

# Media Access: A Question of Design

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## I. *The Problem of Private Power*

I turned to Jerome Barron's classic article on First Amendment rights of access to the press<sup>1</sup> just as a story appeared in the newspapers. Many political organizations now use a technology called short message service, more colloquially called text messaging, to reach large numbers of people. If you give an organization your cell phone number and sign up for their text messaging program using a "short code," they will send you regular text messages about subjects they think are important.<sup>2</sup> The messages travel through your cell phone carrier's system. NARAL Pro Choice America, an abortion rights group, contacted Verizon requesting permission to send its text messages to Verizon subscribers using a five digit short code, and Verizon refused, saying it violated its policy against "controversial or unsavory text messages."<sup>3</sup> Verizon said it would block messages coming from NARAL Pro Choice America.<sup>4</sup> As soon as this refusal became public, Verizon backed down, arguing that its employees had misapplied its policy and that of course NARAL was welcome to send messages through its system.<sup>5</sup> But Verizon reiterated its right to block any messages it thought were inappropriate.<sup>6</sup>

Why could Verizon refuse NARAL? Telephone companies that provide traditional voice service are regulated as "telecommunications services" and are treated as common carriers under Title II of the Communications Act.<sup>7</sup> Common carriers must provide communica-

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

<sup>2</sup> For an explanation of the use of short codes for text messaging subscription, see About CSCs—Common Short Codes, [http://www.usshortcodes.com/csc\\_csc.html](http://www.usshortcodes.com/csc_csc.html) (last visited Apr. 16, 2008).

<sup>3</sup> Adam Liptak, *Verizon Rejects Text Messages from an Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, at A1 (citation omitted).

<sup>4</sup> See *id.*

<sup>5</sup> See Adam Liptak, *Verizon Reverses Itself on Abortion Messages*, N.Y. TIMES, Sept. 28, 2007, <http://www.nytimes.com/2007/09/28/business/28verizon.html>.

<sup>6</sup> *Id.*

<sup>7</sup> See 47 U.S.C. §§ 201–209 (2000).

tions services to the general public and cannot discriminate based on content or speaker.<sup>8</sup> The Federal Communications Commission (“FCC”), however, has not yet held that it will treat cell phone companies’ text messaging services as common carriers, even though they use much of the same equipment.<sup>9</sup>

In fact, most information services in the digital age, including the broadband services through which most people connect to the Internet, are free from the common carrier obligations of traditional phone service.<sup>10</sup> One of the biggest fights in telecommunications policy today is whether such services should have any obligations of “network neutrality.”<sup>11</sup> A legislative requirement of network neutrality would mean, among other things, that information carriers and conduits like Internet service providers (“ISPs”) could not block, slow down, or give preferential treatment to packets moving through their system on the basis of the content of the packets.<sup>12</sup> Broadband carriers, which include telephone companies like Verizon, have argued that there is no need for network neutrality; telecommunications companies will not unreasonably discriminate against traffic because doing so is bad for business.<sup>13</sup> Free markets, they argue, will guarantee freedom of speech.<sup>14</sup>

Jerome Barron’s article, written in 1967, shortly before the Supreme Court’s decision in *Red Lion Broadcasting Co. v. FCC*,<sup>15</sup> argued that freedom of speech in the United States was at greatest risk not from state suppression of speech but from private suppression from mass media.<sup>16</sup> Today, people often identify the article with the

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<sup>8</sup> See 47 U.S.C. § 202 (2000) (describing nondiscrimination requirements for common carriers).

<sup>9</sup> See Liptak, *supra* note 3; Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling that Text Messages and Short Codes Are Title II Services or Are Title I Services Subject to Section 202 Non-Discrimination Rules, 23 F.C.C.R. 262 (2008); Public Knowledge, Petition for Declaratory Ruling Stating that Text Messaging and Short Codes Are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules (filed Dec. 11, 2007), available at <http://www.publicknowledge.org/pdf/text-message-petition-20071211.pdf>.

<sup>10</sup> See Liptak, *supra* note 3.

<sup>11</sup> See *id.*

<sup>12</sup> See Brad Stone, *Comcast Altering Its Method of Managing Web Traffic*, N.Y. TIMES, Mar. 28, 2008, at C2.

<sup>13</sup> *But cf.* Liptak, *supra* note 3 (“In rejecting the NARAL program, Verizon appeared to be acting against its economic interests.”).

<sup>14</sup> *Cf. id.* (“Some scholars said such a [common carrier] rule was not needed for text messages because market competition was sufficient to ensure robust political debate.”).

<sup>15</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>16</sup> See Barron, *supra* note 1, at 1641–42, 1646–47.

argument that the First Amendment creates positive rights.<sup>17</sup> But Barron's real focus was on the power of private censorship. The First Amendment, Barron argued, protected people who already had access to a medium of communication, but it offered no assistance to "those whose ideas are too unacceptable to secure access to the media."<sup>18</sup> Giving media companies free speech rights to control access meant that the First Amendment became "a rationale for repressing competing ideas."<sup>19</sup> Barron denied that a free market would promote free speech because mass media would refuse to carry information that did not serve their bottom line, and they would shy away from "unorthodox, unpopular, and new ideas,"<sup>20</sup> preferring bland and mindless entertainment with commercial appeal.

"Today," Barron wrote, "ideas reach the millions largely to the extent they are permitted entry into the great metropolitan dailies, news magazines, and broadcasting networks."<sup>21</sup> "Only the new media of communication," he argued, "can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance."<sup>22</sup> The constitutional protection against abridging freedom of speech is "not applied to the very interests which have real power to effect such abridgment."<sup>23</sup> "Indeed," Barron argued, "nongoverning minorities in control of the means of communication should perhaps be inhibited from restraining free speech (by the denial of access to their media) even more than governing majorities are restrained by the [F]irst [A]mendment,"<sup>24</sup> because the minorities who owned media companies had no electoral mandate from the public.<sup>25</sup> The First Amendment's guarantees were "useless," Barron argued, "if a restraint on access is effectively secured by private groups."<sup>26</sup>

The Verizon/NARAL story and the larger discussion about network neutrality are part of the modern-day debate about private power in telecommunications. We are still fighting about the role of

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<sup>17</sup> See, e.g., Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373, 1377 (2007).

<sup>18</sup> Barron, *supra* note 1, at 1641.

<sup>19</sup> *Id.* at 1642.

<sup>20</sup> *Id.* at 1647.

<sup>21</sup> *Id.* at 1655–56.

<sup>22</sup> *Id.* at 1656.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* Barron also foresaw that media would use the First Amendment to deny access and to avoid regulation. *Id.* at 1661–63.

private power in structuring opportunities for free expression. And yet the world is quite different today. The private power that concerned Barron in 1967 is not the same.

## *II. Speech Conduits and User-Generated Content*

Today, the most powerful and important methods of communication flow through telecommunications conduits—wire, cable, and wireless services—owned by private companies. They include cable companies, phone companies (wired and wireless), ISPs, and Internet backbone providers. For the most part, these conduits allow people to send content from one place to another or mount applications on top of their delivery services, like search engines, e-commerce applications, or voice over Internet protocol (“VOIP”) phone communications. These conduits make money by allowing people to communicate with each other. Although the government could treat these companies as common carriers, or impose obligations of nondiscrimination like network neutrality, it has chosen not to do so.<sup>27</sup>

In addition to ISPs, broadband companies, and Internet backbone providers, there are a whole range of online service providers, like YouTube, Blogger, and their parent company Google; social networking sites, like MySpace and Facebook; Flickr, a photo-sharing service owned by Yahoo; and virtual worlds, like Second Life. These online service providers offer platforms through which people can find content, create new content, transform existing content, and broadcast the content to others. For example, Flickr allows people to publish photos, while MySpace allows people to create Web pages, serve videos and content, link to friends, and send messages. These online service providers, in turn, host other online service providers—like individual bloggers and Web site operators—who create their own content online and also create spaces for others to communicate. My own blog, *Balkinization*,<sup>28</sup> uses a blogging platform hosted by Blogger. It allows the members of my blog to reach a large audience, including journalists and other members of the traditional mass media. Because I have turned comments on, it also allows readers to talk back to the bloggers and criticize what we have to say.

Like ISPs and broadband companies, online service providers like MySpace and Blogger are conduits for other people’s speech and

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<sup>27</sup> See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 974–75 (2005) (noting that the Federal Communications Act currently “regulates telecommunications carriers, but not information-service providers, as common carriers”).

<sup>28</sup> *Balkinization*, <http://balkin.blogspot.com> (last visited Apr. 16, 2008).

communications. Indeed, a key element of their business models is providing widespread access to media and encouraging mass participation. That is because their business models depend on user-generated content: that is, they depend on people using their facilities to place new content online and manipulate or comment on existing content. For example, some businesses make money from selling advertising space; fresh user-generated content draws people to spaces where advertising is displayed and keeps them coming back. A virtual world may make money from a subscription model and so it wants users to spend time in the world to make new things, build communities, and add variety and competition to the world.

As a result, online service providers do everything they can to get people to sign up, use their services, and add new information. YouTube depends on fresh user-generated content and cannot survive without it. Virtual worlds are interesting to their users, and keep them coming back, because people in these worlds continuously interact with each other and create new things. Social software sites like Facebook and MySpace demand widespread social participation and fresh content to attract new users and satisfy existing ones. The power of Google's search engines depends on people creating Web pages and links that Google can scrape and index.

Finally, we have the traditional media conduits of newspapers, television, radio, and cable television, which combine content delivery with content production, and which tightly control the messages that they publish or broadcast. These conduits, which dominated the world of 1967, remain very important today. Yet they are now outliers in the current media ecology precisely because they do not allow the public to communicate with each other through them. Instead, they mostly communicate to other people, and they strictly control any outsider content they allow to appear on their media. These are the media that concerned Jerome Barron in his famous 1967 article. They are still central to our culture: they set agendas for public discussion, and much of the blogosphere, for example, comments on and reacts to what they say. Nevertheless, their importance has diminished. They are no longer alone, and we cannot understand today's media ecology by viewing traditional mass media as even the paradigm case.

Indeed, these "traditional" conduits are increasingly merging with and becoming more like the newer conduits, particularly online service providers like Blogger, Facebook, and YouTube. The "dead tree" newspaper, *The New York Times*, shares most of its content with the Web site NYT.com, but there the similarity ends. On NYT.com,

individuals can write comments to the site's many different blogs and even to some of its editorials and op-eds.<sup>29</sup> Indeed, the very fact that NYT.com now hosts a variety of blogs, with all of the user content they generate, is an important sign of the times (pardon the pun). NYT.com is by now far more than an online newspaper. It is an online service provider that facilitates and encourages user-generated content. It hopes to draw people to the site, and keep existing users coming back, with the promise that they can write things that will appear on the site and that others can read. That user base, in turn, helps NYT.com sell online advertising. Indeed, NYT.com is only beginning to scratch the surface of what other online service providers already do and will do in the future.

Amazon.com offers the chance for every customer to be a book reviewer. Facebook and MySpace become valuable to other users (and thus to advertisers) because people willingly add content to their sites and use them to communicate to others. Google and YouTube thrive off Web pages and videos created by the public. The older model of one-to-many mass communication has been supplemented, if not replaced, by a model of mass communication that invites and even depends on user-generated commentary and content. These days, conduit owners are literally begging people to use their sites to talk to others, to add valuable content to their sites, and to draw other users to visit them. It is the Tom Sawyer theory of telecommunications—inviting users to whitewash the fence (or contribute to the platform)—that the conduit provides.

In short, just as in 1967, the world of communication is a world of information conduits, most of which are in private hands. And just as in 1967, the practical freedom of speech is deeply tied to how these conduits work and what kinds of access and opportunities they offer to ordinary citizens. The difference today is the technological structure of these conduits, the business models that these technologies make possible, and the opportunities for public participation that flow from these technologies and business models.

How can we preserve and expand the opportunities and the access that today's information conduits provide? In 1967, Jerome Barron thought that the First Amendment, suitably interpreted by courts, could help secure media access and promote public participation in

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<sup>29</sup> See *The New York Times*: Opinion, <http://www.nytimes.com/pages/opinion/index.html> (last visited Apr. 16, 2008). Several of the *Times*' columnists also have separate blogs through which readers can respond to previous op-eds. For example, Paul Krugman's blog is at <http://krugman.blogs.nytimes.com>.

mass media. My view, by contrast, is that although First Amendment *values* are quite important in shaping public policy and technological design, the First Amendment itself, at least as interpreted by courts, will do very little to promote these goals. Indeed, the question whether the First Amendment secures affirmative guarantees of access to media only arises after we have already stipulated a particular kind of media ecology: a set of technologies subject to regulation and a set of business models that grow up in this ecology. Usually, by the time judicial enforcement of the First Amendment gets involved, the basic parameters of media—and media access—have already been set. Then it is already too late.

Barron's 1967 article exemplifies this point. It is divided into two halves. The first, and larger, half is a full-scale attack on private power and on the condition of the public sphere, which he finds too bland, too cowardly, and too dominated by a small number of sources.<sup>30</sup> Then, in the second half of the article, Barron offers his solution: a judicial remedy that would give representatives of significant groups in the community a limited opportunity to have their voices heard in newspapers, radio, and television stations.<sup>31</sup> Barron's proposal was probably thought of as radical in its own day. But from today's perspective what is remarkable is how modest his proposal was and how limited in scope. Technological changes and changes in the methods of information creation and delivery have allowed far greater participation and far greater ability to reach mass audiences and shape public opinion than his proposed judicial remedy ever could.

### III. Knowledge and Information Policy

This brings me to my central point: The basic problem of media access is not constitutional in the legal sense, i.e., what the U.S. Constitution demands or forbids. Rather, it is "constitutional" in a *technological* and *social* sense: what kinds of technologies, business models, social formations, and user practices constitute the media ecology. Law plays a crucial role in shaping and regulating technologies, business models, social formations, and user practices, but traditional judge-made First Amendment law—at least the kind Barron wrote about in 1967—plays a surprisingly minor role.

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<sup>30</sup> See Barron, *supra* note 1, at 1644–47.

<sup>31</sup> See *id.* at 1667–68, 1677–78.

Media access depends on the kind of media we have, how they are designed, what types of communication and what affordances they make possible, and what administrative rules and statutory regulations we design to govern them. Media access also depends on what business models, end-user innovations, and forms of social cooperation develop in the environment generated by technological innovation and regulation. If we are really serious about guaranteeing media access, we must focus on the design of the media ecology, because some kinds of ecologies make media access much easier or much harder to accomplish. If media access is easier today than it was in 1967, it is because technological developments, shaped by law and by public investment, have helped create technological infrastructures, business models, and social practices that make access far easier.

In saying this, I am not making a claim of technological determinism. Rather, my point is precisely the opposite. People may be tempted to think that the Internet by itself has solved the problem of media access once and for all. But the Internet by itself does not guarantee effective media access. It has to be built, based on whatever incentives law provides, and it has to be built in a certain way: to facilitate openness and participation. It is possible to have a relatively closed Internet that inhibits widespread access, that uses closed or proprietary architectures and standards, that restricts the creation and deployment of new third-party applications, and that tends to relegate end users to largely passive roles as consumers. It is also possible to have a relatively open Internet that generates third-party innovation and business models that in turn encourage widespread access, innovation, and participation by end users. The key question is how we should organize telecommunications policy to promote the latter goals. Media access depends on creating incentives for different kinds of conduits and media models to thrive. In particular, it depends on policies that promote innovation and prevent incumbents from blocking new ideas and new competition. Media access depends on a combination of good technological design encouraged by sound innovation policy, information policy, and free speech values.

What role do the judicially enforceable guarantees of the First Amendment play in these debates? In his essay for this Symposium, Frederick Schauer points out that one can describe that role in one of two ways.<sup>32</sup> First, one might say that the First Amendment articulates values that are underenforced by the courts, because, for example,

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<sup>32</sup> Frederick Schauer, *Hohfeld's First Amendment*, 76 *GEO. WASH. L. REV.* 914, 928–30 (2008).



courts are not institutionally well-suited to protect them.<sup>33</sup> Second, and more broadly, one might argue that First Amendment law is actually a special case of a more general set of policy goals.<sup>34</sup>

I think that both these claims are true. As to the first point, I believe that there are First Amendment values that go beyond First Amendment doctrine. Sometimes these values are best enforced not by constitutional courts, but by legislatures, administrative agencies, and by courts interpreting statutes and regulations. Indeed, they are sometimes best enforced by the design and implementation of technology. But the second point is, to my mind, even more important than the first. The judicial doctrines that express First Amendment values form only a subset of a larger concern that I would call *knowledge and information policy*. The judicial doctrines of the First Amendment, and even what we might call “First Amendment values,” are only special cases of this larger concern.

Briefly stated, the goals of knowledge and information policy are: (1) to promote the production and diffusion of valuable information and knowledge; (2) to develop a healthy and vibrant public sphere of opinion and culture; (3) to encourage widespread participation in a culture of information and knowledge production that arises from a broad, diverse, and antagonistic set of sources; (4) to promote innovation in, widespread availability of, and access to knowledge and information technologies; and (5) to develop human capacities and human capabilities through the spread of knowledge and information technologies. As you can see from this list, First Amendment values play an important role in knowledge and information policy, but the latter encompasses far more. Policies that promote scientific research, education, and universal access to telecommunications facilities, for example, overlap with free speech values, but their scope is far broader. Knowledge and information policy includes, for example, concerns about innovation and competition, technological development, and the creation of new applications and delivery methods for knowledge production. Other areas of law, like intellectual property law, focus on these goals and on knowledge production generally, but we cannot reduce their concerns to those of the First Amendment.

Indeed, we would be better served by seeing free speech values as a subset of a larger set of concerns with family resemblances to the values of freedom of speech. For example, what Ed Felten calls the

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<sup>33</sup> See *id.* at 928–29.

<sup>34</sup> See *id.* at 929–30.

“freedom to tinker”<sup>35</sup>—the right to experiment with new applications, discover how products are made, and add new innovations—has obvious analogies with and similarities to freedom of speech, but it is not the same thing. Promoting open systems and open standards in technology, and promoting interoperability between different technologies and software, may be quite important to promoting democratic participation in technologies and technical innovation, and it may ultimately assist the growth and spread of knowledge and free expression.<sup>36</sup> The Internet, for example, was made possible by the adoption of certain open standards that allowed interoperation between different communications networks and promoted the creation of new applications that could be delivered over these networks. Once again, the values of open standards and interoperability bear a family resemblance to the values of freedom of speech, but they are not identical to them.

Knowledge and information policy, which includes free speech values, should guide and inform how we design media institutions. When I speak of “design,” I do not simply mean passing laws or creating social institutions. I also mean the design of technology itself. One lesson of the Verizon story that begins this Essay is that technological design can be more or less free speech friendly, and more or less participatory. At the same time, the legal rules that regulate technology can promote business practices that encourage media access and democratic participation in mass media or, conversely, practices that seek to limit access and make end users more like passive consumers.

Thus, if we want to promote media access today, we need to look beyond the boundaries of judicially created First Amendment rights. Telecommunications regulation—and, in particular, the debate over open access and network neutrality—has important consequences for media access. To be sure, network neutrality policies prevent certain forms of content censorship by conduits, and open access policies promote competition among ISPs that will lead at least some ISPs to promise not to censor. Yet, a more important argument for these policies is that they might promote innovation in content delivery, applications, and content production that comes from entrepreneurs outside the current duopoly of cable and phone companies. People should be able to create new applications to be laid on top of the

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<sup>35</sup> Freedom to Tinker, <http://www.freedom-to-tinker.com> (last visited Apr. 16, 2008).

<sup>36</sup> See Laura DeNardis & Eric Tam, *Open Documents and Democracy: A Political Basis for Open Document Standards 4–5, 25* (Nov. 1, 2007) (unpublished manuscript, on file with Yale Information Society Project), available at <http://www.ifap.ru/library/book255.pdf>.

broadband network without fear that they will be blocked by broadband providers. And individuals and start-ups should be able to serve not only text, but also video and multimedia, without fear that they will be blocked or slowed down because their content and applications compete with broadband companies or their business partners.

A second set of issues, and somewhat closer to traditional free speech concerns, involves the liability of conduits for content that travels through their networks or is posted on the servers of online service providers. In 1967, Barron pointed out that *New York Times Co. v. Sullivan*<sup>37</sup> was not necessarily a great victory for freedom of speech. It merely aided powerful media organizations without securing greater access.<sup>38</sup> But if today's conduits make money by allowing end users and other strangers to upload content and maintain new applications through their facilities, then greater conduit liability may cause them to block or close off access; conversely, limiting conduit liability can promote media access.

Section 230(c)(1) of the 1996 Telecommunications Act<sup>39</sup> immunizes broadband companies, ISPs, and online service providers for objectionable material that flows through their channels.<sup>40</sup> It may be one of the most important laws in the United States for making possible business models that promote media access by ordinary individuals; indeed, in terms of its practical effects, it may be even more important than many aspects of First Amendment doctrine. Because § 230 does not apply to intellectual property questions, the Digital Millennium Copyright Act (“DMCA”)<sup>41</sup> has also proved crucial. The Act's safe harbor provisions limit liability for copyright violations for material posted on online service providers or flowing through conduits.<sup>42</sup> Without these safe harbor provisions, many features of current Internet practice—including the development of Web 2.0 applications that leverage the content contributions of many people—would be legally risky. Indeed, were it not for statutory safe harbors and other limits on copyright liability, the basic practices of search engines, and indeed much of the traffic on the Internet, might be illegal.

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<sup>37</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>38</sup> See Barron, *supra* note 1, at 1657–60.

<sup>39</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

<sup>40</sup> See 47 U.S.C. § 230(c)(1) (2000).

<sup>41</sup> Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

<sup>42</sup> See 17 U.S.C. § 512(a) (2000).

Neither § 230 of the 1996 Telecommunications Act nor the DMCA are perfect solutions. Section 230(c)(1) may provide immunity for constitutionally unprotected activities that are not really necessary to ensure media access, while the DMCA's provisions, which offer far less protection than § 230, may not go far enough. They may sometimes favor the interests of large content industries over smaller and anonymous end users. Perhaps more to the point, § 230(c)(2) immunizes conduits when they censor the speech of others,<sup>43</sup> which may actually encourage business models that limit media access in some circumstances. Nevertheless, statutory immunities, and not the First Amendment, have proved vitally important in creating the rich ecology of creativity and free expression that we see on the Internet today.

#### *IV. Media Design and Mass Participation*

Barron correctly understood that private power affected people's practical ability to express themselves; private power also affected the health, vibrancy, and diversity of the public sphere.<sup>44</sup> He also understood that the law of freedom of speech must pay attention to technological change, especially changes in technologies of communication.<sup>45</sup> Much of what he said in 1967 still rings true today, despite the enormous opportunities for individual communication that the digital age has made possible.

But what Barron did not see in 1967 is as important as what he did see. When Barron wrote his article in 1967, one of the towering figures in First Amendment theory was Alexander Meiklejohn, who tied the purposes of the First Amendment to the production of information necessary for deliberation about issues of public concern.<sup>46</sup> Barron's arguments were both influenced by and limited by Meiklejohn's conception. First, like Meiklejohn, Barron took existing business models of the broadcast media for granted; thus, he assumed that relatively few people would be able to use the mass communications media of his day.<sup>47</sup> That is why Barron wanted representatives of the community to have a limited right of access; he assumed that not everyone could enjoy such a right.

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<sup>43</sup> See 47 U.S.C. § 230(c)(2).

<sup>44</sup> See Barron, *supra* note 1, at 1643–44, 1646–47.

<sup>45</sup> See *id.* at 1643–47, 1650–51.

<sup>46</sup> See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 163–64 (1965).

<sup>47</sup> See Barron, *supra* note 1, at 1647.

Accepting the basic structure of mass communications created a second problem: Meiklejohn's model of freedom of speech and democratic deliberation was not strongly participatory. It was based on the metaphor of a New England town meeting, with limited time and a controlled agenda.<sup>48</sup> What mattered was getting relevant information out to the electorate, not ensuring that each of them would get the time or the opportunity to express themselves. This idea made perfect sense given the existing structure of the mass media. But it created a tension with Barron's own instincts about the purpose of the First Amendment, which were much more participatory than Meiklejohn's.

Barron was (and is) a law professor, and so he viewed the solution to the problem of media access through a law professor's eyes. He proposed creating an individual cause of action for media access, either under the First Amendment or through legislation.<sup>49</sup> In addressing the problem this way, he did three things. First, he assumed that the best solution to a violation of individual access was granting particular individuals judicial causes of action against newspapers and broadcasters. Second, he assumed that the best way to secure practical free speech rights was through judicial interpretations of the First Amendment or a statute that judges would apply. Third, he took the existing technological structure and existing business models of mass media for granted and asked lawmakers or judges to add a minor gloss.

Once he took those business models as a given, however, Barron was very limited in the sort of remedies he could propose. There were simply too many people who wanted to speak and too little space available. His actual proposals were quite modest. He argued that individuals who could prove that they were representative of "a significant sector of the community" would have the right to petition for a right of access.<sup>50</sup> Courts would use a contextual judgment to determine whether access should be granted, based on a number of factors, including the petitioner's representativeness, whether the petitioner's speech was being excluded or censored by the media, and the degree of competition in the media.<sup>51</sup> He also argued that in return for the *New York Times Co. v. Sullivan* privilege, newspapers should offer rights of reply to persons who had been attacked in their pages.<sup>52</sup>

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<sup>48</sup> MEIKLEJOHN, *supra* note 46, at 24–28.

<sup>49</sup> See Barron, *supra* note 1, at 1667, 1669–70.

<sup>50</sup> *Id.* at 1677–78.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 1657–60.

Barron was deeply concerned with abuses of private power. He recognized that the privately owned mass media of his day were conduits for speech that closely tied editorial functions with dissemination functions.<sup>53</sup> But he did not focus on the basic technological and regulatory issues that created the disparity in access and the resulting impoverishment of the public sphere. He treated the technology of his times—and, more importantly, the governing models for making money with that technology—as more or less given.<sup>54</sup> He accepted the Meiklejohnian motto that “what is essential is not that everyone shall speak, but that everything worth saying shall be said,”<sup>55</sup> and that given the limited opportunities for speech, the speech that was most important to promote was political speech.<sup>56</sup>

Meiklejohn’s theory of free speech was premised on a mass media and broadcast model that assumed the legitimacy of existing technological structures and business practices. And once one assumed this, a great deal followed. In this model, the most important speech comes from media that are one-to-many: newspapers, radio, movies, and television. These media are controlled by a very small number of people. As a result, we must focus on the rights of listeners, not speakers, and we must make sure that listeners—that is, the public—get all the information they need to ensure a healthy democracy.<sup>57</sup> And because time and space are limited, we must make sure they get access to the most important kind of speech in a democracy: speech that concerns matters of public importance directed to the great issues of the day.<sup>58</sup> In short, Meiklejohn’s vision of what the First Amendment meant and how best to protect First Amendment rights was structured by background features of technology and information policy that were not inevitable. These background features profoundly shaped the constitutional theories of his era, even as they do today.

What would the alternatives have been in 1967? Barron did not argue—and we can hardly blame him for not arguing—that the proper response to the problem of private censorship was to invent the Internet. Create a network of networks, lower the costs of distribution, and make it possible for everyone to be a broadcaster and a publisher, and the problem of private censorship is ameliorated. People can

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<sup>53</sup> See, e.g., *id.* at 1642–43.

<sup>54</sup> See *id.* at 1644–47.

<sup>55</sup> *Id.* at 1653 (quoting MEIKLEJOHN, *supra* note 46, at 26).

<sup>56</sup> *Id.* at 1668.

<sup>57</sup> See MEIKLEJOHN, *supra* note 46, at 26.

<sup>58</sup> See *id.*

route around traditional media gatekeepers; they canglom onto, comment on, and criticize what the mass media do.<sup>59</sup> It is true that they will not have access to NBC, but if they become a blogger and say things that other people want to read—like Markos Moulitsas, the founder of Daily Kos—then someday maybe NBC, and political candidates too, will come running to their doorstep.

In 1967, Jerome Barron could not have been expected to imagine the Internet, the hypertext protocol (the basis for the World Wide Web), blogging, YouTube, and Web 2.0 applications. Indeed, as late as 2000, people did not recognize the importance of blogging in changing political discourse. We can hardly expect Barron to have seen it coming. Nor could we have expected him to write all this up in the *Harvard Law Review*. In fact, if he had written an article about how to redesign telecommunications facilities, the *Harvard Law Review* would probably have rejected his article. Not legal scholarship, they would say: it belongs in a journal of public policy, or maybe even electrical engineering. Our ideas about how to think about law and technology are different today. The growth of the Internet is a big reason why.

All the Internet does, however, is make salient features of our world that were already present in 1967. If the Internet sensitizes us to the issues of technological design and information policy, those issues were also present in 1967. They existed, and continue to exist, even before we ask whether judges should grant limited rights of reply to representatives of significant elements of the community.

Suppose we had thought about media access not in terms of judicially enforceable interpretations of the First Amendment, but in terms of the design of the media ecology. What could we, from the perspective of 1967, have imagined?

First, we might have focused on the fact that broadcasting was a conduit. It was a way of getting speech from one place to another. The person who owned the conduit did not have to be the person who controlled the content. We could, in theory, divide up these functions. And not merely in theory: telephone companies were already treated differently from broadcasters. They owned the conduits, but they were common carriers and could not control content going over their lines. If government wanted to expand the number of speakers, it could require some broadcast licensees—as a condition of their li-

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<sup>59</sup> See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Digital Age*, 79 N.Y.U. L. REV. 1, 9–13 (2004).

cense—to operate as common carriers of radio and television signals. This would change their business models, causing them to focus primarily on the quality and reach of their signals. Or the FCC could require that some licensees act as common carriers with respect to parts of their broadcast day. For example, from 6:00 a.m. to 2:00 p.m., Channel 4 would have to sell its airtime on a “first come, first served” basis, in thirty-minute blocks, to anyone who wanted to broadcast. After 2:00 p.m., Channel 4’s owners would control content. In addition, government could reserve some channels for government-owned and -operated stations of two types. One type would deliver educational and public affairs programming. Another type would be a dedicated electronic public forum, open to anyone who wanted to use it.

Second, we might have argued that the radio and television spectrums imposed artificial scarcity. The radio and television bands were not necessarily fixed; they were shaped by existing business models as well as by the design of existing radio receivers. Even within the existing AM and FM bands, there was much more room available than government actually licensed. Moreover, the government prevented the development of broadcast licenses for low-power radio transmissions that could reach whole neighborhoods, purportedly due to fear of interference, but more likely, one suspects, due to pressure from major media outlets who feared new competition.<sup>60</sup> If government shaped its licensing policies to maximize participation and relaxed its bans on low-power transmissions, many more people could have effective access to a wider public.

Third, spread-spectrum technologies already existed in 1967. They were developed during World War II and used for military purposes. These allowed many different radio broadcasts to share frequencies without interference. The government could have offered tax incentives or subsidized research into developing these spread-spectrum technologies for commercial applications, created incentives for the production of commercial radios that could receive these transmissions, and reserved bands for spectrum-sharing technologies, thereby allowing a much wider array of individuals to be broadcasters. With sufficient effort, the technology might have been adapted to television broadcasts as well.<sup>61</sup>

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<sup>60</sup> See Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 13–17 (2002).

<sup>61</sup> See Yochai Benkler & Lawrence Lessig, *Net Gains: Will Technology Make CBS Unconstitutional?*, THE NEW REPUBLIC, Dec. 14, 1998, at 15. The FCC came comparatively late to the development of spread-spectrum technology, issuing a notice of inquiry in June 1981. See Au-



Fourth, radio, television, and newspapers in the 1960s were one-to-many media. One entity broadcast to many people. That is what made these media so powerful as methods of communication and also limited who had access to them. But we did not have to devote radio and television spectrum primarily for one-to-many communications. One of the government's early decisions in regulating the airwaves in the 1920s was to prefer commercial mass broadcasters to amateur radio operators, creating a self-fulfilling prophecy of a world dominated by one-to-many broadcasting.<sup>62</sup> That result, however, was hardly necessary, either as a matter of technology or as a matter of good policy. The government might have poured money into, and designed regulatory and tax incentives toward, encouraging the use of one-to-one or one-to-few communications, especially for education and discussion of issues of public concern. Ham radio and citizen's band radio, both of which were still quite active in 1967, were both one-to-many and one-to-one; both, however, were placed on separate bands from commercial radio. If government were serious about encouraging mass participation in broadcasting, it might have chosen very different policies.

With sufficient thought, we could probably multiply these examples. What they all have in common is that they seek to expand the number of people who have effective access to media, not by accepting existing business models and laying a judicial remedy of access on top of them, but by redesigning the system of mass communications. We might do this by separating content provision from content delivery, by relaxing technological restrictions that reduce the number of broadcast licenses, by giving incentives to develop new commercial technologies, and by creating new institutional frameworks for media production. That is to say, we might secure media access through build-out requirements, through structural regulation, through technological regulation, and through innovation policy. None of these proposals would have violated anybody's First Amendment rights. Far from punishing people from speaking, they would have used the powers of the administrative and welfare state to increase opportunities for more people to speak and to have effective access to broadcast media.

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thorization of Spread Spectrum and Other Wideband Emissions Not Presently Provided for in the FCC Rules and Regulations, Notice of Inquiry, 87 F.C.C.2d 876 (1981).

<sup>62</sup> See Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 309, 314 (1998) ("The present regulatory system was fashioned around the needs of one model of wireless communications: broadcasting. . . . [T]o make possible a consumer market in simple receivers, which were at the time the sole product appropriate for mass marketing.").

And there is the rub. All of these proposals for greater media access in the 1960s, other than Barron's original proposal, had two things in common. First, most of the proposals required that governments spend money, either in the form of direct subsidies, tax breaks, or government-run stations. Second, each of these proposals would have been opposed by the incumbent broadcast and newspaper industries. After all, who wants extra competition? By contrast, Barron's argument for a First Amendment right of media access was a remarkably modest proposal that did not seriously threaten existing business models, no matter how much newspapers and broadcasters claimed it violated their First Amendment rights. The proposals for technological innovation that I have described above would not violate anyone's constitutional freedoms. But incumbent media would have been just as opposed to them as to Barron's proposal. Much has changed today, but one thing has not: the biggest opponents of structural regulation designed to promote media access tend to be incumbent organizations whose existing models of doing business are threatened by new competition and new media participation. If we want to increase practical access to communications media, we must not take incumbent business models for granted and graft judicial remedies atop them. Rapid technological change teaches us that no way of doing business is sacred and, therefore, no government system of communications regulation that facilitates that way of doing business should be sacred either. It is always possible to imagine things differently.

### *Conclusion*

Much of the debate over media access has struggled with a series of interesting jurisprudential questions: whether the First Amendment protects positive liberties or only negative ones; whether it includes a right of access or merely a right against noninterference; and whether free speech rights give people rights over communicative property, so that the right to speak requires access to media or, to the contrary, is violated when the state requires access to a private party's newspaper or television station. But technology policy is prior to all these issues. It is not prior logically or jurisprudentially, but practically. If the system of mass communications is designed correctly, better media access is built into the system and into the existing models of business competition. Greater media access occurs without having to fight over whether the First Amendment guarantees positive rights and, if it does, whether the judiciary is the proper institution to recognize and enforce them. One reason why people fight over positive rights in

media law is because previous decisions in shaping competition and technology have driven us there. But if we are willing to change our attitudes about technology policy, the issues of freedom of expression, and the role of courts, can start to look quite different.