional, high-quality communications that it believes copyright stimulates are more valuable and add more to the communications realm than what is lost to the marketplace of ideas by suppressing the infringer's speech. Of course, from the perspective of individual liberty, speech-suppressive means are impermissible even if maximizing valuable speech (as the government sees it) is the result.\textsuperscript{121} But from the Press Clause perspective, this aim is precisely the right objective, and particular means are not excluded. The question from the Press Clause perspective is empirical: Does a better and more diverse communications realm result from protecting an economic return, made available to some speakers by copyright, or by allowing opportunities for unrestricted commercial copying? It is clear that the answer does not always disfavor copyright. The Press Clause determination should turn on the plausibility of that policy conclusion in relation to particular copyright rules.

This dual Speech Clause/Press Clause approach, though surely more disruptive than the copyright bar will find appealing, turns out to be not at all out of line with the historical role and scope of copyright. Copyright largely developed not to give authors complete dominion over some sort of intellectual creation, but to provide enough incentives to promote creation and distribution of intellectual products by preventing what might be described as unfair forms of commercial competition. Personal uses, for example, were not even covered by early copyright legislation.\textsuperscript{122} Expanding the current scope of permitted personal uses allows all that the Speech Clause guarantees but would not destroy (though it will sometimes marginally reduce) the commercial value of copyright. Thus, although these personal uses add greatly to speech opportunities and individual liberty, they would hardly eliminate copyright's effectiveness at serving its legitimate policy purposes. The Press Clause—as will be further discussed below—might restrict the permissible scope or form of copyright protection. However, these limits will not be inconsistent with the underlying purpose or

\textsuperscript{121} Post's essay \textit{Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse} makes this point powerfully. See ROBERT POST, CONSTITUTIONAL DOMAINS 268-89 (1995). Where Post goes wrong in his critique of Sunstein is that noninterference in the realm of the press, which is itself necessarily structured either well or poorly by law, makes no sense. Sunstein's call for a New Deal for speech, on the other hand, with its strong analogy to the New Deal's recognition that there is no prelaw conception of legal entities and property on which to fall back, such that legal structuring is inevitable, makes considerable sense in relation to the press but not with respect to individuals, whose structure we usually do not think requires much legal structuring. See Cass R. Sunstein, \textit{Free Speech Now}, 59 U. CHI. L. REV. 255 (1992).

\textsuperscript{122} See, e.g., PATTERSON, supra note 35.
method of copyright—in part because any such constitutional limits will be serving the same purpose, making diverse communications available to the public, as copyright grants are intended to serve.

These conclusions obviously depend on a particular interpretation of the First Amendment: namely, that the Speech Clause concerns individual liberty and the Press Clause is instrumentally aimed at protecting a democratically needed robust and diverse communications order. Although controversial, this theory does a lot of necessary doctrinal constitutional work outside the copyright context and arguably does it more successfully than any other theory. For example, only this two-clause, dual-purpose interpretation reconciles the issues around the appropriate interpretation of content discrimination described earlier. That is, it explains the constitutional objections to content discriminations (and suppression) in the case of individual and nonmarket oriented speakers while, at the same time, explaining the propriety of content-oriented policy justifications for, and constitutional permissibility of, the similar content-based discriminations in structuring the industrial order in the realm of commercial communications. “Suppressing some speech as a means” is inconsistent with speech freedom but often not with the instrumental rationale of the Press Clause.

Speech freedom protects an individual’s expressive choice. The individual should be free to choose what to say. To tell a person that she cannot communicate something that she wants to say directly suppresses her expressive freedom—just as does telling her that she must say specific words authored by someone else that she finds offensive, like a pledge of allegiance to a flag.\textsuperscript{123} Her choice to express herself by repeating or distributing someone else’s initially authored words (or to retain access to specific intellectual products) does not lessen the fact that her freedom is at stake.

In contrast, media entities, typically corporate bodies, have no intrinsic moral autonomy that the law must respect. The rationale for constitutional protection of the press is that aspects of its freedom make absolutely vital contributions to democracy and to society’s need for an independent source of information and vision. Here, censorship of ideas or information must be forbidden, and laws that undermine the press’s institutional capacity for independent action and judgment are constitutionally objectionable. Nevertheless, government intervention is often needed to help create a more robust press. In media cases involving access require-

ments or mandated attention to particular subjects, individual liberty is not at stake as it had been in the Barnette flag salute case. Thus, in these cases the Court properly approves laws that compel speech that the media entity would not choose to present. These legislative interventions aim at correcting for circumstances that make media entities less likely to perform their democratic or social roles. The policy rationale is broadly content related. The government expects these rules to add diversity or increase exposure to otherwise underprovided content. In response to the citation of Miami Herald Publishing Co. v. Tornillo invoked for the proposition that the government could not require speech by a media entity, the Court in Turner I explained that the problem with the candidate's asserted right to reply in Tornillo was that it penalized and might deter the speech that triggered the reply right.

The Court did not seem bothered that Turner I involved compelled speech (and interpreted Tornillo as not making that fact crucial), which would be fatal in the context of individual speakers. Thus, as in other media access cases, the Court in Turner I approved compelled content that responds to predicted content failures of the media order while not deterring or penalizing any other content. This judicial approval, however, makes sense only if the relevant constitutional concern in these media cases is with the functional (i.e., marketplace of ideas) role of the media as opposed to a notion of individual liberty.

Interestingly, the Court in Turner I implicitly accepted the rationale that Justice Frankfurter made in dissent but that the Court implicitly rejected in Barnette. Frankfurter thought the mandatory flag salute did not impair communicative freedom (or, implicitly the marketplace of ideas) because the compelled student and her parents remained free to express themselves about flags or

124. See, e.g., supra note 119 (citing authorities).
127. 512 U.S. 622, 644, 653-55 (1994). Though the primary dissent thought that Tornillo applied because it concluded the law was content-based, it too thought that a true content-neutral requirement that compelled speech would not generate a powerful First Amendment objection. See id. at 684-85 (O'Connor, J., concurring in part and dissenting in part).
128. See supra note 119 (citing authorities).
flag saluting. 130 In contrast, the majority in Barnette invalidated the compulsion due to its emphasis on the centrality of individual liberty to the meaning of the First Amendment. My claim here is that the Court's apparent contradictory holdings in Barnette and Turner I got it right in both cases. Compulsion (or prohibition) is impermissible as to the individual's freedom of speech (Barnette) but sometimes permissible as a means to improve the overall communications environment in relation to a free press (Turner I). Since the cases involved no censorship, the Court could approve compelled speech in the press context that would improperly impinge on individual liberty in the speech context.

The same distinctions can be applied in copyright, although in one respect copyright differs from these media law examples of permissible legislative intervention. Copyright allows the infringer's speech to be suppressed, not just mandated. (Even under compulsory licensing, the copier must pay. For constitutional purposes—certainly for speech purposes—mandating payment to speak is generally a form of suppression or censorship when based on content.) If suppression of expressive choices, whether by individuals or media entities, is always properly viewed as impermissible censorship, all copyright should fall. However, this conclusion should be resisted. The different rationales of the Speech and Press Clauses justify a closer examination to determine whether the relevant freedom is actually restricted in each case.

Barring a person from saying what she chooses to say automatically interferes with speech liberty. Her peculiar choice of words, even her choice to speak through the words of another, can be the exercise of her expressive freedom. Press freedom, however, protects the press's unimpeded, uncensored, opportunity to perform its constitutionally based role: being an independent source of information and vision. Copyright is unconstitutionally inconsistent with this role if either (1) it restricts the press's right to publish facts or ideas or (2) it is directed at dampening the press's contribution to a robust public sphere. Copyright, however, is generally justified precisely in terms of enhancing, not dampening, media entities' capacity to perform their role. It supposedly leads to more and

130. According to Justice Frankfurter, "[i]t is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity . . . to disavow as publicly as they choose . . . the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I [would strike it down]." Id. at 964 (Frankfurter, J., dissenting).
higher quality provision of information and vision. If this content-based rationale is plausible, the second problem is not raised. Moreover, under deeply ingrained aspects of existing copyright law, the first objection generally does not apply. It has long been understood that facts or ideas cannot be copyrighted.\textsuperscript{131} The claim here is that this limitation is not merely a policy decision that could be changed legislatively but is constitutionally mandated, as are many aspects of "fair use," including the automatic existence of fair use when another's particular set of words is itself the "news"—the relevant "fact."\textsuperscript{132}

These limitations on copyright embodied in existing law, and maybe others yet to be considered, respond to the same goal of a robust and informative communications environment that lies behind the Press Clause's limitation on government power to abridge press freedom. From the perspective of the rationale of the Press Clause, beyond these constitutionally necessary but currently existing limits on copyright, copyright's restrictions on commercially copying other people's expressive formulations generally pose no constitutional problem. The constitutional value underlying the Press Clause concerns the availability of facts and ideas, not particular entities getting to use their preferred (i.e., copied) expressive formulations. The prohibition on using someone else's words is not inherently inconsistent with the press freely and effectively serving its constitutional role of providing information or vision. Thus, copyright's content-based suppression of copying particular expressions is permissible in the media realm as long as copyright's rules plausibly promote a more robust and independent press sphere.

In sum, copyright is directly content-based—its application turns on content, and it directly restricts some speakers' use of that content. It is also content-based in its purpose—its goal is to stimulate creation and distribution of better, more professional, and maybe more diverse content. Whether this content basis makes copyright constitutionally objectionable is a different story. My claim is that it does when applied to restrict an individual's non-commercial expressive activities. Here, copyright limits speech that


\textsuperscript{132} See, e.g., Harper & Row Publishers, 471 U.S. at 563 (suggesting that President Ford's characterization of the Nixon tapes as the "smoking gun" may be an expression necessary to fully report the facts).
the individual finds expressive—content that she wants to quote, spread, and maybe endorse. The same limitation on copying or repeating in the media area has a different constitutional significance. Here, content discrimination is objectionable only to the extent that it interferes with the press's constitutional role. Even if some copyright rules could do that—so far restrictions on facts and ideas have been identified—a very plausible (hence constitutionally permissible) legislative judgment is that copyright usually does not interfere and sometimes may provide crucial support for the press's constitutional role.\(^{133}\) Thus, despite being a content-based suppression of infringers' speech, copyright as a form of media policy is constitutionally authorized (under the Article I grant of power) and can be constitutionally permissible (under the First Amendment).\(^{134}\)

VII. PRESS CLAUSE LIMITS ON COPYRIGHT

The Press Clause stands in opposition to any intellectual property provision that predictably reduces the public availability of different visions and factual accounts. On this ground, I endorsed the widespread view that allowing the copyright of facts or ideas would be unconstitutional. Given the usual centrist inclinations of both lawmakers and, often, of market forces, constitutional review should also find especially troublesome any tendency to reduce dissenting, marginal, or non-mainstream perspectives. Although an attempt to provide a complete list and full analysis of possible Press Clause limits on copyright is hardly plausible here, a brief discussion can illustrate the potential.

\(^{133}\) See, e.g., Netanel, supra note 28, at 1899-1932.

\(^{134}\) The Court in *International News Service v. Associated Press*, 248 U.S. 215 (1918), made common law distinctions very similar to those here asserted on the basis of First Amendment theory, thereby intuitively supporting the wisdom of the constitutional approach developed in this Essay. The Court repeatedly emphasized that the case did not involve any restriction on the public copying and "spread[ing] . . . of its contents gratuitously," but only involved rights as between commercial competitors. *Id.* at 238. Even Justice Brandeis's dissent concluded with the observation that "the propriety of some remedy seems to be clear," implicitly agreeing that law could properly regulate not just the news business but could limit newspapers' content choices despite the general rule that intellectual productions should be "free as the air to common use." *Id.* at 250, 267 (Brandeis, J., dissenting). Justice Brandeis's only substantial disagreement with the majority, especially important given the particular historical context of the public's need for vital war reports, was over whether a court or, as he thought, a legislature would more wisely and legitimately formulate a remedy. *Id.* at 265-67 (Brandeis, J., dissenting).
A. Transformative Uses

Possibly the highest priority is to protect transformative uses: an integration into a different expressive context that changes or expands the meaning of the copyrighted expression. Uses as varied as becoming the organizing focus of a discussion, a parody, or an imaginative expansion on a presently copyrighted work are illustrative. "Appropriation" for inclusion in expression alien to that of the original can stimulate enormous opposition from "loyalists," as illustrated in a noncopyright context by the political storms over various purported disrespectful "artistic" uses of various religious symbols—crosses, Madonnas, and Christ figures. Similarly, in an intellectual property colloquium, a major copyright scholar tried to generate horror by imagining that copyright be interpreted to allow an "infringer" to feature, without obtaining the predictably denied permission, the popular fictional character, Harry Potter, in a tale such as "Harry Potter: The Axe Murder." On the contrary, such culturally challenging transformations—"exploitations!"—are precisely what the First Amendment most clearly should protect. (Properly interpreted, the Copyright Clause itself may not have authorized such legislative limitations on these uses.) The normative principle is that authors should have the right to contribute to, not exercise power over, cultural discourse and change.

Close cases may be found where the line is thin between merely gaining economic benefit from the use of another's work and using the work to create something new. Moreover, users typically should have no right to benefit by fraudulently (of course, this term represents the conclusion of the analysis) passing her product off as that of another, e.g., the copyright holder. In various contexts, the Court has properly held that the First Amendment does not protect "knowing falsehoods" that treat others instrumentally for the speaker's own purposes. This is what would be occurring in the "passing off" context, at least if the purported infringer does or should know that, even after viewing, hearing, or reading her as-

136. The fact that there will be difficult cases of line drawing, which should reflect the normative content of the rationales and not mechanical tests, see Baker, supra note 52, at 114-27. does not mean that there will not be important easy cases see, e.g., SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (protecting Alice Randall's The Wind Done Gone, a transformative use of the novel Gone with the Wind).
138. See, e.g., Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (characterizing "known lie as a tool").
sented transformation, people are likely to mistake it for the original author’s work.\textsuperscript{139} Still, the point of the Press Clause—protecting the process of providing independent and diverse sources of information and vision—requires a constitutionally grounded (fair use) privilege for broadly conceived category of transformative uses.

Especially if the Press Clause is thought to support either a complex or liberal pluralist notion of democracy,\textsuperscript{140} the First Amendment should especially protect dissident or norm-challenging uses of copyrighted materials.\textsuperscript{141} This consideration provides the constitutionally required reason for an expansive reading of the privilege to engage in transformative uses.\textsuperscript{142} The privilege should be read to prevent any stifling of diverse, especially dissenting or non-mainstream, expression. These uses are also precisely the ones for which many copyright holders, even for a payment, are least likely to give consent.\textsuperscript{143} Thus, both the rationale for and the need for a privilege to ignore the author’s copyright claim exists here at a heightened level. Of course, since existing copyright law already provides considerable fair use privileges for these transformative and parodic uses, these observations are not too radical. Still, current law frequently rejects the claim. For example, the law holds that copyright protects derivative products and exploitation of new markets,\textsuperscript{144} an arena where the Press Clause concerns may require a retreat from these economically valuable but culturally limiting rules. In sum, these constitutional considerations call for democ-

\textsuperscript{139} The opposite—false attributions—can also be forbidden. See, e.g., Cher v. Forum Int’l, 692 F.2d 634, 639 (9th Cir. 1982).

\textsuperscript{140} Baker, supra note 25 (discussing the implications of various theories of democracy for the role of the press). The point is much less clear-cut from the perspective of elite democracy, where virtually the only role of the Press Clause is to protect the press’s capacity to serve as a watchdog, or from a republican conception of democracy, which most fundamentally seeks common ground. Id. at 125-213.


\textsuperscript{143} This was precisely the situation with respect to Gone with the Wind, and Judge Marcus identified that fact as one of the evils that fair use should be employed to prevent. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1277, 1282-83 (11th Cir. 2001) (Marcus, J., concurring); see also Madow, supra note 60, at 144 (illustrating this theme with the case of the estate of John Wayne refusing to allow the use of an image of John Wayne wearing lipstick on a greeting card with an inscription saying “It’s a bitch being butch,” and objecting to the existence of legal power to suppress a “semiotic democracy”)

\textsuperscript{144} 17 U.S.C. § 106(2) (1994) (granting creator a right over derivative works).
ratically very significant, even if practically quite marginal, changes in the law.146

B. Unpublished Materials

A long-running dispute, recently encouraged by language in Harper & Row Publishers, Inc. v. Nation Enterprises,146 concerns third parties’ publication of content that liberally quotes unpublished materials. The consequence of recognizing copyright protection here could seriously impair historically and politically significant uses of an author’s writings.147 If copyright protection could avoid seriously restricting the media’s opportunity to publish this content while simultaneously protecting potential authors in a manner designed to encourage them to publish, copyright would serve the constitutionally based purposes of both the Copyright Clause and the Press Clause. These dual objectives would possibly mean attempts to “scoop” an author’s imminent publication merit little legal sympathy.148 However, any purported right of an author to determine when, and especially, whether to publish interferes directly with the press’s role of providing information. Such a right should be rejected on First Amendment grounds.

Although denial of the author’s right may seem to conflict with respect for privacy, the issue here does not involve compelling an author to hand over or otherwise disclose her private writings.

145. This may underestimate the change called for with respect to freeing up new creators to engage in behavior that presently constitute derivative works. Interestingly, this may be the area where the routine interests of individual content creators and the larger corporate entities which end up holding most copyrights that are exploited in making derivative works most typically diverge—with even commercially oriented, corporately employed creative or artistic personnel regularly engaged in “borrowings” or appropriations that can be seen as making derivative works. Less copyright protection is likely to have both desirable distributive and desirable cultural, pro-creative consequences—although my constitutional argument does not depend on these empirical predictions. Cf. Madow, supra note 60 (making similar predictions about the consequences of rejecting any legally protected right of publicity).

146. 471 U.S. 539 (1985). The Court emphasized that “fair use traditionally was not recognized as a defense to charges of copying from an author’s as yet unpublished works” and at common law the author’s right in a work was absolute until he voluntarily parted with it. Id. at 550-51.


148. Because the decision in Harper & Row Publishers involved multiple issues, this point about protecting against unfair scoops may be insufficient to justify the Court’s holding to doubters (like myself). The point may, however, provide the best argument for the majority result and suggests an appropriate basis for limiting the decision.
Rather, the issue is: Can the original author control further dissemination once her expression is already known by another? The immediate observation is that privacy protection is not a basis for Congress’s power under the Copyright Clause, which instead is only intended to increase the information available to society. Of course, the greater security to authors that a privacy-oriented copyright rule would provide might increase people’s willingness to fix their intimate thoughts to a tangible medium and eventually to make them available. In any event, protecting privacy is a high-sounding goal. Someone might think that surely the government should be permitted to use copyright to serve it. The trouble is that the First Amendment limits the means by which privacy can be protected just as it limits the ways an author’s economic interests can be advanced. The state should (and does) provide privacy with many legal protections. It restricts trespass by strangers, including the press, into a person’s home; it prohibits theft of manuscripts; and it restricts tapping into a person’s wired or wireless electronic communications.149 The state, however, should not protect privacy by means that directly restrict the media’s right to publish what they choose and individuals to say what they want.150 As currently understood, the First Amendment severely restricts carving out a broad realm of private information or private content that others cannot communicate.151 Copyright protection for unpublished materials would do precisely that.

From a First Amendment perspective, the question is whether the law can give a person a right to stop publication as a means of honoring or protecting a person’s interest in privacy. The answer is “no”. Often the First Amendment even disallows legal

149. The constitutionality of applying these laws to restrict reporters and thereby the press is not particularly controversial. See, e.g., Wilson v. Layne, 526 U.S. 603, 613-14 (1999). Rather, without questioning the basic legal protection of private space, what is controversial is whether someone not a party to the invasion of privacy can be prohibited from publishing information that was originally obtained through the tort or crime, see, e.g., Bartricki v. Vopper, 532 U.S. 514 (2001), or whether damages for the wrongdoing can cover the injury due to publication and spread of the illegally obtained information, see, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522-24 (4th Cir. 1999).


151. In upholding a First Amendment claim in a case where a newspaper violated state law by identifying by name the victim of a sexual assault, Justice Marshall cautioned that “although our decisions have without exception upheld the press’ right to publish, we have emphasized each time that we were resolving this conflict [between a free press and personal privacy] only as it arose in a discrete factual context.” Fla. Star v. B.J.F., 491 U.S. 524, 530 (1989) (emphasis added). See generally Diane L. Zimmerman, Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Test, 68 CORNELL L. REV. 291 (1983).
prohibitions on publishing information that was originally obtained through illegal activity. Similarly, allowing a copyright holder to stop publication of unpublished material is suppression of information. This restraint is presumptively inconsistent with the Press Clause. A person’s freedom not to speak or write or disclose protects her original control. Once the press has the knowledge, however, the government should not censor what it can print. Of course, the Press Clause-based First Amendment right might typically be satisfied by copyright’s fact/expression distinction. The constitutional interest is sufficiently served if the press is able to summarize the illegally taped or the copyrighted material. However, when the unique expression is itself “news” or historically or culturally valuable content, the constitutional right must extend further. More generally, the policy values that underlie the Press Clause further explain why the fair use presumption should be especially strong, not especially weak, in situations where the author has not published and not indicated any plans to do so. The infringer is likely to be the only party willing to bring the expression before the public in a timely fashion.

**C. Remedies**

The Press Clause also arguably limits the way the government designs the remedies portion of the copyright system. Go back to the rationale for recognizing copyrights. These rights add to the economic incentives purportedly needed to get some authors to create and publishers to distribute valuable expression. At bottom, the copyright system is justified as media-promoting legislation. Underlying copyright rules perfectly designed for these purposes would

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152. Barteniicki, 532 U.S. at 514 (finding, in the limited circumstances of the case, that the wiretap law’s prohibition on publishing contents of illegally recorded conversations violated the First Amendment); cf. Neb. Press Ass’n v. Stuart, 427 U.S. 539 (1976). In Nebraska Press, a majority of the Court may have agreed with Justice Brennan that it is always unconstitutional for a state to prohibit a defendant’s right to a fair trial by means of prohibiting publication of information, “no matter how shabby the means by which the information is obtained.” Neb. Press Ass’n, 427 U.S. at 588 (Brennan, Stewart, and Marshall, JJ., concurring); see id. at 570-71 (White, J., concurring); id. at 617 (Stevens, J., concurring). Another case, Cohen v. Cowles Media Co., 501 U.S. 663 (1991), is clearly distinguishable from both cases because the press knowingly and purposefully agreed to the restriction on publication.

153. See, e.g., Landmark Communications v. Virginia, 455 U.S. 829 (1978) (holding that state’s interest in maintaining confidentiality of information regarding proceedings of Judicial Inquiry and Review Commission justifies nondisclosure and secrecy but prohibiting “strangers” to the proceeding from divulging or publishing the information violates First Amendment).

154. This point might help justify the narrowness of the decision in Barteniicki, where the court did not reach the issue of whether the law could constitutionally protect less newsworthy expression. 532 U.S. at 533.
leave little cause for constitutional concern about the particular scheme chosen for their enforcement. The logic of a full protection theory of the First Amendment requires a determination of whether a substantive rule does or does not restrict speech in violation of the First Amendment. The Court has never suggested, for example, that First Amendment rights are differentially offended by criminal and civil penalties; either there is a right that can be offended by either penalty or there is no right so either can be applied.\footnote{155} Inevitably, however, mistakes in legal crafting of or applying copyright rules will occur. Some mistakes will grant too much control to the author-owner. A court might defer too readily to legislative bodies, especially on more fact-based policy judgments. Or a court, like an apparently well-intended but poorly calculating legislature, might itself err in not constitutionally overriding the copyright grant. No degree of legislative integrity or judicial interpretive care can do away with this potential for “constitutional” error.

The loss due to constitutional error would be reduced if the law did not allow copyright owners entirely to block apparently illegal, transgressive “copying.” For this reason, any transgressor should be able to copy in order to engage in her preferred expression as long as she pays the copyright holder for his economic loss, including any compensation necessary to cover the gain he could have reasonably hoped to receive by delaying publication. Not only does this principle rule out damages based on the copier’s purported unjust enrichment,\footnote{156} or based on values unrelated to the legitimate purposes of copyright, such as damages for lost privacy. More importantly, this principle rules out injunctions as long as payment is made. Note, however, that this argument does not rule out injunctions entirely. An injunction lasting until the transgressor demonstrates a capacity and willingness to pay might be permissible. Without engaging in a full discussion, it is also clear that this argument does not rule out all temporary injunctions during a short

\footnote{155. This may be an overstatement to the extent that the Justices indicate a willingness to engage in legislative-like balancing. See FCC v. Pacifica Found., 438 U.S. 726 (1978); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). My claim, however, applies within a full protection theory and is well illustrated by Justice Brennan’s dissent in Gertz. 418 U.S. at 361-69 (Brennan, J., dissenting).

156. A recovery for unjust enrichment is inconsistent with the view that the copier serves the public by making the material available and serves it well to the extent that she makes the content more effectively—potentially more profitably—available than the copyright owner would have.
period in which the parties’ respective rights are worked out.\textsuperscript{157} Still, a permanent injunction clearly would be impermissible, as would any injunction applicable after the infringer credibly offers to pay damages. Essentially, this approach amounts to a constitutionally mandated, judicially determined license fee. After reliable evidence of a willingness to pay the “fee,” further resistance by a copyright owner to the copier’s use suggests reasons other than receiving the economic incentive which justifies copyright as media policy. These reasons include privacy, maintaining or gaining political power, and preserving possibly undeserved reputation. These reasons, however, even though generally worthy of respect, are not permissible bases for restricting the press’s freedom to make publication decisions.

\textit{D. Interpretative Stance}

A final observation concerns the appropriate judicial predisposition in approaching copyright issues—either their interpretative orientation toward claims of fair use and other matters of statutory reach or their general attitude toward constitutional challenges to copyright rules. Earlier I noted reasons for constitutional courts to give legislative branches considerable deference regarding structural media policy. I admitted that much depends on the particular theory of democracy that is considered appropriate.\textsuperscript{158} Elite democracy combined with a generalized faith in the market leads to general policy opposition to and constitutional presumptions against media-specific, legislative interventions—and the same \textit{might} follow for republican democrats. Liberal pluralists, concerned with how the market predictably underserves diversity in the media field, often would favor and, arguably, sometimes would mandate governmental interventions. Complex democracy requires both media that both serves republican democracy’s goal of a unified, society-wide discourse and also, as the liberal pluralists emphasize, media that serve the discourse, organization, and activist needs of segmented groups. Determining which discourse is, or whether neither or both are, underserved is a complicated, contextual matter.

\textsuperscript{157} Cf. Carroll v. President & Comm’rs, 393 U.S. 175 (1969) (holding that the First Amendment requires procedural protections on government restrictions of rallies or meetings); Freedman v. Maryland, 380 U.S. 51 (1965) (holding that severe procedural limitations, including requirement of speedy decision, are constitutionally required before prior restraints can be used during the process of determining if a movie is obscene).

\textsuperscript{158} For a discussion of these claims about different theories of democracy and support for complex democracy, see BAKER, supra note 28, at 125-213.
To allow appropriate policy responses, a complex democrat should normally avoid a heavy-handed constitutional stance in favor of allowing legislative choice among a wide range of plausible policy options.

With the exception of elitist democracy, all these theories of democracy purport to favor popular democratic participation. They divide over the type of professional media that participatory democracy requires. However, this framing of the disagreement ignores a second divide: the relation, in a properly functioning democracy, of professional to more voluntaristic communication structures. Both are clearly vital for democracy. Still, the question can always be posed whether the market and legal order inadequately nourishes or disadvantages one or the other of these communication spheres—the professional or the voluntarist—or, on the other hand, whether one sphere is unnecessarily and inappropriately given dominance. The Speech Clause discussed in the first part of this Essay, arguing for a virtually complete exemption of nonmarket oriented speech from copyright restraint, partly responds to the need to protect the voluntarist side of democratic communications. This realm can include the popular or nonprofessional publicists and the free-lance or occasional market participant. Nevertheless, media policy in general and copyright law in particular inevitably influence the comparative robustness and the competitive advantages of these two sorts of communication. The appropriate judicial predisposition to claims advantaging one or the other sphere might turn on whether special reasons exist for worrying about the legislative resolution.

An institutional argument has possible relevance here. Increases in the scope of copyright protection will predictably most advantage centralized, conglomerate media enterprises and their communications, while most likely disadvantaging nonmarket-oriented participants in the communication order. Although democratic dependence on a professional press certainly justifies giving these economic entities' needs some focused legal protection, often these protections have little negative impact on free-lance authors or nonprofessional communications. Shield law legislation protecting reporters' confidential relation with their sources, press galleries, and provision of press facilities at government headquarters serve as legislative examples. In contrast, copyright policy of-

159. Benkler, supra note 67, at 401-12. Not just this point, but more generally much of the analysis in the current discussion owes a large debt to Benkler.
ten favors one and disfavors the other of these domains of democratic communication.

Dispersed, unorganized, and often financially marginal lay speakers are the mainstay of the participatory side. These characteristics mean that these speakers are unlikely to represent themselves effectively in the legislative process. At best, noncommercial communicators and democratic participants might hope to have their case presented by occasional spokespersons based in the academic community or in activist nonprofit public interest organizations. On the other hand, market-based media have more professional and enterprise-based organizational resources, greater wealth, and clearer incentives that provide the foundation for extensive and effective lobbying. Given that persuasive materials aimed at public opinion are these organizations’ product, the politicians and public officials who depend upon favorable public opinion are especially unlikely to cross the lobbying efforts of these enterprises (except when the professional and enterprise organizations are internally divided). Thus, an obvious structurally based prediction is that legislators will be much more attuned to hearing and accepting democratic claims favoring greater copyright enclosures than those democratic claims favoring less enclosure.\(^{160}\) The evidence amply supports this prediction. The country has experienced a continual historical process of a copyright extension to encompass an increasing enclosure of the public domain of expressive content. This history arguably illustrates the public’s weakness and the commercial media and publishing industry’s strength in the legislative arena, at least in the copyright context. That is, the nonprofessional participatory speakers in democratic discourse are predictably, observably, and systematically disadvantaged when in policy level competition, as they often are in the copyright arena, with professional participants.

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. This fact cautions restraint by courts in evaluating media enterprises’ challenges to structural regulations. Such regulations—“must-carry rules” and “speaker access rules” and concentration rules are examples—not only purport to embody the legislators’ best vision of more democratic communications, but

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\(^{160}\) Benkler credits David Lange, Recognizing the Public Domain, 44 LAW & CONTEMP. PROBS. 147 (1981), with first identifying this enclosure problem. Benkler, supra note 67, at 354 n.2.
also the media entities will have already forcibly presented their opposing view as to the best vision within the policy discussion. A deferential orientation toward legislative judgments seems appropriate here.

Alleged infringers' challenges to the scope of copyright present a systematically different context. The losing side in the legislative decision to approve copyright "enclosures" often is not represented by well-organized, financially and politically powerful advocates. Observers commonly report the public was largely excluded from the bargaining table. Thus, a large portion of those disadvantaged by any challenged copyright enclosure will be precisely those who, on the one hand, are not well-represented legislatively but who, on the other hand, are key participants in democracy. The courts may be the main realm in which their participatory claims can be effectively heard and advanced.

Generally, the demise of Lochner involves acceptance of the view that the likelihood of rent seeking and the existence of unequal political advantage do not justify constitutional suspicion of economic legislation. However, in challenges to copyright "enclosures," the interests that are systematically disadvantaged in the legislative context are often constitutionally valued participatory democratic interests. Of course, these democratic interests lie on both sides. The ultimately central participants—citizens—must rely to a degree on the professionals. Therefore, the best policy results cannot be identified definitionally with those that favor participatory or voluntarist communicators over professionals. Nevertheless, the inevitable tilt of the legislative process can justify a degree of independent judicial appraisal of copyright enclosures that is inappropriate either in other media policy contexts or in nonmedia contexts. Essentially, the same judicial responsiveness to the democratic needs of engaged citizenry that justifies a presumption of validity to nonsensitively media structural regulations justifies a much more skeptical constitutional and interpretive attitude in the copyright arena.

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161. See Litman, supra note 68.
163. The degree of necessary reliance is disputed—depending upon on the interaction of technology and how its use is economically and legally structured, the degree of valuable or necessary reliance may change. This observation reinforces arguments for independent judicial review of legislative settlements that predictably favor rules that help maintain reliance on commodified information.
CONCLUSION

The tension between copyright and the First Amendment has long been noted. It might turn out that giving full force to First Amendment principles would be too destructive of the proper aims of copyright to be acceptable. If so, it would then be time to consider appropriate accommodations. The need for accommodation, however, should not be merely assumed from the start. Thus, this Essay examines the question of what giving full force to the First Amendment would mean for copyright.

Understanding the implications of the First Amendment for copyright requires an understanding of the First Amendment. Arguably the best interpretation, which elsewhere I defend both descriptively and normatively, sees protection of individual liberty at the heart of the Speech Clause and protection of democratic communications structures at the heart of the Press Clause. Relying on this constitutional understanding, this Essay argues that copyright generally cannot be applied to limit noncommercial copying. Although dramatic constitutionally, this conclusion turns out to be much less radical in practice. Historically, the main concern of copyright involved contexts where copies would be sold or otherwise used for commercial purposes—although as time has passed, copyright owners’ often successful efforts to restrict noncommercial use or copying have increased. In contrast, given doctrines such as denial of copyright protection for facts or ideas and related provisions for fair use, most copyright restrictions on commercial copying are constitutionally acceptable forms of media policy. Thus, the Essay concludes that many but not all elements of existing copyright law are perfectly acceptable from a First Amendment perspective—just as most other structural media regulations are constitutionally acceptable.

Of course, the conclusion that much of copyright is constitutional does not mean that copyright “enclosures” are wise. Just as is true about societal decisions concerning the establishment of public parks, regulation of “smoke stack” industries, or public education, the policy choices about the communications environment can be wise or unwise. They make for one or another form of community. Seldom does the Constitution mandate a particular choice. Still, the First Amendment matters. Copyright 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 under the First Amendment.