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ACCESS AND EXCLUSION RIGHTS IN ELECTRONIC MEDIA: COMPLEX RULES FOR A COMPLEX WORLD

Daniel A. Farber*

I. INTRODUCTION

Major disputes about electronic media often involve issues of access and exclusion. Owners of physical or intellectual property seek to reinforce their rights to exclude unwanted users, while others seek access for their own purposes. On the one hand, cable operators have struggled against must-carry rules that require them to give broadcasters access to their systems. This struggle has produced two major Supreme Court opinions. On the other hand, owners of intellectual property demand the power to exclude users from unauthorized use of their material, such as limiting the use of peer-to-peer (P2P) networks like Grokster. This struggle, too, has already produced two major Supreme Court opinions.

The rhetoric of these struggles has a curious parallelism. Supporters of the cable operators and other media companies invoke a kind of economic libertarianism. They view the First Amendment as protecting their right, as property owners, to exclude others from the use of their facilities. Opponents accuse them of Lochnerism - a reference to the now discredited early Twentieth

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2. See MGM Studios, Inc. v. Grokster, 125 S. Ct. 2764 (2005) (sale of peer-to-peer file sharing software may give rise to copyright liability for infringement by users of the software in some circumstances); Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding extension of copyright term for works created decades earlier, preventing those works from falling into the public domain where they would be available to all users).


4. "Lochnerism" describes judicial activism in the sphere of economic legislation. For an example of the use of the term in the present context, consider the following:

Many commentators have recognized the similarities between the Court's current approach to structural media regulation and its approach to economic and social legislation during the Lochner era. As demonstrated earlier, importing content neutrality and tiered scrutiny into the constitutional analysis of structural regulation has opened the door to deep economic review.

Michael J. Burnstein, Towards a New Standard for First Amendment Review of Structural Media Regulation, 79 N.Y.U. L. REV. 1030, 1057-1058 (2004). See also Yochai Benkler, Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain, 66 LAW & CONTEMP. PROBS. 173, 201-205 (2003). Compare the assertion that First Amendment defenses of the right of databases to control access to their contents have "some fairly strong parallels" with
Century decision that subjected routine economic legislation to rigorous judicial scrutiny. In turn, advocates of access to copyrighted content also claim the support of the First Amendment – and they in turn are accused of Lochnerism.

The fundamental question raised by these disputes is the same: To what extent does the First Amendment limit legislation on issues of access or exclusion in electronic media? As we will see, the Supreme Court has found this question troubling. In its rulings in the cable cases, the Court applied content-neutral scrutiny to must-carry regulations that guaranteed broadcasters access to cable channels. In its more recent rulings on public access to copyrighted materials, however, the Court has resisted applying this level of scrutiny, while nonetheless indicating some sensitivity to First Amendment concerns.

The dueling charges of Lochnerism do not seem to be doing much at this point to clarify the debate. Nevertheless, they have a kernel of truth in that access advocates and opponents alike have deployed libertarian rhetoric and have called for greater constitutional scrutiny of certain classes of regulation. Part II of this Essay explores these opposing versions of libertarianism. Part III hones in on the issue of media access, focusing on the constitutional issues raised by must-carry regulations. Part IV examines the flip side of access – the right to exclude – in the context of efforts by IP owners to prevent unauthorized copying of their work. Finally, Part V argues that none of these issues will yield to the beguiling simplicities of libertarianism, whether of the economic or expressive varieties.

A complex world presents complex choices, and those choices are often at the edge (if not beyond) the competence of courts. Rather than enforcing obvious rights, courts may more often find themselves playing a modest role, simply attempting to ensure that regulators can provide reasonable explanations for their choices between conflicting First Amendment interests. Rousing slogans are no substitute for careful thought in dealing with issues of this caliber.

II. TWO KINDS OF LIBERTARIANISM

To argue that complex issues require complex answers may seem trite. Yet, two influential bodies of thought argue otherwise – though each accuses the

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6. See Paul M. Schwartz and William Michael Treanor, Eldred and Lochner Copyright Term Extension and Intellectual Property as Constitutional Property, 112 Yale L.J. 2331, 2335 (2003) (if it had been decided in favor of access rights, “Eldred might have been the third millennium’s Lochner.”).
8. See infra Part III.
9. See infra Part IV.
other of advocating an inappropriate form of judicial activism. Each body of thought relies on some set of rights to act as trump cards in the otherwise complicated policy disputes over media regulation. One body of thought stresses the right of property owners (whether tangible or intellectual) to control access to their property. The other body of thought stresses the right of speakers to have access to the digital resources needed to communicate effectively. Each approach has an undeniable rhetorical appeal, though the existence of a contesting rhetoric should make us a little suspicious of this rhetorical appeal.

Constitutional doctrines governing economic regulations are quite permissive. But as traditional commodity activities are replaced by informational transfers, those doctrines may be displaced by First Amendment rules. Those rules are far more libertarian; "indeed, an information economy governed by the First Amendment might not look much different from the laissez faire world championed by economic libertarians." Defining the appropriate domain of the First Amendment has never been completely straightforward: the line between speech and conduct can prove an elusive one. But the problem is much more pressing today because of the nature of digital media. The most controversial rules often allocate control of digital media. They may constrain ownership of hardware, or give access rights to individuals who do not own the hardware, or allow media owners to prohibit certain kinds of uses. Preventing the government from making such rules would roll back regulatory authority over critical elements of the information economy.

Admittedly, the goal of curtailing the regulatory state is not without its enthusiasts. It is a common belief in some quarters that government regulation has gone too far, that the federal government has become too powerful, and that

10. See, e.g., Schwartz & Treanor, supra note 6, at 2334 (arguing that intellectual property is deserving of equal status as other, more traditional forms of property).

11. See, e.g., Eldred, 537 U.S. at 803 (Breyer, J., dissenting) (noting that "copyright was designed 'primarily for the benefit of the public,' for 'the benefit of the great body of people, in that it will stimulate writing and invention.'"); See also Benkler, supra note 4, at 204 ("This trend in First Amendment law of the information economy—towards protecting corporations broadly, even at the expense of very real and immediate constraints on the expressive autonomy and democratic speech of individuals—is unstable because it represents a moral inversion of the First Amendment.").


13. See Garrison v. State of Louisana, 379 U.S. 64, 82 (1964) (Douglas, J., concurring) ("I think it is time to face the fact that the only line drawn by the Constitution is between 'speech' on the one side and conduct or overt acts on the other. The two often do blend."); see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1358-59 (7th ed. 2000) ("Symbolic speech cases really present no issues different from those in other types of speech cases . . . It is this decision—to determine that an activity is speech—that may not always appear easy.").

14. Indeed, must-carry regulations discussed throughout this article are themselves examples of regulations that constrain traditional notions of property ownership.

15. See Turner Broadcasting (Turner II), 520 U.S. at 185 (upholding must-carry regulation).

16. For example, consider the implementation of "broadcast flag" regulations, discussed infra.
we need to “get the government off peoples’ backs.” For some, this form of economic libertarianism is not only a policy preference but a constitutional imperative. A leading modern Lochnerian, Richard Epstein, has argued that most government regulations violate the Takings Clause of the Constitution, and its companion, the Contracts Clause.17 “An anonymous critic once suggested that what Epstein really wants is to shorten the First Amendment to its initial five words: ‘Congress shall make no law.’”18 Epstein’s vision is explained in Simple Rules for a Complex World.19 This vision places heavy emphasis on autonomy,20 as does First Amendment law in the more limited sphere of speech.21

The conventional wisdom is that the New Deal banished the ghost of Lochner. Yet, an intensely libertarian approach to judicial review still reigns in the more limited arena of First Amendment law. The economic and First Amendment realms intersect in the electronic media. The question, then, is the extent to which economic regulation of the media should come under First Amendment scrutiny. There have certainly been strenuous efforts to deploy the First Amendment against media regulations. Indeed, as Glen Robinson has said, “it sometimes appears that the First Amendment has become the first line of challenge for virtually all forms of regulatory initiatives.”22

Perhaps the most prominent critic of such uses of the First Amendment has been Justice Breyer. He argues against applying strong speech protections that evolved to protect political speech in other areas of speech:

The kind of strong speech protection needed to guarantee a free democratic governing process, if applied to all governmental efforts to control speech without distinction (e.g. securities or warranties), would limit the public’s economic and social choices well beyond any point that a liberty-protecting framework for democratic government could demand. This, along with a singular lack of modesty, was the failing of Lochner.23

As Justice Breyer points out, in an information economy, regulation often impacts speech, but

18. Farber, supra note 12, at 794.
the modern, information-based workplace, no less than its more materially based predecessors, requires the application of community standards seeking to assure, for example, the absence of anticompetitive restraints, the accuracy of information, the absence of discrimination, the protection, safety, the environment, and so forth.

He adds that "[n]o one wants to replay that discredited history in modern First Amendment guise," apparently having forgotten about Epstein and other economic libertarians.

Opponents of economic libertarianism often see private ownership of media as being a threat rather than bulwark of free expression. They fear that eliminating federal regulation of access would "be far more harmful to the First Amendment than maintaining the alternative." In one scholar's words:

[without federal regulation or constitutional protections, the marketplace of ideas is left not to the courts or to Congress but rather solely to the economic marketplace for safekeeping. Big government might be problematic, but it is far from clear why Americans ought to completely trust big corporations to safeguard the marketplace of ideas.]

Critics of economic libertarianism not uncommonly champion another libertarian vision of their own. While they would leave the government free to distribute access rights to media, they would sharply restrict its power to give content providers the ability to exclude copying and other uses. In short, they are bullish on access rights but bearish on exclusion rights.

Expressive libertarians perceive an alarming trend toward expanding exclusion rights. For instance, one leading IP theorist remarks on the "continual historical process of a copyright extension to encompass an increasing enclosure of the public domain of expressive content." Another constitutional scholar worries that the digital revolution "presents new dangers for freedom of speech, dangers that will be realized unless we accommodate ourselves properly to the changes the digital age brings in its wake."

Similarly, invoking the words of Justice Brandeis, Yochai Benkler insists that "once information is communicated to others it becomes 'free as the air to

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24. Id. at 255.
25. Id. at 256.
27. Id.
common use." He fears that concentrated control of information resources is “likely to exclude challenges to prevailing wisdom” and to “translate unequal distribution of economic power in society into unequal distribution of power to express ideas and engage in public discourse.” Specifically, Benkler warns that the expansion of exclusion rights “is likely to lead, over time, to concentration of a greater portion of the information production function in society in the hands of large commercial organizations that vertically integrate new production with owner-information inventory management.”

According to Benkler, the trend toward expanded exclusion rights “conflicts with the First Amendment injunction that government not prevent people from using information or communicating it,” as well as violating the “First Amendment commitment to attain a diverse, decentralized ‘marketplace of ideas.’” In the same vein, Jed Rubenfeld laments the expansion of the concept of copyright infringement. “Today,” he says, “reproducing a minute or two from a film (in a television broadcast) or a few hundred words from a book (in a news article) is unquestionably enough to constitute infringement.” For similar reasons, he denounces restrictions on the use of derivative works (works making creative use of copyrighted material), because such works “always involve a fresh exercise of imagination” and “under the First Amendment, there can be no such thing as a harmful exercise of the imagination.”

Critics have pointed to arguable parallelisms between this form of libertarianism and Lochner. In their defense of Eldred, which rejected libertarian attacks on copyright restrictions, Schwartz and Treanor invoke the concept of Lochnerism: “More fundamentally, however, the opinion in Lochner is similar to the position championed by Eldred’s attorneys and the dissents in that both involve aggressive review of economic legislation and both can be seen as reflecting the belief that an active judicial role is necessary to combat rent-seeking in the legislative process.” They also accuse “leading cyberlaw scholars” of “advanc[ing] a substantive vision of the proper scope of government regulation that, in its hostility to regulation and its strong commitment to freedom of contract, resembles the economic vision reflected in Lochner.”

31. Id. at 377.
32. Id. at 378.
33. Id. at 410.
34. Id. at 358.
36. Id. at 52.
37. Id. at 54.
38. Schwartz & Treanor, supra note 6, at 2392.
39. Id. at 2365.
Economic and expressive libertarians applaud different dimensions of liberty and corresponding differences in the kinds of government regulation that they wish to eliminate. What they have in common is a desire to use the First Amendment as a tool to uproot government regulation. Parts III and IV will examine how these efforts have fared.

III. MEDIA ACCESS RIGHTS

The first area that we will investigate is access to cable channels by broadcasters. In a 1992 statute that built on earlier FCC rules, Congress required cable systems to transmit local commercial and public broadcasting stations, subject to some restrictions.\(^{40}\) After extraordinarily lengthy and complex litigation, the Supreme Court ultimately upheld the “must carry” provisions.\(^{41}\) In its first opinion on the issue in 1994, the Court held that the “must carry” rule was content neutral.\(^{42}\) It remanded the case so the District Court could develop the appropriate record for applying the content-neutral test.\(^{43}\)

In rejecting strict scrutiny, the Court emphasized that the must-carry rule was not a restriction on editorial decision-making.\(^{44}\) It was not triggered by the content of the cable operator’s other broadcasting,\(^{45}\) nor did its application depend on the content of the local broadcasts which would be retransmitted.\(^{46}\) All that the rule said was that speakers meeting a certain description (cable systems) had to provide space for speakers meeting another description (local broadcasters):

Insofar as they pertain to the carriage of full-power broadcasters, the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech. Although the provisions interfere with cable operators’ editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators’ programming. The rules impose obligations upon all operators . . . regardless of the programs or stations they now offer or have offered in the past. Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations, the cable operator has selected or will select.\(^{47}\)

\(^{41}\) Turner Broadcasting (Turner II), 520 U.S. at 185.
\(^{42}\) Turner Broadcasting (Turner I), 512 U.S. at 643.
\(^{43}\) Id. at 668.
\(^{44}\) Id. at 653-57.
\(^{45}\) Id. at 655.
\(^{46}\) Id.
\(^{47}\) Turner Broadcasting (Turner I), 512 U.S. at 643-44.
But the purposes of the law were not unrelated to content, as the legislative history made crystal clear. Congress was afraid that the growing market dominance of cable systems would bankrupt television stations lacking cable access. Consequently, Congress believed, the non-cable portion of the population would have considerably less access to broadcasting sources. Because of the local and educational programming provided by potentially excluded stations, the result would be a loss to public discourse. Justice Kennedy’s majority opinion argued that this rationale was subsidiary to Congress’s goal of preventing the destruction of the broadcast industry, rather than an independent reason for must-carry:

By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenues – or, in the case of noncommercial broadcasters, sufficient viewer contributions, see § 2(a)(8)(B) – to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation’s communication system, and to ensure that every individual with a television set can obtain access to free television programming.

This overriding congressional purpose is unrelated to the content of expression disseminated by cable and broadcast speakers. Indeed, our precedents have held that “protecting noncable households from loss of regular television broadcasting service due to competition from cable systems,” is not only a permissible governmental justification, but an “important and substantial federal interest.”

The Court rejected the argument that the congressional purpose was actually based on content, given congressional emphasis on the need to preserve local television as a source of local news and other local broadcasting service: “That Congress acknowledged the local orientation of broadcast programming and the role that noncommercial stations have played in educating the public does not indicate that Congress regarded broadcast programming as more valuable than cable programming.” Instead, this legislative history “reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable.”

48. Id. at 647.
49. Id.
50. Id.
51. Id.
52. Turner Broadcasting (Turner I), 512 U.S. at 647 (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).
53. Id. at 648.
54. Id.
The Court then concluded that the government had the burden of making two showings: (1) that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry," and (2) that the must-carry requirement "does not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" The Court then remanded "[b]ecause of the unresolved factual questions, the importance of the issues to the broadcast and cable industries, and the conflicting conclusions that the parties contend are to be drawn from the statistics and other evidence presented," so as to "permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining, before passing upon the constitutional validity of the challenged provisions."

Justice Stevens, who provided the critical fifth vote, contended that the proper disposition would be to simply uphold the statute. He emphasized that "[e]conomic measures are always subject to second-guessing; they rest on inevitably provisional and uncertain forecasts about the future effects of legal rules in complex conditions." In his view, it was not up to the Court to determine whether "Congress might have accomplished its goals more efficiently through other means; whether it correctly interpreted emerging trends in the protean communications industry; and indeed whether must-carry is actually imprudent as a matter of policy . . . ." In contrast, the four dissenters believed that must-carry was "an impermissible restrain on the cable operators' editorial discretion as well as on the cable programmers' speech," and would be invalid even if considered content neutral because they "restrict too much speech."

On remand, following long and expensive litigation, the District Court found that the must-carry rule was significantly related to achieving its purpose of preserving local broadcasting. The Court affirmed, with roughly the same division of Justices. The majority opinion displayed considerable willingness to defer to Congress's predictions about the future of the communications industry. The Court made it clear that the question was not about the objective validity of the congressional judgment, but merely whether it was "reasonable and supported by substantial evidence in the record before Congress." It

55. id. at 664-65 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).
56. id. at 668.
57. Turner Broadcasting (Turner I), 512 U.S. at 668.
58. id. at 671 (Stevens, J., concurring).
59. id. at 670.
60. id.
61. id. at 681 (O'Connor, J., dissenting).
65. id. at 196.
66. id. at 211.
rejected demands for more extensive factfinding by the courts as "an improper
burden for courts to impose on the Legislative Branch." Rather,

Judgments about how competing economic interests are to be
reconciled in the complex and fast-changing field of television are for
Congress to make. Those judgments "cannot be ignored or undervalued
simply because [appellants] cast[] [their] claims under the umbrella of
the First Amendment." . . . We cannot displace Congress' judgment
respecting content-neutral regulations with our own, so long as its
policy is grounded on reasonable factual findings supported by
evidence that is substantial for a legislative determination.

In a concurring opinion, Justice Breyer found "important First Amendment
interests on both sides of the equation," and he found that Congress had struck "a
reasonable balance between potentially speech-restricting and speech-enhancing
consequences." In the aftermath of the Turner decisions, lower courts have subjected a broad
range of media regulations to First Amendment scrutiny. For example, the
D.C. Circuit struck down restrictions limiting market share of cable companies and
limits on the number of channels that could be assigned to a cable operator's
affiliates. The decision has been criticized from the expressive libertarian
perspective for "its truly remarkable nature" in misreading Turner I.
The Turner cases seemed to settle the question of must-carry, but the debate
has resurfaced with an interesting new twist because of technological changes
under the Digital Television Transition and Public Safety Act of 2005. As of
February 17, 2009, all analog broadcasting will cease and will be replaced by

67. Id. at 213.
68. Id. at 224 (citing Columbia Broadcasting System, Inc. v. Democratic National Committee,
412 U.S. 94, 103 (1973)).
69. Turner Broadcasting (Turner II), 520 U.S. at 227 (Breyer, J. concurring).
70. Professor Burnstein lists several affected areas:

Indeed, the variety of regulations found to be . . . subject to heightened scrutiny
after Turner I includes: limits on local telephone companies' provision of video
services, surcharges on non-locally produced cable programming, municipalities' grants of exclusive local cable franchises, open access
requirements for cable Internet service provision, limits on cable channel allocation to affiliated programmers (vertical ownership rules), limits on the
total number of subscribers that can be served by a single cable provider
(horizontal ownership rules), and "must carry" requirements as applied to
satellite television providers.

Burnstein, supra note 4, at 1037. Burnstein also observes that "[l]ower courts applying the Turner
decisions often have required a significant showing of economic rationality in order to uphold a
structural regulation." Id. at 1042.
72. C. Edwin Baker, Media Structure, Ownership Policy, and the First Amendment, 78 S.
Cal. L. Rev. 733, 752 n. 61 (2005).
digital broadcast signals.\footnote{74} To view broadcasting signals without a digital TV, consumers must use cable or satellite or buy a converter box (which they can obtain with the help of up to two $40 coupons).\footnote{75} How common digital TVs will be at that point remains an open question: as of now, about 32 million households have them, but only half have the reception equipment to receive digital signals; analog TVs continue to substantially outsell digital ones.\footnote{76} The technologically backward will pay a price, however, because the bill does not authorize cable operators to "down convert" high-definition signals for analog cable customers without the consent of the broadcaster,\footnote{77} which may force almost 40 million customers to upgrade to digital cable service.\footnote{78} Whether substantial numbers of consumers will move to digital programming or whether this transition is actually in the interests of consumers collectively seems unclear.\footnote{79} Indeed, the motivation behind the statute may have less to do with improved television than with the desire to fill the federal fisc by auctioning off the portion of the broadcasting spectrum currently used for analog television.\footnote{80}

The interesting new twist for must-carry comes from an aspect of the technology. Television stations will receive six megahertz of spectrum for digital broadcasting. They can use the spectrum in either of two ways. First, they can use the entire bandwidth to offer high-definition television (HDTV),

\footnote{74}{Tuna Amobi, Big Media’s Digital Advantage: When The Long-Awaited Digital-TV Bill Becomes Law, As It Likely Will Smaller Cable operators and TV Broadcasters Will be Out in the Cold, BUSINESS WEEK ONLINE, Dec. 22, 2005, available at http://www.businessweek.com/investor/content/dec2005/pi20051222_5606_pi015.htm?campaign_id=search (last visited Apr. 6, 2006).}


\footnote{76}{Id.}

\footnote{77}{The legislation does not address this point directly, but the consensus seems to be that additional authorization for down converting may be needed. See Stephen Labaton, Transition to Digital Gets Closer, N.Y. TIMES, Dec. 20, 2005, at C1 (“Analysts and cable company executives said additional legislation might be required to enable cable companies to alter their broadcasting feeds so that more than 50 million customers who subscribe to analog cable services would be unaffected.”).}

\footnote{78}{Upton: House Panel Won’t Take Up Second Digital TV Bill, National Journal’s CongressDaily, Jan. 9, 2006.}

\footnote{79}{One may sympathize with the observation that “[m]ost of the media and manufacturing interests have been contemplating only how to profit from the high-definition, “pretty pictures” aspect of digital telecasting. Little commercial media and manufacturing industry thought has gone into the question of improved, socially useful content.” Willard D. “Wick” Rowland Jr., Let Analog Sell-Off Benefit Public, ROCKY MOUNTAIN NEWS (Denver, CO), January 1, 2006, available at http://www.rockymountainnews.com/drmn/speak_out/article/0,2777,DRMN_23970_4352890,00.html (last visited Apr. 6, 2006).}

\footnote{80}{The New York Times reports that the Act “will raise billions of dollars for the federal Treasury from auctions for spectrum licenses that must be surrendered by broadcasters . . . . The government estimates that those auctions, which will begin in 2008, could raise at least $10 billion for the Treasury.” Stephen Labaton, Transition to Digital Gets Closer, N.Y. TIMES, Dec. 20, 2005, at C1.}
which provides much sharper pictures and sound quality. 81 There does not seem to be any dispute that, after the transition, stations choosing this option will be entitled to must-carry.

Second, broadcasters can use the spectrum along with digital technology to offer multiple programs in standard-definition television (SDTV), in effect splitting themselves into several different channels. 82 Some options might relate to the main programming, such as multiple camera angles, but the extra channels could also be used for infomercials or other programming. 83 This multicasting would allow a station to broadcast up to five or six channels. 84 The key question is what obligation cable operators would have to carry the additional programming: does must-carry apply only to the main programming stream, to that stream plus related materials (such as multiple camera angles), or to any and all programming? Would a multicasting must-carry requirement violate the First Amendment?

This issue has produced some very odd alignments. Religious broadcasters and social conservatives strongly favor multicast must-carry. 85 Public interest groups fear that the extra channel space will only be used for infomercials, so they oppose multicast. 86 Within the affected industries, the absence of must-carry may have the greatest impact on unaffiliated local TV stations that are not part of media companies such as Disney or Fox TV, while smaller cable companies may be squeezed by negotiations with the more powerful broadcasting stations. 87 In the meantime, niche cable programmers fear that multiplexing will squeeze them out. 88 C-SPAN has been a major opponent of multicast must-carry, arguing that C-SPAN would be forced out by additional programming from local broadcasters. 89

The 2005 statute does not address the extent to which cable operators are required to carry broadcasters’ additional programming streams. The broadcasting industry 90 and religious organizations 91 are currently pushing for

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82. Id.
83. Id. at 106.
86. Just Another Toaster, National Journal’s CongressDaily, Oct. 3, 2005. The title is a reference to the words of a Reagan-era FCC chair who said that TV is “just another appliance – it’s a toaster with pictures.” Id.
87. See Amobi, supra note 74.
89. See David Lieberman, C-SPAN Chief: Digital TV May Hog Cable Space, USA TODAY, June 2, 1998, at 4B.
90. Todd Shields, NCTA: We’ll Fight vs. Multicast Must-Carry, MEDIAWEEK, Sept. 7, 2005, available at
new must-carry legislation. The FCC's current (but tentative) position is that the Cable Act provides must-carry only for the primary broadcasting stream.\textsuperscript{92} In terms of the related issue of dual must-carry (whether cable must carry the digital and analog versions of broadcast signals during the transition period), the FCC has concluded that such a requirement would not be warranted under the \textit{Turner} decisions.\textsuperscript{93} Cable operators have opposed congressional action on the issue by arguing that multicast must-carry would violate the First Amendment: “The content-neutral purpose found by the \textit{Turner} Court — protection of free over-the-air broadcast from the predations of a cable bottleneck monopoly – no longer exists, and as a result, any new obligation would likely be subjected to strict scrutiny as a regulation of speech designed to affect content.”\textsuperscript{94}

Interestingly enough, it does not seem to have occurred to anyone to wonder whether the digital transition requirement itself is constitutional. And yet, a plausible enough case might be made that it violates the First Amendment under the \textit{Turner} test. Consider, by analogy, a congressional requirement that all publications have high print definition on high quality paper. The statute would have the following effects. Some people would gladly pay more for the higher quality (but also more expensive) product. Others would pay more but would not have a corresponding desire for the higher print quality — from their point of view, the quality requirement is the equivalent of paying a monopoly price for the product. Finally, others would reduce their purchases or stop buying periodicals entirely, because they do not find the product worth buying at the higher price despite the quality increase. In the meantime, sellers would be differentially affected, depending on their conversion costs and on their market segments. For instance, newspapers would probably go out of business or publish much shorter editions (which is why newspapers are printed on cheap stock in the first place). It seems doubtful that the Court would find that the value of delivering a high quality product to a subset of readers outweighed the harm to publishers and to consumers who could no longer buy affordable reading material.


\textsuperscript{94} Charles J. Cooper, Michael W. Kirk & Brian S. Koukoutchos, \textit{A Mandatory Multicast Carriage Requirement Would Violate Both the First and Fifth Amendments} (Sept. 6, 2005) (on file with author).
It is not clear to what extent the digital transition requirement is different. Clearly, it would be technologically possible to allow TV stations to choose whether to go digital or manufacturers to decide what kinds of TV sets or adapters to sell. To that extent, the digital TV requirement is no different than the hypothetical rule requiring high quality printing. If there is a difference, it has to lie in economic factors that make a mixed digital/analog TV world impractical or undesirable. The question under *Turner* would be whether the asserted interest in forcing the transition ("prettier pictures") is narrowly tailored to avoid the First Amendment harms to programmers, TV stations, and audience members who are forced out by the changeover.

The First Amendment costs of the digital transition may seem different in kind from those of multicasting. After all, the digital transition merely suppresses some speech, whereas multicasting coopts the cable owner's facilities for the speech of others. From this point of view, access rights may seem akin to forced expression. Just as the government cannot force the owner of a cable system to allow someone else's sign in her front lawn, one might argue, it also should not be able to force her to put programming she doesn't want on her cable system.

The Supreme Court properly rejected this analogy in *Turner I*. Unlike the homeowner who may feel a sense of personal invasion if required to give space to someone else's sign, such a psychological impact is unlikely in the case of a cable system owner who is forced to transmit a marginal UHF station instead of an additional shopping channel.

More fundamentally, this argument assumes that in the electronic setting, ownership of hardware is equivalent to ownership of transmission rights. In the cable situation, property rights are something of a mess from the start, since (1) the company can only function thanks to its use of an easement on public property, (2) grant of the easement gives it a virtual monopoly status, leading to the negotiation of complex contracts with municipalities, (3) ownership of content was similarly confused in the early days of cable, given the operator's power to appropriate broadcast material, (4) must-carry and public access requirements have been in effect almost since the emergence of cable as a mass

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95. Opponents of multicasting acknowledge "the fact that the costs of the transition may drive a few broadcasters out of business." Timmer, *supra* note 81, at 139.

96. The coupon program softens the blow to consumers, but most likely some will not take advantage of the program (perhaps because of age or disability) and will no longer have functioning TVs after the transition.

97. See *e.g.* Wooley v. Maynard, 430 U.S. 705 (1973). In *Wooley*, the Court held that the state of New Hampshire could not require a motorist to carry the slogan "Live Free or Die" on his or her license plate. According to the majority, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714.


99. See *id.* at 633.
market. In this setting, it is difficult to say that the "natural" owner of control over content is always the owner of the physical cable.

If we overcome any fixation on the ownership of the physical cable as a decisive First Amendment factor, then the fundamental similarity of the constitutional issues becomes clear. Both must-carry and the digital transition have First Amendment winners and losers. In terms of must-carry, the winners are one set of speakers (broadcasters) who get additional speech opportunities, while the losers are cable programmers who lose some speech opportunities. In terms of the digital transition, the winners are basically the middle and upper end of the market, who will benefit from the technological advantages of the new technology, and the potential losers are the marginal broadcasters and audience members who may forfeit speech opportunities. This does not mean that the constitutional outcome should be the same in both cases. What it does show is ubiquity of potential constitutional claims with respect to any real substantial media regulation.

IV. IP EXCLUSION RIGHTS AND DIGITAL MEDIA

Exclusion and access rights are two ways of talking about the same thing. In the cable cases, broadcasters seek access to cable channels, and cable companies seek to exclude them. In the cases we are about to discuss, users seek freer access to copyrighted materials, and the copyright holders seek to exclude them.

The Supreme Court entered the fray with the Eldred case,\(^\text{100}\) which involved the Copyright Term Extension Act (CTEA).\(^\text{101}\) The CTEA extended the copyright term by twenty years, so that it is now usually the author's life plus seventy years.\(^\text{102}\) Because the extension was retroactive, copyrights that were about to expire (such as Disney's copyright on Mickey Mouse) were given a new lease on life.\(^\text{103}\) The plaintiffs contended that the retroactive extension exceeded Congress's power under the copyright clause and violated the First Amendment.\(^\text{104}\)

As the two dissenting opinions make clear, the "limited term" argument had some intuitive appeal. The Constitution purportedly only gives Congress the power to grant copyrights for a "limited term."\(^\text{105}\) Yet today, for all practical purposes, the term might as well be forever. Even before CTEA, as Justice Stevens pointed out, "only one year's worth of creative work – those copyrighted

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101. Id. at 192.
103. See Schwartz & Treanor, supra note 6, at 2333 (pointing out that some have even referred to the CTEA as the "Mickey Mouse Protection Act").
104. Eldred, 537 U.S. at 196.
105. U.S. CONST. art. 1, § 8 cl. 8. The full text reads: "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 . . . ."
in 1923 – has fallen into the public domain during the last 80 years.” 106 The effect of CTEA will be, as Justice Breyer explained, “the transfer of several billion extra royalty dollars to holders of existing copyrights.” 107 Justice Breyer also observed that CTEA gave the average author 99.8% of the economic value of a perpetual copyright. 108 Also, it was no secret that some members of Congress would have preferred a perpetual term; the statute was named in honor of a deceased House member who “wanted the term of copyright protection to last forever.” 109

The Court nevertheless rejected the “limited term” argument. 110 It relied on a history of previous retroactive extensions of the terms of IP protection and viewed Congress’s purported desire to harmonize copyright terms with the European Union as a sufficient justification for the change. 111 Fundamentally, the majority seemed to be unwilling to second-guess Congress in the inevitably uncertain enterprise of setting the copyright term. 112

The plaintiffs also made a First Amendment argument. 113 The extension had a significant effect on speech, making it impossible to offer cheap editions of early Twentieth Century authors and hampering the ability to establish on-line archives with photos and letters from the same period. 114 If, as Justice Breyer’s dissent plausibly argued, CTEA had little to offer in the way of countervailing benefit, this burden on speech might seem hard to justify.

Yet the Court also rejected the First Amendment claim, declining the invitation to apply “a heightened form of judicial review” to CTEA. 115 Tracking language in earlier decisions, the Court relied on the purpose of the copyright law (which is First Amendment-friendly because it is intended to promote speech), and on copyright law’s “built-in First Amendment accommodation.” 116 By the latter, the Court apparently meant the idea-expression distinction and the “fair use” doctrine,” which the Court characterized as allowing “considerable ‘latitude for scholarship and comment,’ and even for parody.” 117

A careful reading of the opinion suggests, however, that the First Amendment continues to have relevance. As the Court explained:

106. Eldred, 537 U.S. at 241 (Stevens, J., dissenting).
107. Id. at 248 (Breyer, J., dissenting).
108. Id. at 255-56.
110. Id. at 198.
111. Eldred, 537 U.S. at 200-204.
112. Id. at 208.
113 Id. at 218.
114. Id. at 249-250 (Breyer, J., dissenting). Even the song “Happy Birthday to You,” first copyrighted in 1935 but with a melody many years older, remains under copyright today. Id. at 261-62.
115. Id. at 218-19.
117. Id.
The First Amendment securely protects the freedom to make — or decline to make — one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches. To the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.118

The effect is to immunize traditional copyright doctrine from First Amendment scrutiny, with some possible escape hatches — for example, the Court says that the built-in protections are “generally adequate” but leaves some wiggle room for a future decision to find exceptions.119 Moreover, the Court speaks in terms of copying, which suggests that more transformative uses might have different First Amendment status.120 Moreover, because the Court restricts its comments to situations where “Congress has not altered the traditional contours of copyright protection,” the implication seems to be that curtailing those traditional protections would raise First Amendment issues.121 If so, incursions on these rights should require exceptional justification.122

Unlike Eldred, the Supreme Court’s most recent foray into the definition of exclusion rights was statutory rather than constitutional. Although the details of the statutory analysis are not relevant for present purposes, the opinion is relevant because it confirms the Court’s cautious approach to these issues.

MGM, Inc. v. Grokster, Ltd.123 involved a peer-to-peer (or P2P) file sharing service, of a kind used to share billions of files monthly, primarily to swap music files. Over 100 million copies of this type of software have been downloaded,124 and in the court’s view there was “reason to think that the vast majority of users’ downloads are acts of infringement.”125 The question before the Court was whether the distributors of the software were themselves liable for helping to

118. Id. at 221.
119. Id.
120. Id. at 220-21.
121. Eldred, 537 U.S. at 221.
122. Prior to Eldred, Neil Netanel argued for application to copyright issues of a heightened version of O’Brien scrutiny, using the Supreme Court’s opinions on regulation of cable TV as a model. Neil Netanel, Locating Copyright Within the First Amendment Skein, 54 STAN. L. REV. 1, 59, 85-86 (2001). The Supreme Court rejected that argument in Eldred, instead creating a safe harbor for traditional copyright doctrine without explaining what happens outside of that safe harbor. Eldred, 537 U.S. at 221.
124. Id. at 2722.
125. Id.
promote these massive infringement activities, even though the software also had non-infringing uses.\textsuperscript{126}

The Court emphasized the delicacy of the policy judgment involved in the case:

MGM and many of the \textit{amici} fault the Court of Appeals' holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incident of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.

The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before . . . As the case has been presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies.\textsuperscript{127}

Bearing in mind these conflicting purposes, the Court's ruling was a narrow one. The Court emphasized that the defendants were not "merely passive recipients of information about infringing use," but instead that each defendant "clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement."\textsuperscript{128} "Here," the Court said, if "liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was."\textsuperscript{129}

There were two concurring opinions, each accounting for three Justices. Both concurrences discussed another issue that the lower courts might reconsider on remand. Justice Ginsburg argued that the lower court should have determined whether there was a "reasonable prospect that substantial or commercially significant non-infringing uses were likely to develop over time."\textsuperscript{130} Justice Breyer's concurrence argued that Justice Ginsburg's approach was too stringent and that in fact the defendant was entitled to summary judgment on the issue.\textsuperscript{131} Both of these groups of three Justices, however, joined in the majority opinion as well.

\textsuperscript{126} \textit{ld.} at 2770.
\textsuperscript{127} \textit{ld.} at 2775.
\textsuperscript{128} \textit{MGM}, 125 S. Ct. at 2772.
\textsuperscript{129} \textit{ld.} at 2782. It is unclear whether purely subjective intent is sufficient as a basis for liability under \textit{Grokster}, or whether it must be linked with some kind of objectionable content. \textit{See The Supreme Court, 2004 Term}, 119 Harv. L. Rev. 366, 370 (2005).
\textsuperscript{130} \textit{MGM}, 125 S. Ct. at 2786 (Ginsburg, J., concurring).
\textsuperscript{131} \textit{ld.} at 2787 (Breyer, J., concurring).
The Grokster Court did not refer to the significant First Amendment aspects of the case; in particular, restrictions on P2P software burden those who use P2P networks for non-infringing uses. For example, the BBC is considering the use of P2P networks to make its television archives available to the public, some universities use P2P to make instructional materials available, and Microsoft has used P2P to disseminate software.

The degree to which non-infringing uses were significant (or could potentially become significant in the future) was subject to dispute in Grokster, as shown by the concurring opinions. Realizing that these uses are protected speech would not necessarily change the result in the case. It does, however, provide an additional argument for the narrowness of the majority's approach, which targeted a specifically objectionable type of conduct rather than launching a broadside against P2P in general.

A similar effort to protect IP rights through technological limits has been playing itself out in the context of television. In 2003, the FCC adopted regulations to prevent the unauthorized copying of digital programming by requiring digital TVs to be designed to recognize the "broadcast flag." The broadcast flag is a code in a digital broadcast that "prevents digital television reception equipment from redistributing broadcast content." Under these regulations, "[o]pen devices that allowed information flows in and out, permitted snippets of content to be mixed with other information and made into a transformative work, and allowed unauthorized access to the result so these transformations were on the way to being forbidden."

136. It should be noted that P2P file sharing has continued to grow: Despite the U.S. Supreme Court decision holding Grokster liable for the actions of its copyright-defying users, and despite more than 13,000 lawsuits filed by the Recording Industry Association of America and the Motion Picture Association of America, file swapping is still growing. According to P-to-P research site Big Champagne, some 6.5 million U.S. users share files at any one time--up more than 30 percent from the year before.
The regulations were challenged by several libraries who wanted to use the Internet to make some broadcast materials available to students in a distance learning course.\textsuperscript{140} The D.C. Circuit struck down the regulations on the ground that "the agency's general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission."\textsuperscript{141}

Like a flat ban on P2P, the digital flag had the potential to block lawful communications, to the extent that copying and distribution of digital content would be considered a fair use under the copyright laws.\textsuperscript{142} The broadcast flag would also have meant that prior consent would be required to use copyrighted works. As Randall Picker points out:

While we frequently speak of copyright, patents, and trademarks as "intellectual property," this is a casual, classificatory short-hand that we think helps us to understand these three distinct bodies of law. But the term itself is quite misleading, as in some basic way, to date, intellectual property has lacked one of the key characteristics of tangible property: absent taking by force, use of tangible property requires prior consent of the owner. This isn't true for intellectual property: I can sing copyrighted songs in the shower to my heart's content. Intellectual property has been protected by something more akin to the torts system: a right to sue for the violation – meaning use without consent of course – of a specified right.\textsuperscript{143}

Notwithstanding these criticisms, the broadcasting industry continues to press for legislation that would mandate the broadcast flag.\textsuperscript{144} The Senate has held hearings about whether Congress provide the FCC with authority to put the broadcast flag in place.\textsuperscript{145}

Assuming the broadcast flag went into effect, it would raise interesting First Amendment issues. A key issue is defining the appropriate level of review for congressional grants of exclusion rights. The standard of review question is difficult because copyright is an awkward fit with the content distinction. It does not suffer from the core vices of content-based regulation. Exclusion rights

\textsuperscript{140} American Library Ass'n, 406 F.3d at 697.
\textsuperscript{141} Id. at 700.
\textsuperscript{142} See Cuong Lam Nguyen, Comment, A Postmortem of the Digital Television Broadcast Flag, 42 Hous. L. Rev. 1129, 1160-61 (2005) ("The broadcast flag would have cost the American public an invaluable fraction of the fair use spectrum.").
\textsuperscript{143} Randall C. Picker, From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright, 70 U. Chi. L. Rev. 281, 283 (2003).
normally protect expression indiscriminately, with no favoritism toward particular viewpoints or subjects. Yet, they are not exactly content-neutral either. They are deeply concerned with content, with central purposes that focus on the content of speech (encouraging more and better content). Copyright's various exemptions also are connected with content (such as the idea/expression distinction). Rather than squeezing copyright within these classifications, *Eldred* seems to view it as *sui generis*. Because the broadcast flag would block even fair use of the material, it does not fall within *Eldred*'s safe harbor for traditional copyright protection. Instead, some form of content neutral scrutiny would be in order, arguably of the kind utilized in the *Turner* decisions.

V. EXCHANGING LIBERTARIAN SIMPLICITY FOR PRAGMATIC COMPLEXITY

We have surveyed a series of media disputes: analog must-carry, multicast must-carry, copyright expiration, P2P networks, and broadcast flags. Libertarians have simple (though conflicting) answers for each of these disputes. Economic libertarians would resolve the must-carry issues in favor of the cable. They would also resolve the copyright expiration, P2P, and broadcast flag issues in favor of the IP owners. Expressive libertarians would reach the opposing results, favoring access for multiple speakers on cable and expansive user rights in the IP-related disputes.

What these two brands of libertarianism have in common is the point on which they are most surely wrong: they both find these disputes simple and straightforward to resolve. This common point of agreement is also the most obvious error on both sides. These disputes are anything but simple.

In each of these cases, competing First Amendment interests are at stake. This is obviously true of the must-carry issues, where channels will either be used by broadcasters or by other cable programmers selected by the cable

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147. Perhaps copyright infringement, like obscenity, should just be considered a traditional category of unprotected speech. Just as in the case of obscenity, however, the Court should be careful not to allow the unprotected category to expand beyond its traditional boundaries.

148. See *supra* notes 116-17 and accompanying text.

149. Expressive libertarians, not surprisingly, see hints of intellectual bad faith in this combination of preferred outcomes:

Thus, in the digital age, media corporations have interpreted the free speech principle broadly to combat regulation of digital networks and narrowly in order to protect and expand their intellectual property rights. These positions seem inconsistent on their face. In fact, they are not. They reflect a more basic agenda: It is not the promotion and protection of freedom of speech per se, but the promotion and protection of the property rights of media corporations. Both intellectual property and freedom of speech have been reconceptualized to defend capital investments by media corporations.

operator. To a large extent, to favor one speaker is to partially silence the other, and different audiences will have corresponding losses or gains. Indeed, as we saw, this is also true of a straightforward regulatory intervention like the transition to digital TV, which will have its winners and losers among speakers and audiences.

Similarly, in the copyright cases, there is a conflict between speakers. Failure to protect rights holders against widespread copying will limit their ability to create and disseminate works, interests that fall within the First Amendment. Allowing broad restrictions on user activities limits the ability of users to co-opt existing materials as part of their own expression and disseminate the materials to others. In the copyright cases, some of those user activities may be illegal to begin with, but others – such as using material after the expiration of the copyright term or making fair use of material – would be lawful if not for some regulatory intervention after the creation of the material. Free copying will also allow some audience members to obtain materials that they could not otherwise access. Thus, there are tradeoffs in all of these situations between the First Amendment interests of various speakers and audiences.

Libertarians can only make these issues seem easy by ignoring conflicts or privileging one side of the debate. Expressive libertarians ignore the adverse effect of copying on the production of new speech and the voluntary dissemination of speech by its creators. They also privilege users as First Amendment actors, ignoring the equal status of creators. Users have a collective stake in ensuring that appropriate incentives exist to create new work and disseminate it broadly without fear of completely losing control over it.

Economic libertarians fixate on property issues, acting as if those rights were absolute and dated from time immemorial. One searches Blackstone in vain, however, for guidance about the ownership of digital electronic signals. To say that the owners of the physical cable own the channel capacity is not to announce a fact; it is to state the conclusion of an argument over how management rights should be allocated.

150. Justice Breyer emphasized this in Turner II:
Congress could reasonably conclude that the statute will help the typical over-the-air viewer (by maintaining an expanded range of choice) more than it will hurt the typical cable viewer (by restricting cable slots otherwise available for preferred programming). The latter's cable choices are many and varied, and the range of choice is rapidly increasing. The former's over-the-air choice is more restricted; and as cable becomes more popular, it may well become still more restricted insofar as the over-the-air market shrinks and thereby, by itself, become less profitable. In these circumstances, I do not believe that the First Amendment dictates a result that favors the cable viewers' interests.


151. This is not to say, however, that arguments for strong property rights cannot be mounted, as in Patricia L. Bellia, Defending Cyberproperty, 79 N.Y.U. L. Rev. 2164 (2004). But strong property rights have to be defended, not simply assumed. And of course, there are also powerful
right to limit users is to ignore the equally well-established rights to engage in fair use and access materials in the public domain.\textsuperscript{152} Indeed, every creator of IP uses existing IP as the basis for new work – otherwise, every inventor would literally have to reinvent the wheel. In short, economic libertarianism basically begs the question of how control over media transmissions should be assigned by simply assuming that the decision has already been made. Property rhetoric is powerful, but just for that reason we need to be wary of its potential to confuse rather than clarify the issues.\textsuperscript{153}

Thus, media access and exclusion cases generally involve multiple First Amendment speakers. The interests of these speakers may partly conflict, but they may also be interdependent. Determining the appropriate outcome in terms of First Amendment interests presents inherent difficulties. These difficulties are compounded by the fact that the cases involve complex industries and rapid technological change. Forecasting what effects a regulation has on speech may depend on difficult economic calculations and risky technological forecasts.

What has been said is enough to explain the inadequacy of libertarianism (economic or expressive) in connection with media access and exclusion issues. We are not confronted with simple conflicts between speakers and overbearing governments. Instead, we see governments attempting to referee disputes between contesting speakers and would-be speakers. Moreover, deciding on the best set of rules involves a complex, difficult determinations that judges are ill-suited to make. We are likely to need complex rules for this complex world, and judges cannot expect to play the lead role in crafting those rules.

Nevertheless, we should not expect judges to withdraw from the fray completely. There are First Amendment interests involved here, which courts are institutionally committed to defending. Moreover, without judicial oversight, regulators may be tempted to design rules in order to favor particular viewpoints or silence speakers with less political power. Thus, we have arguments against expansive views of property. See Mark A. Lemley, \textit{Property, Intellectual Property, and Free Riding}, 83 Tex. L. Rev. 1031 (2005).

\textsuperscript{152} Indeed, one could also characterize the interest of users in accessing networks as a form of property. See generally Joshua A.T. Fairfield, \textit{Virtual Property}, 85 B.U. L. Rev. 1047 (2005) (arguing for recognition of this interest as a property right). In conventional property terms, this interest might be considered an easement – the right to traverse the domain of another.

\textsuperscript{153} As a leading IP scholar puts it:
My worry is that the rhetoric of property has a clear meaning in the minds of courts, lawyers, and commentators as "things that are owned by persons" and, that fixed meaning will make it all too tempting to fall into the trap of treating intellectual property as an absolute right to exclude. Furthermore, it is all too common to assume that because something is property, only private and not public rights are implicated.

Lemley, \textit{supra} note 149, at 1071. The power of property rhetoric to cloud thought is shown by the unthinking equation of a person sampling songs on-line in order to decide what to buy retail with a "thief's contention that he shoplifted 'only 30' compact discs, planning to listen to them at home and pay later for any he liked." BMG Music v. Gonzalez, 430 F.3d 888, 891 (7th Cir. 2005) (per Easterbrook, J.).
something of a conundrum: judges need to police this process, but they do not have very good tools for doing so.

Attempting to resolve this conundrum is a large task, well beyond the scope of this Essay. Quite possibly, there is no simple resolution, and judges will be forced to negotiate the opposing horns of the dilemma with as much sensitivity and intelligence as possible. Given the difficulties posed by changing technologies and conflicting First Amendment interests, there are limits to what courts can do. They may be able to usefully place some outer boundaries on regulation, by ensuring that regulators strike a "reasonable balance" between the conflicting interests and do not gratuitously ignore "significantly less restrictive ways" to achieve their goals.\textsuperscript{154} Even this task is not free from difficulties and from the temptation to overreach into the domain of policymaking. But it is a good deal more constructive than efforts to establish simple rules for the complex world of digital media.

VI. CONCLUSION

The rhetoric of rights is important and powerful. It often serves as the basis for advancing crucial moral claims. Yet it can also delude us into adopting simple solutions to hard problems. We know from the history of the \textit{Lochner} era that the rhetoric of rights can lead to judicial over-reaching. Property rights do not define themselves, and in the context of new technologies it can be misleading to take those rights as a given. Expressive rights are undoubtedly central to a democratic, free society. Yet expressive rights may conflict with each other in ways that resist easy resolution. Life, in other words, is complicated. Einstein once said that a theory should be as simple as possible, but no simpler.\textsuperscript{155} When considering how to allocate right of access and exclusion with regard to electronic media, this is advice that we would do well to keep in mind.

\textsuperscript{154} Turner Broadcasting (Turner II), 520 U.S. at 227 (Breyer, J., concurring).

\textsuperscript{155} THE INTERNATIONAL DICTIONARY OF QUOTATIONS 281 (Margaret Miner & Hugh Rawson eds., 1986).