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Pathologies, and the Abiding Wisdom of
First Amendment Access Rights

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**MARKET TRIUMPHALISM, ELECTORAL PATHOLOGIES,
AND THE ABIDING WISDOM OF FIRST AMENDMENT
ACCESS RIGHTS**

Gregory P. Magarian¹
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Jerome Barron's seminal writings that advocate a First Amendment right of access to the media² make a powerful case that constitutional speech protection must actually yield dynamic, broad-based public debate in order to ensure the vitality of our democratic society. Barron posited that the First Amendment's underlying purpose is to enable effective democratic debate, and he accordingly called on courts to invoke the First Amendment to provide underfinanced and socially marginalized speakers access to the infrastructure of public discourse. The mass media's persistent incapacity to inform and guide public discussion of critical issues – most notably in recent years the decision to invade Iraq³ – reaffirms that argument's urgency. In the four decades since Barron's seminal writings on access rights appeared, however, the Supreme Court and free speech theorists have largely ignored or scorned his prescription for a First Amendment right of access to the media, along with similar democracy-advancing arguments for strong First Amendment rights of access to the political process. When the end toward which First Amendment access rights would aim is so obviously important, and when institutions that control access to public debate continue to suppress and exclude critically important dissenting perspectives, why has the case for access rights fallen so far out of favor?

This article defends and elaborates Barron's argument that courts can and should employ the First Amendment to advance equalization of access to means of expression. Its primary goal is to explain and refute the two principal intellectual critiques of that argument, which I call the *libertarian critique* and the *regulatory reform critique*. Part I sets the stage by assessing the state of Barron's legacy. The first section emphasizes the elements of Barron's case for access rights that fuel the two critiques: an egalitarian, instrumental theory of expressive freedom, opposed by the libertarian critique; and the commitment to a judicially enforced

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² See JEROME A. BARRON, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA (1973); Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1968) (hereinafter Barron, *Emerging Right*); Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (hereinafter Barron, *New Right*).

³ For an indictment of the U.S. media's failures to facilitate effective public debate before and during the early part of the Iraq War, see Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 117-21 (2004) (hereinafter Magarian, *Public-Private Distinction*).

constitutional requirement of broadly distributed expressive opportunities, opposed by the regulatory reform critique. The second section accounts for the importance of these critiques by noting First Amendment doctrine's wholesale rejection of access rights. It also notes technological optimists' disdain for distributive accounts of expressive freedom and explains why developments in information technology have not diminished Barron's case for access rights.

The article then proceeds to its primary task: assessing the two stores of intellectual capital that underwrite doctrinal rejection of access rights. Part II critically analyzes the first of those positions, the libertarian critique, which stands on a foundation of market triumphalism. The first section presents the views of one group of libertarian thinkers, including Charles Fried, Steven Gey, Jon McGinnis, and Christopher Yoo, whom I classify as conservative libertarians. These critics openly espouse a First Amendment theory that elevates the autonomy of speakers, including powerful institutions, above all other concerns. They advocate a regime in which the economic market dictates people's opportunities to participate in democratic discourse, and they assail any departure from their *laissez-faire* vision as statist tyranny. The second section presents the views of a second group of libertarian critics, including Robert Post, Martin Redish, and Kathleen Sullivan, whom I classify as progressive libertarians. These theorists sympathize with access rights advocates' egalitarian concerns, and they offer thoughtful accounts of the First Amendment that acknowledge the importance of effective public debate for a healthy democratic system. My analysis, however, reveals that progressive libertarians fully embrace the conservative libertarians' core constitutional commitments: the autonomy-focused theory of expressive freedom, the insistence on market distribution of expressive opportunities, and the rhetorical strategy of demonizing access rights advocates as creeping tyrants. Part II concludes by setting forth the primary empirical, theoretical, and normative reasons to reject the libertarians' faith in unfettered market control of democratic discourse.

Part III critically analyzes the other principal attack on access rights, the regulatory reform critique. The first section describes the arguments of regulatory reformers, including C. Edwin Baker, Jack Balkin, and Mark Tushnet, against access rights. Regulatory reformers agree with access rights advocates that public discourse needs to become more egalitarian and informative. They also agree that government can and should play a role in improving public discourse. They break with access rights advocates, however, by arguing that courts should not invoke the First Amendment to broaden media access. Regulatory reformers trust the elected branches of government to implement access reforms, and they exemplify the prevailing academic pessimism about the utility of judicially enforced constitutional rights as a vehicle for progressive social change. Accordingly, they urge courts to narrow the scope of the First Amendment so that legislators and regulators may impose progressive access rules. The second section takes issue with the regulatory reform

critique. I first contend that, just as the libertarians indulge an uncritical faith in the market, regulatory reformers indulge an uncritical faith in the elected branches of government. Our present electoral system suffers from an unusual amalgam of electoral pathologies – some of which erode elected officials’ accountability to the public generally, others of which serve to perpetuate the exclusion of poor and socially marginalized people from electoral politics – that doom any hope for legislative or regulatory efforts to broaden media access. I then contend that constitutional rights provide a stronger theoretical basis, and courts a stronger institutional vehicle, for broadening access to the means of expression.

This article endeavors to show that Barron’s brief for access rights remains as persuasive today as it was 40 years ago. The libertarian critique of access rights represents a reckless plunge into the market triumphalism that has become a regrettably dominant feature of post-Cold War political rhetoric. The regulatory reform critique places untenable reliance on elected officials in a system rife with electoral pathologies and undervalues judicial review in a field constitutional courts are well positioned to navigate. Moving forward, advocates of access rights should pick up Barron’s flag and consider how best to achieve the aims he so eloquently articulated. This article’s conclusion suggests First Amendment attacks on the very electoral pathologies that undermine the regulatory reform critique as a first step toward broadening media access and encouraging reformist impulses in the elected branches.

I. THE LEGACY OF BARRON’S CASE FOR ACCESS RIGHTS

Professor Barron’s writings form the cornerstone of a case for First Amendment rights of access to the means of public debate. The first section of this part describes Barron’s case for access rights, emphasizing two key aspects of his argument: an underlying commitment to an egalitarian and instrumental theory of expressive freedom, and close attention to the institutional benefits and hazards that various public and private institutions present for the development of informative and inclusive public debate. These theoretical and institutional elements of the case for access rights provide the context for the article’s subsequent discussion of the intellectual currents that have led present First Amendment doctrine to reject access rights. The second section notes the Court’s steadfast refusal to take access rights seriously in the years since Barron’s writings, and it briefly explains why access rights remain crucial even in an era of broadly accessible information technology.

A. *Barron’s Theoretical Foundations and Institutional Insights*

In advocating a First Amendment right of public access to the

media,⁴ Barron sought to constrain “the unanticipated power which the marriage of technology and capital has placed in the relatively few hands which dominate mass communication.”⁵ Employing economic and sociological insights, he explained how the profit structures and communicative dynamics of the mass media had created strong incentives for media corporations to avoid presenting opinions on controversial issues.⁶ In these circumstances, the conventional, “romantic view” of the First Amendment as a shield for speakers’ autonomy had “perpetuated the lack of legal interest in the availability to various interest groups of access to means of communication.”⁷ Accordingly, Barron called on courts to interpret the First Amendment as ensuring a positive right of access for otherwise excluded speakers and ideas, to be applied with sensitivity to the distinctive contexts of different communications media.⁸ By “access” Barron meant not merely equal time for opposing opinions – a concept whose limitations he well recognized – but open space for a full range of subjects and viewpoints.⁹ Among the forms he saw access rights taking were a public right to have media outlets present discussion of public issues,¹⁰ a right for political speakers to purchase advertising space or time on equal terms with other members of the general public,¹¹ and a right to have newspapers consider submissions for publication without ideological bias.¹²

Barron’s call for access rights grew out of an egalitarian, instrumental theory of the First Amendment. He emphasized “the positive dimension of the first amendment: The first amendment must be read to require opportunity for expression as well as protection for expression once secured.”¹³ In the tradition of Justice Brandeis¹⁴ and Alexander Meiklejohn,¹⁵ Barron contended that the Constitution granted expressive

⁴ Barron’s emphasis on the word “media,” combined with his incisive analysis of the print and broadcast media, should not obscure the breadth of his conception of access rights, which extended to real property. See Barron, *Emerging Right*, *supra* note [x], at 492-94 (analyzing and praising *Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)).

⁵ Barron, *Emerging Right*, *supra* note [x], at 506.

⁶ See Barron, *New Right*, *supra* note [x], at 1644-47. Barron’s view that the mass media’s lack of ideology drives their failure to engage the public in political debate provides an interesting contrast to contemporary arguments from both the left and right that media outlets deliberately advance their own policy preferences.

⁷ *Id.* at 1642.

⁸ See *id.* at 1653 (advocating contextual analysis).

⁹ See BARRON, *supra* note [x], at 150-59 (exploring differences between “access” and “fairness”).

¹⁰ See *id.* at 151.

¹¹ See *id.* at 55-59 (proposing model statute).

¹² See *id.* at 48.

¹³ Barron, *Emerging Right*, *supra* note [x], at 509.

¹⁴ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), discussed in Barron, *New Right*, *supra* note [x], at 1648-49.

¹⁵ See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1948), discussed in Barron, *New Right*, *supra* note [x], at 1653.

freedom not out of a romantic commitment to autonomy in the abstract but rather because of our democratic system's need for inclusive, thorough debate about matters of public concern.¹⁶ He believed the equal participation values central to democratic ideals should inform the expressive freedom meant to implement those ideals.¹⁷ The First Amendment guaranteed not just a private right of powerful institutions to speak but also "public rights in the communications process."¹⁸ To the extent the media impeded rather than aided in broadening participation in public debate, the proper role of First Amendment doctrine was not to shield media owners' autonomy but rather to obligate them to distribute expressive opportunities more broadly.¹⁹ Barron viewed access rights as an alternative to left-wing calls for state suppression of right-wing ideas,²⁰ and he emphasized that his inclusive vision encompassed speakers on the right as well as the left.²¹ In particular, he found access rights inconsistent with prohibitions on hate speech,²² instead advocating vigorous efforts to open expressive opportunities for members of historically disadvantaged and marginalized communities.²³

Barron portrayed access rights as serving two values that appear inextricably linked in his conception of democracy: better informing the public and broadening participation in public debate. First, he maintained that the validity of a First Amendment access claim should turn on "whether the material for which access is sought is indeed suppressed and underrepresented."²⁴ Exposure to the broadest possible range of information optimizes the effectiveness of the political community in influencing and evaluating government decisions.²⁵ Thus, Barron emphasized "[t]he failures of existing media . . . to convey unorthodox, unpopular, and new

¹⁶ See Barron, *New Right*, *supra* note [x], at 1673 (stressing necessity of "adequate opportunity for debate, for charge and countercharge").

¹⁷ See *id.* at 1647 (criticizing romantic view of First Amendment for failing to recognize "inequality in the power to communicate ideas").

¹⁸ *Id.* at 1665.

¹⁹ Barron chose, in my view, an unhelpful illustration of judicial solicitude for media power when he criticized *New York Times v. Sullivan*, 376 U.S. 254 (1964), as a judicial license for powerful media to squelch debate by attacking reputations. See Barron, *New Right*, *supra* note [x], at 1656-60; see also BARRON, *supra* note [x], at 7-12. Barron's analysis of *Sullivan* paid insufficient attention to the Court's careful assessment of the power dynamics between public officials and their critics, see *Sullivan*, 376 U.S. at 279-83, as well as the particular power disparity between the Jim Crow-enforcing plaintiff and the civil rights activists named as nonmedia defendants in the libel action. Given these factors, *Sullivan* actually stands out as one of the Court's most incisive defenses of public discourse against private abridgement.

²⁰ See BARRON, *supra* note [x], at 75-81 (criticizing Herbert Marcuse's arguments for "repressive tolerance").

²¹ See *id.* at 85-89 (sympathetically considering Vice President Agnew's charges that liberal elitists were excluding conservative voices from the mass media).

²² See *id.* at 288-303.

²³ See *id.* at 300.

²⁴ Barron, *New Right*, *supra* note [x], at 1677.

²⁵ See generally CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).

ideas [and] to afford full and effective hearing for all points of view.”²⁶ Second, Barron tied the force of access claims to “the degree to which the petitioner seeking access represents a significant sector of the community.”²⁷ This principle would give members of socially and economically marginalized groups opportunities to engage and influence public debate without regard to social standing or economic means. By opening debate to marginalized speakers, access rights would advance “the relationship between a stable and vital political order and adequate access for protest to the significant means of communication”²⁸ and satisfy “the longing for an information process which is truly participatory.”²⁹

Central to Barron’s case for access rights was an attack on First Amendment doctrine’s uncritical acceptance of a rigid public-private distinction. “Only the new media of communication can lay sentiments before the public,” he explained, “and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance.”³⁰ The defining characteristic of the romantic First Amendment doctrine he opposed was its “singular indifferen[ce] to the reality and implications of nongovernmental obstructions to the spread of political truth.”³¹ He cast powerful media institutions not as legal persons with paramount expressive autonomy rights but as “non-governing minorities”³² who abuse their control over important communicative infrastructure to stifle public debate. He charged any medium that could support democratic discourse with the responsibility of doing so.³³ Accordingly, he contended that “[a]n access-oriented approach to the first amendment implies affirmative obligation on government as well as on the private sector and its concerns.”³⁴ Even so, he opposed government surveillance of the press,³⁵ and he conceived of the government’s role in mandating access to privately owned media as strictly procedural, disavowing any understanding of the First Amendment in which the gov-

²⁶ Barron, *New Right*, *supra* note [x], at 1647.

²⁷ *Id.* at 1677.

²⁸ Barron, *Emerging Right*, *supra* note [x], at 488; *see also* Barron, *New Right*, *supra* note [x], at 1650. In this respect, Barron’s analysis ties First Amendment access rights to the familiar “social safety valve” argument for expressive freedom. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 884-86 (explaining value of First Amendment for preserving balance between stability and change).

²⁹ Barron, *Emerging Right*, *supra* note [x], at 509.

³⁰ Barron, *New Right*, *supra* note [x], at 1656; *see also id.* at 1669 (suggesting that courts properly could treat newspapers, at least those with monopoly power, as having “quasi-public status” for purposes of constitutional analysis).

³¹ *Id.* at 1643.

³² *Id.* at 1649.

³³ *See* Barron, *Emerging Right*, *supra* note [x], at 494 (claiming that “any natural or obvious forum in our society” bears “responsibilities for stimulating the communication of ideas.”); *see also* Barron, *New Right*, *supra* note [x], at 1675 (contending that “the nature of the communications process imposes quasi-public functions on these quasi-public instrumentalities”).

³⁴ Barron, *Emerging Right*, *supra* note [x], at 494.

³⁵ *See* BARRON, *supra* note [x], at 54.

ernment influenced the content of ideas.³⁶ Access rights, in Barron's conception, would "build counterbalances into each sector."³⁷

A final, crucial but little noted feature of Barron's case for access rights is his primary faith in courts, rather than legislators or bureaucrats, to broaden access to the media. Barron contended that the First Amendment, given its instrumental purpose and egalitarian values, did not merely permit but rather required broad access to the means of communication.³⁸ He recognized that an access rights regime would present difficult legal questions, such as which points of view were absent from public discourse, where and how to require access for dissident speakers, and how much media attention to public controversies would adequately feed public debate.³⁹ However, he anticipated and adroitly answered concerns about judicial competence to resolve access claims: the necessary analysis, which would turn on "the public use and public need," was "no more complex a judicial task than is presently involved in analyzing the puzzles of apportionment, school desegregation and obscenity."⁴⁰ While Barron endorsed legislative and regulatory reforms to expand access, particularly in the context of the electronic media,⁴¹ he believed "[i]t is by the judicial process that we shall establish the contours for answers to questions which a working right of access obviously presents."⁴² Even in areas of legislative action, such as right-of-reply statutes, Barron maintained that "[a] right of access law is far more likely to serve as an effective counterpoise to media power if administered in the courts."⁴³ Barron's advocacy of a judicially enforced constitutional right of media access, while substantively radical, was also procedurally conservative. Acutely aware of the ignoble history of press licensing, he posited that – at least in cases of such traditionally nonregulated media as newspapers – courts would more fairly strike the proper balance between publishers'

³⁶ See Barron, *Emerging Right*, *supra* note [x], at 507.

³⁷ *Id.* at 509.

³⁸ See BARRON, *supra* note [x], at 22-25 (advocating judicial creation of a right of access to the press); see also Barron, *New Right*, *supra* note [x], at 1678 (positing that "it is open to the courts to fashion a remedy for a right of access, at least in the most arbitrary cases, independently of legislation").

³⁹ See Barron, *Emerging Right*, *supra* note [x], at 496 (summarizing legal questions that access rights claims would present).

⁴⁰ Barron, *Emerging Right*, *supra* note [x], at 495; see also BARRON, *supra* note [x], at 65 (identifying judicial independence and experience in enforcing First Amendment guarantees as reasons to favor judicial administration of access rights).

⁴¹ See Barron, *New Right*, *supra* note [x], at 1674-76 (discussing sources of constitutional authority for access rights legislation); see also Barron, *Emerging Right*, *supra* note [x], at 500 ("the existing structure of broadcast regulation permits an understanding of the problem of access which can be inclusive enough to reach failure to recognize or seek out dominant public issues").

⁴² Barron, *Emerging Right*, *supra* note [x], at 496. By the time of his 1973 book on access rights, Barron realized that courts were refusing to implement access rights. See BARRON, *supra* note [x], at 25.

⁴³ BARRON, *supra* note [x], at 64.

editorial interests and the public's access interests.⁴⁴

In the two decades following publication of Barron's work on access rights, his arguments received forceful scholarly defense and elaboration, notably from Owen Fiss⁴⁵ and Cass Sunstein.⁴⁶ Like the Vietnam era that fostered Barron's ideas, and the McCarthy era during which Meiklejohn developed his First Amendment theory, the present War on Terrorism would appear to cast the importance of access rights into particularly sharp relief.⁴⁷ Unfortunately, First Amendment doctrine and more recent scholarly commentary have almost uniformly rejected Barron's First Amendment vision.

B. *Access Rights, First Amendment Doctrine, and the Fallacy of Technological Optimism*

The Supreme Court's rejection of access rights is a familiar chapter in recent First Amendment history. Because I have told that story at length elsewhere,⁴⁸ I will not dwell on its details here. The Court in a wide range of First Amendment disputes has foresworn any emphasis on equalizing expressive access and enriching public debate, instead equating speech with property and thus insulating the economic market's pre-political distribution of expressive opportunities. Under present First Amendment doctrine, mass media owners may refuse to sell advertising

⁴⁴ See Barron, *Emerging Right*, *supra* note [x], at 495; see also Barron, *New Right*, *supra* note [x], at 1667. Barron, perhaps mistakenly, valued the print media's contributions to public discourse above those of the electronic media. See Barron, *Emerging Right*, *supra*, at 495. Even so, he avoided the trap of premising his case for access rights on technological factors, emphasizing that economic consolidation in the print media posed as great an impediment to the diversity of public discourse as technological limitations of the electronic media. Compare Barron, *New Right*, *supra*, at 1666 with *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387-89 (1969) (emphasizing broadcast spectrum scarcity in upholding FCC's fairness doctrine). His argument for access rights turned not on scarcity but on the societal benefits of informative, inclusive debate and the social reality of inequalities in the distribution of expressive opportunities. See Barron, *New Right*, *supra*, at 1645 (emphasizing need to focus on content rather than technology).

⁴⁵ See OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996) (hereinafter FISS, *LIBERALISM DIVIDED*); OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); Owen M. Fiss, *State Activism and State Censorship*, 100 *YALE L.J.* 2087 (1991) (hereinafter Fiss, *State Activism*); Owen M. Fiss, *Why the State?*, 100 *HARV. L. REV.* 781 (1987) (hereinafter Fiss, *Why the State?*); Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405 (1986) (hereinafter Fiss, *Social Structure*).

⁴⁶ See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993) (hereinafter SUNSTEIN, *DEMOCRACY*); Cass R. Sunstein, *Free Speech Now*, 59 *U. CHI. L. REV.* 255 (1992).

⁴⁷ See Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 *MINN. L. REV.* 247, 254-57 (2005) (discussing parallels between period that gave rise to Meiklejohn's First Amendment theory and post-2001 period) (hereinafter Magarian, *Substantive Due Process*).

⁴⁸ For a detailed account of the Court's expressive access decisions, see Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation Reinforcing Review*, at ___-___ (forthcoming 2007) (hereinafter Magarian, *Colliding Interests*).

space to political speakers;⁴⁹ owners of shopping malls may ban speakers who seek the access to public audiences that the public square once provided;⁵⁰ wealthy concerns face few constraints in crowding more modestly funded voices out of electoral discourse;⁵¹ and copyright holders face only minimal statutory constraints in barring incorporation of their intellectual property into new creations.⁵² All of these rejections of access rights reflect the Court's disregard for the interests of socially marginalized, disaggregated, and underfinanced would-be speakers – the bearers of access rights claims – and solicitude for the interests of powerful institutional speakers – the targets of access rights claims.⁵³ Those priorities, in turn, reflect the Court's rejection of a free speech theory focused on advancing the public's interest in informative, inclusive democratic discourse in favor of a theory focused on protecting empowered speakers' autonomy against government interference.⁵⁴

The Court has employed two primary doctrinal strategies to dispense with access rights claims.⁵⁵ In contexts such as the political advertising and shopping mall cases,⁵⁶ which squarely present the question whether the First Amendment guarantees some measure of access to means of expression, the Justices deny the existence of access rights as anathema to the First Amendment. In other cases, where advocates succeed in portraying access reforms as matters of legislative or regulatory

⁴⁹ Compare *CBS, Inc. v. Democratic National Comm.*, 412 U.S. 94 (1973) (rejecting political advertisers' First Amendment claim of right to purchase advertising) with *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding statutorily authorized right of reply requirement and emphasizing public's interest in balanced information). For further discussion, see Magarian, *Colliding Interests*, *supra* note [x], at ____.

⁵⁰ Compare *Hudgens v. NLRB*, 424 U.S. 507 (1976) (rejecting First Amendment right of access to shopping center) with *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968) (announcing First Amendment right of access to shopping center). For further discussion, see Magarian, *Colliding Interests*, *supra* note [x], at ____.

⁵¹ See *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). For further discussion, see Magarian, *Colliding Interests*, *supra* note [x], at ____.

⁵² See *Eldred v. Ashcroft*, 537 U.S. 186 (2003). For further discussion, see Magarian, *Colliding Interests*, *supra* note [x], at ____.

⁵³ See Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 *FORDHAM L. REV.* 2201, 2204-06 (2006). The Court still shows occasional concern for the interests of marginalized and underfinanced speakers, although Justice Stevens appears to stand alone in making that concern a priority. See *id.* at 2212-27.

⁵⁴ See Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 *WM. AND MARY L. REV.* 1939, 1951-52 (2003) (discussing Court's shift toward autonomy-based First Amendment theory) (hereinafter Magarian, *Political Parties*).

⁵⁵ In a broad sense, we might view free speech doctrine generally as a regime of access rights, because the First Amendment requires people adversely affected by speech to bear its costs. See generally Frederick Schauer, *Uncoupling Free Speech*, 92 *COLUM. L. REV.* 1321 (1992). This redistributive element of free speech law appears most clearly in the public forum doctrine, to the extent the Court requires the public to dedicate its property to the expressive uses of people without access to private expressive property. Theorists on all sides of the access rights debate, however, appear to agree that judicially mandated access to privately held expressive property would entail a distinctive change in present First Amendment doctrine.

⁵⁶ See *supra* notes ____-____ and accompanying text.

discretion in areas of constitutional uncertainty, the Court submerges the constitutional dimension of the problem and defers to the elected branches.⁵⁷ These twin strategies of denial and deference⁵⁸ roughly correspond with, and reflect the influence of, the two principal theoretical critiques of access rights – the libertarian critique, which objects to access rights on constitutional principle, and the regulatory reform critique, which embraces access reforms but opposes judicial recourse to the First Amendment as a basis for expanding access. The bulk of this article will address those two critiques.

One circumstance that might obviate the need for any theoretical critique of access rights is the ongoing revolution in information technology. The explosion of online communication over the past fifteen years has triggered a wave of technological optimism, which has led many theorists to proclaim that cyberspace will ameliorate the communicative inequalities that inspired Barron to advocate access rights.⁵⁹ If the technological optimists are right, the open-ended character of online communication – the easy ability of anyone with a computer and an Internet connection to join public debate – will by itself ensure the representation in public debate of every variety of speaker and perspective present in the body politic. Although the technological optimist argument does not indict Barron's case for access rights as constitutionally out of bounds or institutionally ill-advised,⁶⁰ it does suggest a basis for shrugging off his ideas as irrelevant. The Court occasionally has prefigured this argument by invoking technological distinctions among media to reject access claims.⁶¹

⁵⁷ See *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (upholding against First Amendment challenge California constitutional provision for right of access to shopping centers); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (upholding against First Amendment challenge federal regulatory requirement that broadcasters sell advertising time to political candidates).

⁵⁸ See Magarian, *Colliding Interests*, *supra* note [x], at ___ (examining Court's use of denial and deference techniques in expressive access cases).

⁵⁹ See, e.g., John P. Barlow, *A Declaration of Independence of Cyberspace* (1996), <http://homes.eff.org/~barlow/Declaration-Final.html> (last visited Oct. 26, 2006); Allen S. Hammond, *Regulating Broadband Communication Networks*, 9 YALE J. ON REG. 181, 190-92 (1992).

⁶⁰ Various proponents of the libertarian and regulatory reform critiques of access rights incorporate technological optimism into their arguments. See MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 190-92 (2001); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (hereinafter Balkin, *Digital Speech*); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 252 (1992); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 100-31 (1996); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 U.C.L.A. L. REV. 1653 (1998) (hereinafter Sullivan, *Intermediaries*); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003) (hereinafter Yoo, *Rise and Demise*).

⁶¹ *Compare*, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387-89 (1969) (citing scarcity of broadcast spectrum as ground for upholding broadcast access regulation) *with* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637-40 (1994) (rejecting *Red Lion* scarcity

A thorough critique of the technological optimist position lies beyond the scope of this article. I simply offer a few observations about why Barron's case for access rights transcends recent and foreseeable developments in information technology. Barron's argument, as described above,⁶² implicates three distinct problems with the mass media: that the cost of entry to media discourse excludes many speakers from participating, and thus prevents many ideas from circulating; that, accordingly, private concentrations of wealth and power control media access to a socially detrimental extent; and that the mass media generally fail to contribute to public debate socially valuable discussions of important issues from a wide range of perspectives. I will call these the *cost*, *concentration*, and *contribution* premises of the case for access rights. Even in our age of burgeoning information technology, one or more of these three premises will remain relevant for the foreseeable future, ensuring the continued vitality of Barron's case for access rights.

The media premise of the case for access rights that the Internet most obviously undermines is cost. Anyone with access to a computer – and fewer people every day fall outside that category⁶³ – knows that the Internet has created unprecedented, undeniable, and welcome opportunities for ordinary people of modest means to communicate with mass audiences. Even that cornerstone of technological optimists' disregard for access rights, however, has two plainly visible cracks. First, traditional mass media, such as the major broadcast networks, commercial radio stations, and urban daily newspapers, still exert tremendous influence over public debate.⁶⁴ Continuing developments in online communication will, albeit to an unpredictable extent, further marginalize the traditional media. Historical experience, however, suggests the new medium will never completely eradicate the old ones. All of television's technological innovation has never fully supplanted newspapers, magazines, and the radio. That phenomenon probably owes something to the paradoxical advantages that limitations can confer. Faced with the opportunity to absorb information passively from a screen, some people, some of the time, still prefer active perusal of the printed page. In the same way, the Internet's customizable interactivity appears to make some people, some of the time, appreciate television's prepackaged mass appeal. Second, even the Internet has already evolved to reward aspects of communication – such as sophisticated graphics, highly interactive features, and the ability to receive prime position from search engines – that require substantial re-

rationale as basis for justifying cable television access requirement).

⁶² See *supra* notes ___-___ and accompanying text.

⁶³ See Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PENN. L. REV. 119, 140-42 (2001) (describing narrowing of the "digital divide").

⁶⁴ See Balkin, *Digital Speech*, *supra* note [x], at 10 (noting that "traditional mass media . . . still play a crucial role in setting agendas because they still provide the lion's share of news and information to most people").

sources.⁶⁵ This phenomenon reflects competition for scarce audience attention in a world of virtually limitless information.⁶⁶

The possibility that high costs of entry to significant public debates may persist even in cyberspace also implicates the second media premise of the case for access rights – concentration. Although the Internet presents great possibilities for making communication more egalitarian, substantial structural inequalities persist in cyberspace. The complex architecture of online communication is not some state of nature; rather, it is a construct whose functions and attributes will always depend on the regulatory constraints that both governments and nongovernmental authorities impose on it.⁶⁷ The Internet, like traditional mass media, gives powerful access providers both ample opportunities and strong incentives to consolidate their power by creating communication bottlenecks.⁶⁸ The same economic factors that have produced concentration and undermined diversity in the traditional mass media have carried over in substantial measure to cyberspace.⁶⁹ The Internet’s seemingly egalitarian diversity of content actually facilitates consolidation, by generating a process of preference-reinforcement that inclines audiences to focus on a relatively small percentage of available content.⁷⁰ Whether the future Internet will look more concentrated or more disaggregated remains a very open question.

Finally, even in the technological optimists’ best of all possible worlds – in which the Internet fully supplants traditional mass media and everyone has an equal share in controlling it – the contribution premise

⁶⁵ See C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 897-99 (2002) (discussing economic factors that could facilitate corporate dominance of online media) (hereinafter Baker, *Media Concentration*); Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1453 (2004) (noting that “the benefits of scale and incumbency will continue to exist in the digital world”).

⁶⁶ See Kreimer, *supra* note [x], at 142-43 (describing relationship between “digital attention deficit” and increased expense of online communication).

⁶⁷ See generally LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999); see also Baker, *Media Concentration*, *supra* note [x], at 896 (emphasizing that Internet merely distributes content and carries no guarantee about diversity or nature of content it distributes); Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945 (1997) (criticizing Telecommunications Act of 1996 for favoring concentrated private interests rather than general public in regulation of information technology); Margaret J. Radin, *Property Evolving in Cyberspace*, 15 J. L. & COM. 509, 523-26 (1996) (describing Internet’s amenability to regulatory control and expressing doubt about unfettered market’s ability to produce an open, competitive Internet).

⁶⁸ See C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 295-96 (2002) (discussing possibilities for online bottlenecks).

⁶⁹ See *id.* at 285-307 (thoroughly analyzing economic features of online communication and concluding that Internet has not ameliorated problems with market distributions of media access); Goodman, *supra* note [x], at 1453-54 (noting traditional media powerhouses’ success in transferring their dominance to Internet).

⁷⁰ See Clay Shirky, *Power Laws, Weblogs, and Inequality* (Feb. 8, 2003), http://www.shirky.com/writings/powerlaw_weblog.html (last visited Oct. 26, 2006).

for access rights arguably retains its salience. The contribution premise is more obviously normative than the other two, because it values communication about particular subject matter – issues of substantial public concern – as well as diversity of perspectives and participants in debate. No one can confidently predict whether even a highly disaggregated system of online communication will exceed traditional mass media in fostering discussion of public issues and bringing marginalized voices into public discourse. The culprit, once again, is scarcity of audience attention. Although online content providers can produce endless quantities of information, audiences may expend their time available for Internet consumption before alighting on any matter of public concern.⁷¹ Those unmoved by the normative priorities underlying the case for access rights tend to brand any critique of audiences’ market choices paternalistic.⁷² However, even assuming paternalism in this context is out of bounds,⁷³ the online audience’s apparent “choice” to disdain political debate might actually result inexorably from content providers’ disincentive to produce information with broad, collective benefits rather than precision-guided appeal.

The Internet’s distinctive architecture makes implementation of any online access rights regime a complicated proposition, requiring nuanced technological as well as legal insights.⁷⁴ The Internet does not, however, obviate the problems of cost, concentration, and contribution that plague existing mass media and animate Barron’s case for access

⁷¹ For discussions of the relationship between attention scarcity and underproduction of information about matters of public concern, see BAKER, *supra* note [x], at 289 (noting that technology’s dispersion of audience attention complicates production of “many culturally or politically valuable media contents”); Goodman, *supra* note [x], at 1455-61 (identifying attention deficit and diminished quality of attention as factors of digital communication technology that discourage production of information valuable for democratic deliberation); Moglen, *supra* note [x], at 952-53 (indicting commodification of human attention as generating “media designed to force images and information at us, rather than to respond to our requests”); Radin, *supra* note [x], at 517 (“In a world where attention is property, noncommodified political and social ideas and interactions may wither”).

⁷² See *infra* notes ___-___ and accompanying text (discussing libertarian view that market distributions of expressive opportunities accurately reflect individual preferences). For discussion of that argument’s empirical and normative failings, see *infra* notes ___-___, ___-___ and accompanying text.

⁷³ Cass Sunstein contends that such “paternalistic” policy initiatives actually can amount to “the people, acting in their capacity as citizens, . . . attempting to implement aspirations that diverge from their consumption choices.” SUNSTEIN, DEMOCRACY, *supra* note [x], at 74.

⁷⁴ Ellen Goodman offers a technologically and architecturally sophisticated proposal focused on the value of targeted government subsidies in an environment of plentiful information and scarce audience attention. See Goodman, *supra* note [x], at 1461-67. For an alternative proposal with more aggressive regulatory components, see CASS SUNSTEIN, REPUBLIC.COM 167-90 (2001). Goodman’s proposal, in my view, makes a great deal of sense on its own terms, although her analysis overstates the force of First Amendment impediments to more proactive regulation. See Goodman, *supra*, at 1462-64. Conversely, some of Sunstein’s prescriptions, such as requiring any opinionated Web site to provide links to opposing points of view, see SUNSTEIN, *supra*, at 186-87, overreach even a public rights conception of the First Amendment while also taking insufficient account of technological and architectural challenges.

rights. Until and unless online communication eliminates all of those problems, Barron's arguments will continue to light a path toward the goals of a better informed public and a more fully participatory democratic system. I now turn to the deeper questions that generate the two principal critiques of access rights: whether a proper understanding of the First Amendment precludes any government effort to broaden access to the means of expression, and – if not – whether a proper understanding of institutional arrangements within government marks the political branches, and not the judiciary, as the proper source of those reforms.

II. THE LIBERTARIAN CRITIQUE OF ACCESS RIGHTS

The decline of academic arguments for First Amendment access rights roughly corresponds with the collapse of the Soviet empire. The fall of the Berlin Wall has inspired a surge in free-market triumphalism, unmatched since the Industrial Revolution, which infers from the collapse of Soviet-style totalitarian bureaucratism a complete vindication of laissez-faire capitalism.⁷⁵ This market triumphalism helps to contextualize, and ultimately indict, the first of two principal intellectual critiques of access rights:⁷⁶ the libertarian critique. The first section of this part presents the conservative libertarian version of that critique, defined by an autonomy-centered theory of the First Amendment, an unwavering faith in economic market distributions of expressive opportunities, and a conviction that any deviation from a laissez-faire First Amendment amounts to censorship bordering on tyranny. The second section discusses a seemingly more moderate articulation of the libertarian critique, the progressive libertarian version. Although progressive libertarian theorists express sympathy with the egalitarian and democratic concerns that animate calls for access rights and offer more nuanced analyses of free speech issues, my discussion reveals that they echo all three of the conservative libertarians' major chords. The final section contends that the rigid constitutional commitment to markets that defines both versions of the libertarian critique suffers from fatal empirical, theoretical, and normative problems.

A. *The Conservative Libertarian Version*

The libertarian critique emerges most predictably and straightforwardly from a group I will call conservative libertarians, which in-

⁷⁵ See generally THOMAS FRANK, ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY (2001).

⁷⁶ Not all of the critics discussed in this article respond directly to Barron's case for media access rights. Most of them criticize access rights alongside other regulatory proposals, including bans on hate speech and pornography, and some address ideas, such as campaign finance regulation, that fall within a broader conception of access rights. My discussion addresses arguments that either respond to access rights proposals or contribute to the critic's objections to access rights.

cludes Charles Fried,⁷⁷ Steven Gey,⁷⁸ John McGinnis,⁷⁹ and Christopher Yoo.⁸⁰ These theorists' arguments against access rights, although varied in approach and emphasis, make three common claims. First, they all embrace an autonomy-focused theory of expressive freedom. The conservative libertarians proceed from a theoretical premise, axiomatic in classical liberalism, that the First Amendment provides nothing more than negative protection for speakers' autonomy against government regulation.⁸¹ This autonomy-based approach to First Amendment theory serves the normative political theory of interest group pluralism, which holds that democratic societies properly distribute social goods through a process of conflict among groups of self-interested utility maximizers.⁸² Conservative libertarians seek First Amendment protection for speakers' autonomy so that communication can facilitate those conflicts in the political sphere and, more importantly, market exchanges in the private sphere.⁸³ Fried exemplifies this approach when he describes communication as "a transaction between citizens" that free speech law protects from collective interference.⁸⁴

⁷⁷ See Fried, *supra* note [x]. Fried attacks access rights alongside distinct proposals by critical race and feminist theorists to alter First Amendment doctrine. My discussion is limited to his arguments against access rights.

⁷⁸ See Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PENN. L. REV. 193 (1996). Gey as well attacks critical race and feminist proposals in addition to access rights. My discussion addresses only his treatment of access rights, which primarily targets Cass Sunstein. See SUNSTEIN DEMOCRACY, *supra* note [x].

⁷⁹ See McGinnis, *supra* note [x].

⁸⁰ See Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669 (2005) (hereinafter Yoo, *Architectural Censorship*); Yoo, *Rise and Demise*, *supra* note [x].

⁸¹ See Fried, *supra* note [x], at 233 ("Freedom of expression is properly based on autonomy . . ."); Gey, *supra* note [x], at 232 (unfavorably comparing egalitarian free speech regime to one that "attempts to allocate to nongovernmental actors the right to choose their particular worldview and make their own basic decisions about social values"); McGinnis, *supra* note [x], at 57 (positing expressive freedom as "rooted in the natural rights of the individual") (footnote omitted); Yoo, *Rise and Demise*, *supra* note [x], at 316 (positing that analysis of democracy-based approaches to free speech "turns largely on their ability to come to grips with . . . autonomy-based visions of free speech").

⁸² See Magarian, *Political Parties*, *supra* note [x], at 1953 (describing correspondence between autonomy-based First Amendment theories and interest group pluralism).

⁸³ See Gey, *supra* note [x], at 262-64 n.212, 271 (arguing for superiority of interest group pluralism over civic republican political theory); McGinnis, *supra* note [x], at 53-55 (asserting that proper understanding of expressive freedom turns on insights of public choice theory and economic theories of communication); Yoo, *Architectural Censorship*, *supra* note [x], at ___ (basing constitutional analysis of media policy on economic analysis of media markets).

⁸⁴ Fried, *supra* note [x], at 236. McGinnis likewise seeks "to cleanse the First Amendment of the obscuring varnish of social democracy and reveal its true origins as a property right of the individual, thus providing a model for an emerging laissez-faire jurisprudence." McGinnis, *supra* note [x], at 56. He derives this economically driven approach to expressive freedom from a biological premise that "the human faculty of speech evolved to improve economic well-being." *Id.* at 55. He further asserts, based on the premise that "civic understanding in a democracy is inevitably limited," that democratic principles are inappropriate not only in First Amendment adjudication but also "in other areas of social life." *Id.* at 126 n.320.

Second, conservative libertarians oppose access rights because, for them, the market's allocation of expressive opportunities defines distributive justice, and thus any "information-producing property"⁸⁵ is protected speech. McGinnis explicitly identifies speech as a property right.⁸⁶ Fried celebrates private rights as "indifferent – blessedly – to the ideological uses to which their beneficiaries would put them,"⁸⁷ and Gey similarly portrays the absence of government regulation as "neutrality – which entails the protection of individual privacy and intellectual autonomy."⁸⁸ Yoo likewise dismisses concerns about distributive justice as irrelevant to First Amendment analysis.⁸⁹ These theorists presume choices unconstrained by direct government regulation to be freely made and thus immune to structural criticism.⁹⁰ Thus, the existing market distribution of expressive opportunities, by definition, accurately reflects the will of the people.⁹¹ Because conservative libertarians ascribe absolute legitimacy to market distributions, the mere possibility that an access rights regime might have disadvantages or might fail to achieve its aims suffices to condemn it.⁹² Conversely, conservative libertarians dismiss concerns about nongovernmental suppression of expression by invoking a rigid public-private distinction, which denies corporations and other pri-

⁸⁵ McGinnis, *supra* note [x], at 93.

⁸⁶ *See id.* at 58-99 (arguing that Framers' intent and economic theory require a property-based view of the First Amendment). On this basis, McGinnis finds a parallel between the Court's application of deferential First Amendment scrutiny to cable "must carry" requirements, *see Turner Broadcasting Corp. v. FCC*, 512 U.S. 622 (1994), and the French Revolution. *See McGinnis, supra*, at 117-18; *see also* Fried, *supra* note [x], at 230 (comparing access rights advocates to "Jacobins").

⁸⁷ Fried, *supra* note [x], at 235 n.47 (discussing "background systems" of tort, property, and criminal law).

⁸⁸ Gey, *supra* note [x], at 261.

⁸⁹ *See Yoo, Architectural Censorship, supra* note [x], at 687 n.65; *see also id.* at 689-90, 715 n.209 (suggesting that regulatory attempts to ensure diverse viewpoints in public debate violate the First Amendment).

⁹⁰ *See Gey, supra* note [x], at 212 (attacking idea that "individual preferences . . . evolve as they adapt to new social conditions"); McGinnis, *supra* note [x], at 100 (characterizing Internet as "an example of spontaneous order" because it results from decisions "without the central direction of the state"); Yoo, *Rise and Demise, supra* note [x], at 318-19 (proclaiming any questioning of process by which market influences preference formation "fundamentally inconsistent with most democratic forms of government"). Fried acknowledges the existence of nongovernmental constraints on autonomy but presumes that "[o]ther legal norms" outside the Constitution eliminate those constraints. Fried, *supra* note [x], at 234-35.

⁹¹ *See* Fried, *supra* note [x], at 251-52 & n.205 (arguing that any underrepresentation in public debate of "opinions on the left" must mean those ideas are "boring" and "unconvincing"); Gey, *supra* note [x], at 265 (claiming that access rights arguments merely reflect the fact that "most of the public has used its existing freedom to reject or ignore . . . favored programming in favor of other, less enlightening alternatives"); Yoo, *Architectural Censorship, supra* note [x], at 675-713 (using economic analysis to deny existence of "market failures" in broadcasting).

⁹² *See Gey, supra* note [x], at 224 (arguing against access rights based on the possibility that they might "do more harm than good"); McGinnis, *supra* note [x], at 123 (discussing practical advantages of market over "centralized authority"); Yoo, *Rise and Demise, supra* note [x], at 324-41 (discussing potential problems with implementing access rights).

vate entities any legally cognizable capacity to undermine expressive freedom.⁹³ Any attempt to ameliorate privately driven constraints on expression runs aground on the twinned convictions that government can only harm expressive freedom and that only government can harm expressive freedom.

Finally, conservative libertarians' equation of the economic market with freedom leads them to equate any effort to create a more egalitarian distribution of expressive opportunities with tyrannical state interference in the proper working of the market. Gey and Yoo, beginning with their article titles, repeatedly indict access rights as "censorship."⁹⁴ Gey situates access rights advocates among a class of "postmodern censors" who "would reinstitute a degree of government control over speech and thought . . . so that the government could mold political reality to its own liking."⁹⁵ Fried dredges up an especially pungent comparison, likening access rights advocates to "socialists"⁹⁶ and "apologists for Marxism-Leninism."⁹⁷ Conservative libertarians dismiss as a fabrication the portrayal of access rights as a substantively neutral effort to encourage presentation of a wide range of viewpoints.⁹⁸ Rather, they see access rights as a means to force a specifically left-wing political agenda upon an unsuspecting people.⁹⁹ Fried, warming to his Cold War theme, por-

⁹³ See Fried, *supra* note [x], at 234 (stating that "[p]rivate impositions and limitations differ fundamentally from state impositions" because "they issue from the limiting person's own exercise of liberty"); Gey, *supra* note [x], at 242 (variously asserting that "the public/private distinction" and "some separation between the governors and the governed" is necessary to democracy); Yoo, *Architectural Censorship*, *supra* note [x], at 715 n.207 (dismissing concerns about private suppression of expression with conclusory statement that "the state action doctrine . . . represents one of the central underpinnings of classic liberal theory").

⁹⁴ See Gey, *supra* note [x]; Yoo, *Architectural Censorship*, *supra* note [x]. Indeed, Yoo's conception of "censorship" extends beyond access rights to any government action, such as the choice to promote advertiser-supported broadcasting and restrictions on ownership of media enterprises, that has the result of altering market distributions of expressive opportunities. See Yoo, *supra*, at 685 (discussing advertiser-supported broadcasting model), 701 (discussing horizontal ownership restrictions), 713 (discussing vertical ownership restrictions). McGinnis similarly sees any regulation specifically directed at information-producing property as a presumptive First Amendment violation. See McGinnis, *supra* note [x], at 116 & n.285 (criticizing media ownership restrictions).

⁹⁵ Gey, *supra* note [x], at 198; see also *id.* at 260 (ascribing to access rights advocates the "Orwellian" notion that "restriction equals freedom"); *id.* at 269 ("Speech regulations are proposed as a means of permanently altering the thought patterns of the citizens living under the control of the government").

⁹⁶ Fried, *supra* note [x], at 251.

⁹⁷ *Id.* at 252.

⁹⁸ See *id.* at 251 (claiming that access rights arguments based on "self-government and support for the fullest measure of public controversy" are "not arguments we can take seriously").

⁹⁹ See Gey, *supra* note [x], at 231-32 (claiming that access rights would create an "elitist" regime); McGinnis, *supra* note [x], at 123 n.304 (asserting that "many academics on the left favor regulation despite th[e] growth of information sources because of their growing realization that most of the truths emerging from contemporary social inquiry are not hospitable to collectivist and egalitarian ideals"); Yoo, *Architectural Censorship*, *supra* note [x], at 674 n.13 (suggesting that structural media regulations mask intent to control media

trays the case for access rights as “an argument for censorship . . . to avoid the competition, in much the spirit that East European television used to jam Western broadcasts of ‘Dallas.’”¹⁰⁰

B. *The Progressive Libertarian Version*

More compelling, for anyone not normatively committed to unregulated market control of expression, is the critique offered by what I will call progressive libertarian opponents of access rights, notably Robert Post, Martin Redish, and Kathleen Sullivan. These theorists, unlike the conservative libertarians, share the normative concerns of Barron and other access rights advocates about inequality in the distribution of expressive opportunities and /or deficits in the quality of public debate. Sullivan acknowledges the relevance of distributive concerns to First Amendment doctrine.¹⁰¹ Post abhors “the inequalities that afflict our contemporary media [and] the many ways in which the quality of our public discourse is undercut by the skew of market forces,”¹⁰² and he credits access rights advocates with “a sincere and admirable effort to rejuvenate democratic self-governance.”¹⁰³ Redish, although generally suspicious of redistributive impulses,¹⁰⁴ seems to acknowledge the desirability of “enriching public debate by including the expression of those who normally lack communicative access to the public at large.”¹⁰⁵ All of these theorists care about the relationship between free speech and democracy. Despite their normative sympathies, however, the progressive libertarians reject as a constitutional matter any public initiative to broaden access to the means of expression, viewing arguments for access rights as misguided egalitarian attacks on the laudable status quo that Sullivan calls “progressive free speech libertarianism.”¹⁰⁶

content).

¹⁰⁰ Fried, *supra* note [x], at 252.

¹⁰¹ See Kathleen M. Sullivan, *Discrimination, Distribution, and Free Speech*, 37 ARIZ. L. REV. 439, 450 (1995) (hereinafter Sullivan, *Discrimination*).

¹⁰² Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1538 (1997) (reviewing FISS, *LIBERALISM DIVIDED*, *supra* note [x]) (hereinafter Post, *Equality and Autonomy*).

¹⁰³ Post, *Micklejohn's Mistake*, *supra* note [x], at 1124.

¹⁰⁴ See REDISH, *supra* note [x], at 153-61 (critiquing theoretical bases for redistribution).

¹⁰⁵ *Id.* at 191.

¹⁰⁶ Kathleen M. Sullivan, *Free Speech Wars*, 48 S.M.U. L. REV. 203, 213 (1994) (hereinafter Sullivan, *Free Speech Wars*); see also REDISH, *supra* note [x], at 152 (praising traditional understanding of First Amendment); Post, *Equality and Autonomy*, *supra* note [x], at 1539-40 (favorably contrasting “the free speech tradition” with arguments for access rights); Sullivan, *Free Speech Wars*, *supra* note [x], at 206-09 (favorably describing the “modern free speech consensus”). Post has at times strongly criticized conventional First Amendment doctrine, albeit in terms that do not undermine his libertarian perspective on access rights. See Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249 (1995); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 678-79 (1990) (describing doctrinal failures related to concept of public discourse) (hereinafter Post,

The progressive libertarians' objections to access rights spring from far more nuanced accounts of expressive freedom than the conservatives' unvarnished market triumphalism. Sullivan argues that differences between economic goods and speech justify perpetuating the constitutional asymmetry between the permissibility of economic regulations and the impermissibility of speech regulations.¹⁰⁷ Redish critiques access rights within the broad framework of redistributive theory,¹⁰⁸ and he draws a damning comparison between access rights and impermissible compulsion of expression.¹⁰⁹ Post's theory of expressive freedom rests on an eloquent account of a functioning democratic society's need for open, robust communication.¹¹⁰ He indicts access rights as compromising essential First Amendment protection for his conception of public discourse, in which "democracy attempts to reconcile individual autonomy with collective self-determination by subordinating governmental decisionmaking to communicative processes sufficient to instill in citizens a sense of participation, legitimacy, and identification."¹¹¹ All of these conceptions of expressive freedom appeal to the same democratic values that animate the case for access rights, and none openly venerates the economic market's distribution of expressive opportunities.

In addition to the nuanced rhetoric of their First Amendment theories, the progressive libertarians distance their attacks on access rights from those of the conservative libertarians by emphasizing what they portray as an internal contradiction of the case for access rights. All of the progressive libertarian theorists seek to drive a conceptual wedge between the two central goals of access rights: better public information and broader democratic participation.¹¹² Redish posits the asserted dichotomy in the clearest terms, distinguishing "equality" of political participation from "enrichment" of public debate as justifications for access rights.¹¹³ Post distinguishes between justifications for access rights that cast the state as "parliamentarian" and "teacher."¹¹⁴ Sullivan likewise distin-

Outrageous Opinion).

¹⁰⁷ See Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 U.C.L.A. L. REV. 949, 959-65 (1995) (hereinafter Sullivan, *Unfree Markets*).

¹⁰⁸ See REDISH, *supra* note [x], at 153-74.

¹⁰⁹ See *id.* at 174-84.

¹¹⁰ For a useful introduction, see Post, *Outrageous Opinion*, *supra* note [x], at 626-46.

¹¹¹ Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1115-16 (1993) (hereinafter Post, *Meiklejohn's Mistake*). For further development of Post's concept of public discourse, see Robert Post, *Democracy and Equality*, ANNALS OF AMER. ACAD. OF POL. SCI. (Jan. 2006) at 25-30; Post, *Outrageous Opinion*, *supra* note [x], at 633-38.

¹¹² See *supra* notes ___-___ and accompanying text (deriving information and participation goals from Barron's case for access rights).

¹¹³ See REDISH, *supra* note [x], at 161-68 (discussing equality and enrichment rationales).

¹¹⁴ See Post, *Equality and Autonomy*, *supra* note [x], at 1528-34; see also Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 187-90 (1996) (recapitulating argument in government subsidy context).

guishes “allocative” from “distributive or paternalistic” justifications.¹¹⁵ This claimed discontinuity between improving informational quality and broadening participation enables the progressive libertarians to argue that access rights could improve public debate only if accompanied by unacceptably elitist substantive prescriptions.¹¹⁶ Attacking the internal dynamics of the case for access rights enables the progressive libertarians to reject access rights without appearing to reject the normative priorities that access rights seek to advance.

Behind their nuanced accounts of free speech and distinctive internal objections to access rights, however, the progressive libertarians actually embrace – as a constitutional if not a normative matter – all of the conservative libertarians’ central precepts. First, the progressive libertarians echo the conservative libertarian dogma that the First Amendment exists to protect personal autonomy against government interference. Without making autonomy quite the battle cry it is for the conservatives, the progressive libertarians still attack access rights in defense of an individualist status quo. Redish has constructed an imposing structure of First Amendment theory on the premise that constitutional speech protection exists solely to protect individual self-fulfillment.¹¹⁷ He especially recalls the conservative libertarians in focusing First Amendment protection on property used for expression – in his phrase, “the associational enterprise that operates the expressive resource.”¹¹⁸ Sullivan praises “[c]onventional First Amendment norms of individualism, relativism, and antipaternalism” and maintains that First Amendment principles “preclude a norm of equality of influence.”¹¹⁹ Both Redish and Sullivan join the conservative libertarians in painting a favorable picture of interest group pluralism as a democratic model.¹²⁰ Post suggests a different theoretical orientation by describing his First Amendment theory as aimed at facilitating democratic self-determination,¹²¹ but he conceptualizes democratic process values in a way that subordinates them to individual autonomy values. “Individual citizens,” he explains, “can identify

¹¹⁵ Sullivan, *Unfree Markets*, *supra* note [x], at 956.

¹¹⁶ Jack Balkin posits a similar dichotomy, although without a libertarian agenda, when he distinguishes populist and progressive tendencies in First Amendment thought. See J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995) (reviewing SUNSTEIN, *DEMOCRACY*, *supra* note [x]) (hereinafter Balkin, *Populism*).

¹¹⁷ See generally Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

¹¹⁸ REDISH, *supra* note [x], at 182 (footnote omitted). Redish argues that the First Amendment should protect expressive property even when the owner has “no substantive message to convey [but is] interested primarily or exclusively in maximizing profits.” *Id.* at 189.

¹¹⁹ Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 673 (1997) (hereinafter Sullivan, *Political Money*).

¹²⁰ See REDISH, *supra* note [x], at 171-72; Sullivan, *Political Money*, *supra* note [x], at 680-82. For discussion of the conservative libertarian rejection of civic republican ideas in favor of interest group pluralism, see *supra* notes ___-___ and accompanying text.

¹²¹ See Post, *Equality and Autonomy*, *supra* note [x], at 1521.

with the creation of a collective will only if they believe the collective decisionmaking is in some way connected to their own individual self-determination.”¹²² Thus, he concludes, “[t]he enterprise of public discourse . . . rests on the value of autonomy.”¹²³

Second, and centrally, the progressive libertarians echo, albeit in subtler tones, the conservative libertarians’ belief in the market as the only constitutionally legitimate arbiter of expressive opportunities. Post strikingly rejects doubts about the underpinnings of market distribution – the public-private distinction and the autonomous character of individual choices – not because he can defend either premise on its own terms but because he cannot conceptualize democratic self-determination without fully crediting both of them.¹²⁴ “The *ascription* of autonomy,” he writes, is “the transcendental precondition for the possibility of democratic self-determination.”¹²⁵ Accordingly, he condemns as anathema to democracy any regulatory effort to alter market distributions.¹²⁶ Redish maintains that the unregulated market gives all competing ideas a fair opportunity to influence debate and insists that altering the market’s distribution of expressive opportunities in any way would contradict the terms of democracy by compromising self-determination.¹²⁷ He also emphasizes a notion of “epistemological humility” that treats market distributions as inherently legitimate while discrediting any questioning of private power as an impermissible appeal to “normative factors.”¹²⁸ Sullivan endorses market distributions of expressive opportunities by avidly embracing the public-private distinction.¹²⁹ Her avowed “differential distrust of gov-

¹²² *Id.* at 1524; see also Post, *Democracy*, *supra* note [x], at 26 (arguing that “the practice of self-government” turns not on “making particular decisions” but rather on “recognizing particular decisions as one’s own”) (hereinafter Post, *Democracy*).

¹²³ Post, *Meiklejohn’s Mistake*, *supra* note [x], at 1118-19; see also Post, *Equality and Autonomy*, *supra* note [x], at 1530 (emphasizing “the principle that the self-determining agency of all persons should be regarded with equal respect” as basis for rejecting efforts to equalize the distribution of expressive opportunities).

¹²⁴ See Post, *Meiklejohn’s Mistake*, *supra* note [x], at 1125-28 (discussing public-private distinction); *id.* at 1128-33 (discussing autonomous character of individual choices). Post’s assertion that our deepening social science knowledge about cultural influences on behavior “is deeply incompatible with the very premise of democratic self-government,” *id.* at 1130, resonates with McGinnis’ similar doubt about the sustainability of democratic values. See *supra* note ____.

¹²⁵ Post, *Meiklejohn’s Mistake*, *supra* note [x], at 1131 (emphasis added).

¹²⁶ See *id.* at 1121; see also Post, *Equality and Autonomy*, *supra* note [x], at 1530-31 (characterizing access rights as impermissibly “repressing the speech of some in order to augment the speech of others”); *id.* at 1537 (charging that, under an access rights regime, “public discourse could no longer mediate between individual and collective self-determination”).

¹²⁷ See REDISH, *supra* note [x], at 163-64. Redish defines “political equality” as requiring only “governmental neutrality in the restriction of private expression” and dismisses the idea of substantive equality as unattainable. *Id.* at 163.

¹²⁸ *Id.* at 170.

¹²⁹ See Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 *FORDHAM L. REV.* 971, 979-82 (1995) (defending public-private distinction) (hereinafter Sullivan, *Resurrecting*); see also Sullivan, *Free Speech Wars*, *supra* note [x], at 207 (describing nongovernmental suppressions of speech as “exercises of editorial discretion, market judgment, social responsibility,

ernment” reinforces the idea that the market distributes expressive opportunities neutrally¹³⁰ and that egalitarian reforms would impermissibly alter that neutral distribution.¹³¹ The progressive libertarians join their conservative counterparts in presuming the market’s distribution of expressive opportunity to be an empirically reliable measure of people’s preferences¹³² while treating any uncertainty about access rights’ efficacy as reason enough to reject them.¹³³

Finally, the progressive libertarians echo the conservative libertarian warning that any attempt to alter the market’s distribution of expressive opportunities amounts to statist tyranny. Too polite to parrot Fried’s red-baiting,¹³⁴ they nonetheless manage to make clear that access rights advocates are enemies of freedom. Post claims that “efforts to equalize influence must involve both the equalization of ideas and the control of intimate and independent processes by which individuals evaluate ideas” and would therefore “verge on the tyrannical.”¹³⁵ Sullivan characterizes access rights advocates as seeking authority for the state to “reorder[] our ideological preferences.”¹³⁶ Redish likewise concludes that an access rights regime would place the state “in a position to manipulate the flow of private debate on the basis of predetermined substantive considerations.”¹³⁷ The progressive libertarians join the conservatives in treating past governmental assaults on expressive freedom as conclusive proof that government cannot enhance expressive freedom.¹³⁸

or just plain taste”).

¹³⁰ See Sullivan, *Unfree Markets*, *supra* note [x], at 961-62.

¹³¹ See Sullivan, *Free Speech Wars*, *supra* note [x], at 212-13 (critically describing egalitarian commitments of access rights advocates); see also Sullivan, *Political Money*, *supra* note [x], at 675 (describing expressive freedom as “a realm of inevitable inequality”).

¹³² See Post, *Equality and Autonomy*, *supra* note [x], at 1536 n.38 (arguing for presumption of market distributions because “we typically do not have access” to “a perspective that is itself impervious to social circumstances”); Sullivan, *Political Money*, *supra* note [x], at 677 (denying the possibility of any baseline from which to measure distortion of political preferences); cf. *supra* notes ___-___ and accompanying text (discussing conservative libertarians’ belief that market distributions accurately reflect preferences).

¹³³ See REDISH, *supra* note [x], at 165-66 (offering assertion that “[t]he impact of a right of expressive access on the scope of public debate. . . is open to question” as a reason to reject access rights); Post, *Equality and Autonomy*, *supra* note [x], at 1529 (questioning efficacy of regulatory efforts to improve public discourse); Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 322 (arguing that campaign finance reform’s ineffectuality as a redistributive device renders it impermissibly content-based); Sullivan, *Resurrecting*, *supra* note [x], at 986 (questioning capacity of government regulation to improve upon socially constructed preconditions for expression); cf. *supra* notes ___-___ and accompanying text (discussing conservative libertarians’ rejection of access rights based on practical doubts).

¹³⁴ See *supra* notes ___-___ and accompanying text.

¹³⁵ Post, *Equality and Autonomy*, *supra* note [x], at 1535; see also Post, *Meiklejohn’s Mistake*, *supra* note [x], at 1120 (equating access rights with censorship).

¹³⁶ Sullivan, *Resurrecting*, *supra* note [x], at 987.

¹³⁷ REDISH, *supra* note [x], at 150.

¹³⁸ See REDISH, *supra* note [x], at 172-73 (recounting instances of governmental censorship); Post, *Meiklejohn’s Mistake*, *supra* note [x], at 1136 (equating “[s]tate intervention” with “[t]he nightmare vision of Michel Foucault”); Sullivan, *Discrimination*, *supra* note [x],

Redish, amplifying the conservative libertarian charge that access rights front for left-wing policy preferences,¹³⁹ would reject access rights because they resemble proposals for economic redistribution.¹⁴⁰ Post and Sullivan sound a variation on this theme, claiming that the deliberative idea of democracy that undergirds access rights proposals would entrench, in Sullivan's words, "a partisan and controversial substantive conception of speech."¹⁴¹

Both Sullivan and Post nominally hedge their bets by carving out narrow spaces for permissible regulations related to speech.¹⁴² Sullivan distinguishes between laws that regulate "the activity of speaking" and those that regulate "the economic attributes of speaking, or in other words the literal markets in which ideas are commodified," proclaiming the latter sort of regulation unproblematic under the First Amendment.¹⁴³ Accordingly, she endorses media cross-ownership restrictions¹⁴⁴ and "must carry" requirements imposed on cable systems.¹⁴⁵ Post suggests that the government "might perhaps" treat some broadcast media as quasi-state actors¹⁴⁶ and that campaign finance regulations might be tolerable "in the most unusual and limited of circumstances."¹⁴⁷ Neither of their allowances, however, actually justifies any meaningful limits on market distribution. Sullivan's constitutional suspicion of any effort to increase the "diversity or competitiveness" of public debate¹⁴⁸ and of regulations designed to serve the public interest¹⁴⁹ effectively dooms cross-ownership

at 450 ("[T]here is good reason in our free speech history to suspect that discretion (both legislative and judicial) will most frequently be exercised with a bias toward the governing status quo.").

¹³⁹ See *supra* note ___ and accompanying text.

¹⁴⁰ See REDISH, *supra* note [x], at 151; see also *id.* at 168-71 (attempting to discredit access rights arguments as masking a substantive agenda of economic redistribution).

¹⁴¹ Sullivan, *Discrimination*, *supra* note [x], at 449; see also Post, *Meiklejohn's Mistake*, *supra* note [x], at 1117 (claiming that a deliberative vision of expressive freedom is "ultimately grounded upon a distinctive and controversial version of collective identity"); Sullivan, *Campaign Finance*, *supra* note [x], at 323 (arguing that justifying campaign finance reform on democratic process principles violates First Amendment).

¹⁴² Redish sticks to his hard line, considering but rejecting out of hand several narrower versions of access rights. See REDISH, *supra* note [x], at 184-90. His sole answer to failings in the system of free expression is the promise of the Internet. See *id.* at 190-92.

¹⁴³ Sullivan, *Unfree Markets*, *supra* note [x], at 964; see also Sullivan, *Intermediaries*, *supra* note [x], at 1659 (explaining "Supreme Court's deference to regulations that it can characterize as market-structuring rather than ideological"); Sullivan, *Resurrecting*, *supra* note [x], at 979-80.

¹⁴⁴ See Sullivan, *Discrimination*, *supra* note [x], at 445 (distinguishing "markets in ideas" from "markets in products that convey ideas" as basis for endorsing media cross-ownership restrictions).

¹⁴⁵ See *id.* at 450-51 (characterizing "must carry" rules as promoting "diversity of competitors, not enforced diversity of substantive views"); see also Sullivan, *Intermediaries*, *supra* note [x], at 1661-62.

¹⁴⁶ Post, *Equality and Autonomy*, *supra* note [x], at 1539.

¹⁴⁷ Post, *Meiklejohn's Mistake*, *supra* note [x], at 1133.

¹⁴⁸ Sullivan, *Intermediaries*, *supra* note [x], at 1661.

¹⁴⁹ See *id.* at 1662.

restrictions or “must carry” rules if the government intends them to affect the quality or diversity of information available to the public – which is exactly why the government imposes any regulation on an informational market. Post’s theoretical allowance for regulation is simply too hesitant, qualified, and grudging to have any discernible consequence. Paradoxically, he suggests justifying speech regulations by narrowing his category of “public discourse,” which defines the very zone of democratic debate in which access rights find their justification.¹⁵⁰

C. *The Failings of the Libertarian Critique*

Once the progressive libertarians’ nuanced rhetoric and subtle arguments against access rights stand revealed as accessories to the familiar conservative libertarian equation of expressive freedom with market distribution, a single set of objections can answer the libertarian critique. The libertarians’ constitutional case for reserving distribution of economic opportunities to the economic marketplace, and thus rejecting access rights, fails on three levels: empirical, theoretical, and normative. I will briefly set forth the principal objections that are most salient and decisive in the context of Barron’s case for access rights.

On an empirical level, critical analysis forecloses the foundational libertarian premise that any departure from market distributions of expressive opportunities contradicts authentic audience preferences. In general, information is an extremely difficult good to commodify, because information by definition is unknown until it is acquired.¹⁵¹ If the market excludes from the airwaves a speaker whose position the audience has not heard, and whose existence may not even be known to the audience, then the market cannot be enforcing an audience preference to exclude her. In the particular context of the mass media, C. Edwin Baker has built a watertight case against uncritical reliance on market principles, even assuming those principles apply to other goods. Baker emphasizes numerous ways in which special characteristics of media products – including substantial public good characteristics, significant positive and negative externalities, and accountability to the dual demands of audi-

¹⁵⁰ See Post, *Equality and Autonomy*, *supra* note [x], at 1539 (stating that boundaries of “public discourse” are “negotiable” and that “much regulation outside that arena is . . . constitutionally unproblematic”) (footnote omitted). This notion is especially curious given Post’s concession that “[t]here is obviously no theoretically neutral way” to define the boundaries of public discourse. Post, *Outrageous Opinion*, *supra* note [x], at 671.

¹⁵¹ This problem correlates with Arrow’s information paradox, which holds that sellers of information, in order to persuade potential buyers of the information’s value, may have to reveal the information and thus diminish or destroy its value. See Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 614-16 (1962). Information in this sense also constitutes a sort of “experience good,” because audiences have difficulty assessing information’s value prior to receiving it. See Philip Nelson, *Information and Consumer Behavior*, 78(2) *J. OF POL. ECONOMY* 311 (1970) (explaining concept of experience goods).

ences and advertisers – can distort the market relationship between consumers’ preferences and media companies’ delivery of content.¹⁵² The market’s commodification of information, and the background legal rules against which the market necessarily operates, tend to influence the preferences people express.¹⁵³ The market’s reliance on consumers’ ability and willingness to pay necessarily overemphasizes the preferences of wealthier consumers, an emphasis that requires normative justification.¹⁵⁴ The market can measure only those preferences expressed through purchase decisions, a measurement that ignores people’s preferences for other expressions of preference and that artificially favors preferences that the market itself substantively influences.¹⁵⁵ Baker’s analysis explodes the libertarian fiction that market distributions embody human freedom and that any redistribution of expressive opportunities therefore undermines liberty.¹⁵⁶

On a theoretical level, the libertarian critics’ case for informational markets depends on a formalistic and underdeveloped distinction between public and private authorities.¹⁵⁷ Libertarian critics inevitably invoke the sorry history of government censorship as if it inherently refuted the case for access rights,¹⁵⁸ without considering the burdens that concentrations of market power impose on people’s freedom to speak and to receive information. Libertarians exacerbate their theoretical fallacy by cloaking their defenses of powerful institutions’ expressive primacy in the inapposite rhetoric of “individual” or “personal” autonomy,¹⁵⁹ sub-

¹⁵² See BAKER, *supra* note [x], at 7-121.

¹⁵³ See *id.* at 64-71.

¹⁵⁴ See *id.* at 71-80.

¹⁵⁵ See *id.* at 80-93.

¹⁵⁶ The failure of the libertarian account of preferences discredits libertarians’ frequent conflation of access rights advocates’ contention that collective processes necessarily influence individuals’ preferences with a paternalistic desire to impose particular preferences. See Gey, *supra* note [x], at 212 (ascribing to access rights advocates the belief that “government should seek to cure the dissenters of their misguided attitudes”); Yoo, *Rise and Demise*, *supra* note [x], at 323 (claiming that access rights advocates “regard[] the individual’s personality as a social construct improvable by the state”). In fact, as Baker suggests, libertarians themselves engage in paternalism when they reduce people’s preferences to only what the market can measure, see BAKER, *supra* note [x], at 83-84, and when they seek to place the media beyond popular control. See *id.* at 121.

¹⁵⁷ For a discussion of conceptual problems with the public-private distinction, see Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 135-46 (2004) (hereinafter Magarian, *Public-Private Distinction*).

¹⁵⁸ See Fried, *supra* note [x], at 226; Gey, *supra* note [x], at 278; Yoo, *Rise and Demise*, *supra* note [x], at 338.

¹⁵⁹ See, e.g., REDISH, *supra* note [x], at 182 (emphasizing democratic value of “personal intellectual autonomy”); Fried, *supra* note [x], at 234 (“The paradigmatic free speech case is one in which government prevents a person from speaking or punishes him for having spoken”); Gey, *supra* note [x], at 274-75 (asserting that “government regulation of speech continues to deal with a highly individualistic phenomenon”); McGinnis, *supra* note [x], at 57 (claiming to advocate a theory “in which the First Amendment protects the individual’s right to transmit his information”); Post, *Meiklejohn’s Mistake*, *supra* note [x], at 1130-31 (focusing autonomy-based First Amendment theory on individual citizens); Yoo, *Rise and*

merging the complex power relationships that enmesh flesh-and-blood individuals, government institutions, and nongovernmental institutions. I have contended that courts should understand the First Amendment, at least in times of war and national emergency, as fully safeguarding the expressive autonomy of natural persons, in order to preserve the essential space within which we generate and evaluate ideas, but as shielding private institutions' autonomy only to the extent it instrumentally serves the paramount First Amendment value of collective self-determination.¹⁶⁰ For libertarians, expressive freedom simply means a guarantee against any alteration in the regulatory status quo that necessarily shapes market relationships, regardless of where that status quo leaves the informational quality and participatory character of public discourse. Their theory promises meaningful freedom but delivers only a flimsy abstraction, unmoored to any principle save protecting the expressive entitlements of the market's winners.

Beyond these empirical and theoretical concerns, libertarians' reliance on economic markets to distribute expressive opportunities presents massive normative problems. The libertarian analysis simply substitutes blind fealty to the market for any consideration of the value judgments that necessarily underlie any policy choice, including laissez-faire distribution of expressive opportunities.¹⁶¹ The central normative problem with the libertarian critique arises from the mass media's unique power to inform and influence democratic deliberation, providing opportunities for a wide range of people to participate in public debate and giving most members of the political community their most important source of access to diverse perspectives and information on important controversies. If the media distributes access inequitably or presents only a limited range of viewpoints on issues of public concern, then public discourse suffers serious damage that may in turn undermine democratic self-government.¹⁶² Constitutional speech protection serves, at least in sub-

Demise, *supra* note [x], at 331 (describing state action doctrine in terms of "the relationship between the individual and the state"). Redish defends the expressive rights of powerful institutions based on the premise that institutions have feelings too. See REDISH, *supra* note [x], at 180 (crediting "large media outlet(s)" with capacity for "cognitive dissonance, public humiliation, and personal demoralization").

¹⁶⁰ See Magarian, *Public-Private Distinction*, *supra* note [x], at 149-50.

¹⁶¹ Baker has captured the essence of the problem: "The most important and difficult tasks for law and legal scholarship are to understand, interpret, and reason about values and normative visions – and for this, economics is largely irrelevant." C. Edwin Baker, *Media Structure, Ownership Policy, and the First Amendment*, 78 S. CAL. L. REV. 733, 747 (2005) (hereinafter Baker, *Media Structure*).

¹⁶² Post argues, to the contrary, that distributive justice concerns fundamentally contradict democratic values, because the substantive democratic commitment to self-government necessarily transcends any baseline of distributive justice. See Post, *Democracy*, *supra* note [x], at 28-30. Democracy, on his account, requires not substantive equality but rather "equality of agency" to participate in public discourse. *Id.* at 29. Expressive freedom confers that equality of agency by "permit[ting] persons to speak in the ways, manner, and circumstances of their choosing." *Id.* Thus, government regulations that impede speakers' choices violate democratic precepts. See *id.* at 29-30. Oddly, despite his acknowledgement that government sometimes must ameliorate material inequalities in order to

stantial part, to ensure open and effective democratic debate. Libertarians' insistence that courts should subordinate that constitutional value to the vagaries of profit motives and demand curves – indeed, that courts must do so – turns our democratic system on its head.

The progressive libertarian attack on the compatibility of access rights' two primary goals, broadening participation and improving debate,¹⁶³ appears to furnish a logical riposte to access rights advocates' normative complaint that market distributions disserve democracy. If we have no good reason to believe that equalizing access to media would improve public debate, the progressive libertarians ask, then how can we justify departing from the market status quo? Like other libertarian arguments against access rights, however, this argument rests on nothing more than a normative belief in the constitutional sanctity of market distributions. If the economic market produces the only distribution of expressive opportunities consistent with a proper understanding of the First Amendment, then any absence of a speaker or idea from public debate must amount to an efficient exclusion of irrelevant information, and altering the market's distributive scheme could not possibly improve the quality of debate.¹⁶⁴ The case for access rights, however, depends on a different normative account of the relationship between participation and information. Ingrained in the case for access rights is confidence in the ability of an engaged polity to generate productive debate, with broader participation producing a wider and more informative range of ideas for the community to evaluate.¹⁶⁵ That optimistic egalitarian premise, in my view, resonates far more clearly than libertarians' harsh social Darwinism with our ideals and aspirations for participatory democracy.¹⁶⁶

The danger of which libertarian critics most loudly warn is not that access rights will fail to make democratic debate more informative and inclusive but that any attempt to do so will censor speech and steer debate toward favored substantive results.¹⁶⁷ This authoritarian smear makes for bombastic rhetorical theater, but it has nothing to do with Bar-

sustain democratic legitimacy, *see id.* at 33, Post never explains how his formal vision of expressive freedom can foster democratically legitimate discourse when some people can indulge their choices to participate in materially expensive forms of persuasion while others cannot.

¹⁶³ *See supra* notes ___-___ and accompanying text.

¹⁶⁴ Conservative libertarians, of course, openly condemn access rights advocates' appeals to distributive justice concerns. *See supra* notes ___-___ and accompanying text. For a thorough and eloquent defense of distributive justice in the context of media access, see BAKER, *supra* note [x], at 71-80.

¹⁶⁵ *See supra* notes ___-___ and accompanying text (discussing Barron's linkage between access rights' informational benefits for the general public and participatory benefits for marginalized speakers).

¹⁶⁶ Indeed, the assumption that greater inclusiveness serves the instrumental ends of democracy has become integral to our constitutional order. *See* Morton J. Horowitz, *Foreword: The Constitution of Change; Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 63-64 (1993) (discussing Warren Court's reconciliation of protecting minority rights with advancing democratic values).

¹⁶⁷ *See supra* notes ___, ___ and accompanying text.

ron's evenhanded, substantively neutral formulation of access rights.¹⁶⁸ To some extent the discontinuity between Barron's case for access rights and libertarians' attacks may result from the louder echo in libertarian ears of Professors Fiss and Sunstein's more recent appeals for access rights. Writing during the relative political calm of the 1980s and early 1990s, Fiss and Sunstein displayed less concern than Barron about immediate threats to political dissent and arguably placed greater emphasis on advancing their substantive social visions.¹⁶⁹ Nonetheless, libertarian critics' blatant disregard of the procedural case for access rights reflects both a methodologically careless inattention to Barron and a sad incapacity to imagine any constitutional world between the paradise of *laissez-faire* capitalism and the inferno of the absolutist state. To the extent libertarians bother to engage the procedural case for access rights, they insist that access rights, even if substantively neutral, would court tyranny by requiring, in Fried's phrase, "equality of results" among different speakers who seek to influence public debate.¹⁷⁰ That assertion, however, presumes an absolutist posture that no advocate of access rights has ever taken. Any effort to make access to important social goods more egalitarian requires ongoing assessment of what "equality" requires and to what extent equalization should supersede competing social values.

The political theory behind the libertarian critique poses a final normative problem. Libertarians treat interest group pluralism, and the vision of autonomy it spawns, not merely as the best explanation of how politics should work but rather as the only explanation consistent with a meaningful account of expressive freedom.¹⁷¹ In contrast, arguments for access rights usually, although not necessarily, resonate with civic repub-

¹⁶⁸ See *supra* notes ___-___ and accompanying text. Redish tacitly acknowledges Barron's procedural approach, grudgingly conceding that "not all commentators who have urged the creation of a right of access appear to advocate a seemingly process-based expressive redistribution as little more than a procedural means to achieve the substantive end of economic justice." REDISH, *supra* note [x], at 169. Astonishingly, that quotation comes from a longer sentence. For a writer as articulate as Redish to torture the language so gruesomely betrays something – in this case, that he can raise no persuasive argument against Barron's forthrightly procedural theory of access rights.

¹⁶⁹ See, e.g., Fiss, *State Activism*, *supra* note [x], at 2100 (advocating role for state as "high-minded parliamentarian"); SUNSTEIN, *DEMOCRACY*, *supra* note [x], at 17-23 (advancing Madisonian vision of democracy). If one reads Fiss and Sunstein fairly, however, their commitments to substantive freedom of expression become obvious. See, e.g., Fiss, *Social Structure*, *supra* note [x], at 1421 (advocating process norms for speech protection and disavowing direction of substantive outcomes); SUNSTEIN, *DEMOCRACY*, *supra*, at 35 (emphasizing dangers of speech regulation and stating that government should never regulate viewpoint or quality of content).

¹⁷⁰ Fried, *supra* note [x], at 230; see also Post, *Equality and Autonomy*, *supra* note [x], at 1534 (ascribing to access rights advocates the position "that the state be required affirmatively to ensure that all persons exercise equal influence on public discourse"); *id.* at 1537 (asserting that access rights proposals require "allotting speech in precisely equal portions").

¹⁷¹ See *supra* notes ___-___, ___-___ and accompanying text (discussing libertarian critics' commitment to interest group pluralism).

lican principles.¹⁷² Access rights advocates posit a need for the political community to debate openly and actively about the issues of public importance, including the proper policy balance between the values of equality and autonomy. The idea of access rights makes no internal sense if political values are not constantly subject to debate and the political order open to revision. Thus, to the extent access rights rest on civic republican premises, those premises – and, indeed, all facets of access rights – must remain constantly open to debate. Libertarians, on the other hand, seek to entrench an uncontested pluralist account of democracy by reifying market distributions of expressive opportunities.¹⁷³ From the perspective of market triumphalism, the idea that democratic ideals might cause us to favor redistribution of expressive opportunities is the only political idea we may not consider.

III. THE REGULATORY REFORM CRITIQUE OF ACCESS RIGHTS

The other critique of access rights, which I call the regulatory reform critique, embraces “access” but not “rights.” The first section of this part describes the regulatory reform position. Like Barron and his successors, regulatory reformers believe the market inequitably distributes important forms of expressive access, particularly access to the media. Also like the access rights advocates, regulatory reformers believe government can and should work to solve the problem of inequitable distribution. The regulatory reformers, however, substantially accept as a descriptive matter the libertarian premise that the First Amendment protects the autonomy of private actors, and they distrust courts as agents of social reform. Accordingly, they would narrow the scope of the First Amendment, in order to allow the elected branches of government to distribute expressive opportunities more equitably. The second section criticizes the regulatory reformers’ institutional prescription. The elected branches, notwithstanding the regulatory reformers’ serene confidence in their value for broadening media access, labor under a set of electoral pathologies that generally fray elected officials’ accountability to the people and particularly exclude the expressive interests of poor and socially marginalized speakers from elected officials’ political calculations. In contrast, the First Amendment presents the most theoretically coherent and normatively appealing basis for broadening expressive access, and courts’ capacity to apply the First Amendment to access disputes makes them the optimal arbiters of an access rights regime.

¹⁷² Compare Magarian, *Political Parties*, *supra* note [x], at 1980-82 (discussing affinity between republican political theory and First Amendment theory that accommodates access rights) with Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 GEO. L.J. 373, 382-88 (1993) (critiquing civic republican emphasis on consensus and making case for access rights based on expansive conception of autonomy).

¹⁷³ Ironically, libertarians repeatedly accuse access rights advocates of seeking to entrench a civic republican political theory. See *supra* notes ___-___ and accompanying text.

A. *The Regulatory Reform Critique's Theoretical Grounding and Institutional Logic*

C. Edwin Baker has articulated the most thorough regulatory reform approach to the media access problem. Baker's core First Amendment theory resembles that of the libertarians, because he steadfastly asserts personal autonomy as the core value protected by the Free Speech Clause.¹⁷⁴ Baker, however, takes a distinctive and nuanced approach to the autonomy theory, critically evaluating different entities' autonomy claims¹⁷⁵ and subordinating autonomy to democratic values in the particular contexts of electoral speech¹⁷⁶ and the media.¹⁷⁷ He contends that the instrumental interests of a healthy democracy, and not the autonomy interests of speakers, should dictate First Amendment protection in those areas.¹⁷⁸ Baker criticizes the mass media as "too timid in exposing corruption and abuse both of public and especially of private power, insufficiently diverse in its presentations, relatively unresponsive to significant elements of society and more encouraging of political passivity than public involvement."¹⁷⁹ He strongly objects to First Amendment theories that treat media institutions as primary subjects of rights or limit the scope of democratic concern to efficient pricing of media products.¹⁸⁰ However, he rejects the idea of constitutionally mandated media access rights, because he believes courts lack both the authority to make normative judgments about what democratic values the press should serve at any given time¹⁸¹ and the competence to make empirical judgments about

¹⁷⁴ Baker articulates and defends his "liberty model" of expressive freedom in C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978) (hereinafter Baker, *Scope*).

¹⁷⁵ Baker has argued that commercial entities lack the autonomy interest necessary to assert a First Amendment claim because the market, and not the commercial speaker's conscience, dictates the content of commercial expression. See generally C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).

¹⁷⁶ See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1 (1998) (hereinafter Baker, *Campaign Expenditures*).

¹⁷⁷ Baker's major recent statements on expressive freedom and the press include BAKER, *supra* note [x]; Baker, *Media Structure*, *supra* note [x]; Baker, *Media Concentration*, *supra* note [x].

¹⁷⁸ See C. Edwin Baker, *Private Power, the Press, and the Constitution*, 10 CONST. COMM. 421, 436 (1993) (distinguishing relative importance of autonomy values and instrumental democratic considerations in speech and press contexts) (hereinafter Baker, *Private Power*); Baker, *Campaign Expenditures*, *supra* note [x], at 28-29 (characterizing elections as "institutionally bound" and measures that constrain electoral speech thus appropriate "to assure the fairness and openness of elections") (footnote omitted).

¹⁷⁹ Baker, *Private Power*, *supra* note [x], at 426.

¹⁸⁰ See Baker, *Media Concentration*, *supra* note [x], at 854-60.

¹⁸¹ See BAKER, *supra* note [x], at 212-13 (advocating regime of constitutional space for media regulation pursuant to Baker's preferred democratic model of "complex democracy"); Baker, *Private Power*, *supra* note [x], at 439 (questioning appropriateness of judicial determinations about how press should serve democratic values).

the proper shape of access measures.¹⁸² Accordingly, he posits a First Amendment “nonmandate”¹⁸³ under which courts should uphold regulations that enhance media access, with particular solicitude for structural regulations of media ownership.¹⁸⁴ Baker’s conception of elections as discursively limited constructs for converting public opinion into political power similarly leads him to advocate constitutional allowance for regulations of electoral speech that would make electoral debate more participatory and informed.¹⁸⁵

Jack Balkin has followed a circuitous intellectual path to arrive at his regulatory reform orientation. In an early treatment of the access issue, in 1990, Balkin perhaps more closely tracked Barron’s case for access rights than any scholar before or since. He argued then that the idea of democratic pluralism had come unmoored from its legal realist roots, resulting in a First Amendment doctrine of formal equality that ignored crucial inequalities in access to means of expression.¹⁸⁶ As a remedy for this ideological drift, he advocated a substantive understanding of the First Amendment as requiring access rights, to be secured in the first instance by judicial enforcement.¹⁸⁷ In a more recent commentary, however, Balkin argues that the growth of the Internet must alter our conception of expressive freedom in fundamental ways.¹⁸⁸ While he disavows the technological optimist credo that the Internet will solve all distributional problems,¹⁸⁹ he nonetheless argues that the Internet’s democratizing effects on public discourse should shift our attention from equality to autonomy and from problems of access to problems of censorship.¹⁹⁰ He also urges a shift in our institutional conception of expressive freedom,

¹⁸² See BAKER, *supra* note [x], at 199 (questioning judicial competence to make empirical determinations about effectuating access); Baker, *Private Power*, *supra* note [x], at 439 (same).

¹⁸³ BAKER, *supra* note [x], at 199.

¹⁸⁴ See Baker, *Media Concentration*, *supra* note [x], at 905-06 (contending that healthy democracy requires substantial dispersion of opportunities to influence public opinion).

¹⁸⁵ See Baker, *Campaign Expenditures*, *supra* note [x], at 33-37.

¹⁸⁶ See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 387-94 (hereinafter Balkin, *Realism*) (explaining development of libertarian aspects of First Amendment doctrine in terms of democratic pluralism).

¹⁸⁷ See *id.* at 412-13.

¹⁸⁸ See Balkin, *Digital Speech*, *supra* note [x].

¹⁸⁹ See *id.* at 31-32 (explaining why we should not expect Internet to solve problems of media diversity); *cf. supra* notes ___-___ and accompanying text (contesting technological optimist arguments against access rights).

¹⁹⁰ See Balkin, *Digital Speech*, *supra* note [x], at 43-45 (arguing for renewed emphasis on liberty in free speech theory). Balkin ascribes to technological developments perhaps a larger portion of his theoretical evolution than they can plausibly explain. He does not make clear, for example, why changes in communications technology should make popular culture more important in First Amendment theory than it was before. See *id.* at 34-35 (advocating shift away from government and toward culture as object of free speech concern). Some of Balkin’s new ideas seem more plausibly rooted in his intellectual engagement with populism and critique of progressivism. See generally Balkin, *Populism*, *supra* note [x].

from a focus on judicial protection to a greater emphasis on the elected branches of government and technological developments in the private sector as guarantors of expressive freedom.¹⁹¹ Although Balkin does not explicitly repudiate his earlier call for access rights, his new analysis emphasizes only the negative sense of the First Amendment and strongly downplays the efficacy of judicially enforced expressive freedom.

Mark Tushnet does not address access rights proposals directly but offers an alternative, contrary First Amendment vision responsive to the same concerns that underlie Barron's analysis. Tushnet sees in contemporary free speech doctrine a lamentable but intractable fixation on protecting the rights of the powerful.¹⁹² Accordingly, in constitutional law generally and the free speech context in particular, he holds out little hope for judicially imposed progressive change. In his farthest reaching argument about institutional approaches to constitutional law, Tushnet advocates a regime in which robust notions of constitutional rights persist but the people, acting through political processes, supplant judges as the principal arbiters of constitutional values.¹⁹³ In a milder variation on that argument, he advocates a process of "weak form judicial review," under which constitutional doctrine would develop over time through judicial-legislative interaction on novel or unsettled constitutional issues.¹⁹⁴ He illustrates this process with what calls the "managerial model" of free speech, under which courts defer to regulations that the legislature believes "increase the availability of expression – net, or on balance."¹⁹⁵ Without providing a full assessment of the managerial model, Tushnet points out its manifestation in cases upholding cable "must carry" rules, campaign finance regulations, and extensions of copyright protections.¹⁹⁶ Tushnet acknowledges that the Court usually practices a stronger brand of judicial review that constrains legislative initiatives to expand expressive opportunities,¹⁹⁷ but he suggests that weak form judicial review, as exemplified by the managerial model, would provide a normatively desirable basis for regulatory efforts to enhance expressive freedom.

The regulatory reformers' simultaneous support for egalitarian government initiatives and skepticism about constitutionally driven

¹⁹¹ See Balkin, *Digital Speech*, *supra* note [x], at 51-54 (arguing for shift in focus from judicial protection of free speech rights to legislative, administrative, and technological protection of free speech values).

¹⁹² See MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 314 (2005) (noting "[t]he emergence of conservative free speech absolutism on the Rehnquist Court"); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 161 (1999) (criticizing free speech doctrine for underprotecting speech critical of government while ignoring distributional inequalities) (hereinafter TUSHNET, *AWAY FROM THE COURTS*).

¹⁹³ See *generally* TUSHNET, *AWAY FROM THE COURTS*, *supra* note [x].

¹⁹⁴ See *generally* Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. CIV. R.-CIV. L. L. REV. 1 (2006) (hereinafter Tushnet, *Weak-Form Review*).

¹⁹⁵ *Id.* at 12.

¹⁹⁶ See *id.* at 13-16.

¹⁹⁷ See *id.* at 3-4 (discussing Rehnquist Court's defense of strong-form judicial review).

change appears to reflect the complicated inspiration of the New Deal and legal realism. The New Deal has strongly influenced those normative premises of access rights that the regulatory reformers most obviously embrace: the desire for more informative and fully participatory public debate and the concern with achieving just distributions of expressive opportunities.¹⁹⁸ The regulatory reformers also echo access rights advocates' quintessentially realist insight that the public-private distinction is a normative construct rather than an inevitable and conceptually organic precondition for freedom.¹⁹⁹ On the other hand, the regulatory reform position exemplifies the New Deal appetite for politically driven reform and disdain for judicial interference with regulatory initiatives.²⁰⁰ The regulatory reformers' prescription for legislative and administrative action to expand access to the means of expression entails a high degree of confidence in the elected branches, although regulatory reformers provide few affirmative grounds for that confidence. Tushnet, the regulatory reformer who most thoroughly defends a greater role for elected officials in constitutional interpretation, can only argue that judicial dominance of constitutional law precludes any confident judgment that elected officials cannot handle constitutional questions,²⁰¹ while elected officials' general incentives would not necessarily stop them from protecting constitutional rights.²⁰² Conversely, regulatory reformers manifest severe doubts about courts' ability to achieve positive change by applying the First Amendment to inequalities of access. Those doubts, which define the regulatory reform critique of access rights, have two distinct dimensions: one relating to the First Amendment's substantive underpinnings, the other relating to courts' institutional attributes.²⁰³

¹⁹⁸ For evidence of the New Deal's importance in shaping arguments for access rights, see SUNSTEIN, *DEMOCRACY*, *supra* note [x], at 28-38 (advocating "a New Deal for Speech"); Balkin, *Realism*, *supra* note [x], at 388-91 (tying instrumental, egalitarian theory of rights to judicial revolution of 1937); Fiss, *Why the State?*, *supra* note [x], at 781 (invoking New Deal in support of proposals for government regulation to improve public debate).

¹⁹⁹ See Baker, *Private Power*, *supra* note [x], at 422 ("[T]he real question [about state action] is always a matter of a substantive interpretation of constitutional norms."); Balkin, *Realism*, *supra* note [x], at 412 (advocating abandonment of rigid public-private distinction in free speech context); Mark Tushnet, *The Supreme Court and Its First Amendment Constituency*, 44 *HASTINGS L.J.* 881, 898 (1993) (critically analyzing role of public-private distinction in setting cognizable range of constitutional claims).

²⁰⁰ Tushnet expressly attributes his doubts about judicial protection of speech to the New Deal paradigm. See Mark Tushnet, *The Culture(s) of Free Expression*, 76 *Cornell L. Rev.* 1106, 1114 & n.27 (1991) (reviewing STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990)) (hereinafter Tushnet, *Culture(s)*). Of course, as Tushnet has acknowledged, the New Deal's redistributive revolution also benefited from judicial action, particularly of expressive opportunities. See LOUIS MICHAEL SEIDMAN AND MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* 120 (1996) (discussing Supreme Court's early public forum cases).

²⁰¹ See TUSHNET, *AWAY FROM THE COURTS*, *supra* note [x], at 57-65 (discussing predictive problems caused by "judicial overhang").

²⁰² See *id.* at 65-70.

²⁰³ Those libertarian critics of access rights who address institutional considerations dismiss the idea of judicial implementation with little or no analysis. See REDISH, *supra*

The regulatory reformers' objection to judicially mandated access rights turns, first, on their First Amendment theory. Although regulatory reformers largely share access rights proponents' normative view that redistribution of expressive opportunities would benefit society, they actually view the First Amendment in a manner consistent with the libertarians. As discussed above, access rights advocates construe the First Amendment as an instrument for achieving effective debate; libertarians, in contrast, object to access rights based on their belief that the First Amendment simply prevents the government from compromising the expressive autonomy of people who possess the means to speak and be heard. Regulatory reformers, although advocating access enhancements, tend to agree with libertarians as a descriptive matter that the First Amendment substantially serves to protect expressive autonomy.²⁰⁴ Regulatory reformers' disagreement with libertarians about the constitutionality of access-enhancing regulations boils down to a dispute about how much territory the Amendment's protective force should cover. Libertarians believe in a strong First Amendment; regulatory reformers believe in a weaker First Amendment that neither provides any guarantee of access rights nor impedes the elected branches from redistributing access.

The second dimension of regulatory reformers' skepticism about courts' role in broadening expressive access is institutional. Regulatory reform arguments, reflecting widespread mistrust in the legal academy about judges as agents of progressive social change,²⁰⁵ cast doubt on courts' ability to enhance marginalized speakers' media access under the First Amendment. The regulatory reformers emphasize courts' persistent failures to advance progressive free speech values,²⁰⁶ but as Tushnet acknowledges, one branch's shortcomings do not suffice to justify dislodging its authority.²⁰⁷ Just as the regulatory reformers offer few particular reasons to favor the elected branches as vehicles for access reform, they

note [x], at 174 (dismissing judiciary's capacity to administer access rights because of its asserted failings in other First Amendment contexts); McGinnis, *supra* note [x], at 124-25 (asserting unnamed judicial "biases" and presuming inability of courts to assess access claims under "neutral principles"); *see also* Yoo, *Rise and Demise*, *supra* note [x], at 325-26 (arguing that access rights proposals are unworkable).

²⁰⁴ *See* Balkin, *Realism*, *supra* note [x], at 385 (including autonomy among values served by First Amendment); Tushnet, *Culture(s)*, *supra* note [x], at 1107-10 (sympathetically analyzing eclectic theory of First Amendment that incorporates autonomy concerns). Autonomy stands at the center of Baker's normative free speech theory, although he puts greater emphasis on democratic process values in the contexts of media and electoral regulations. *See supra* notes ___-___ and accompanying text.

²⁰⁵ *See generally* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

²⁰⁶ *See* TUSHNET, *AWAY FROM THE COURTS*, *supra* note [x], at 129-33 (discussing conservative tilt of recent free speech decisions); Baker, *Media Concentration*, *supra* note [x], at 848-55 (discussing conservative tilt in recent First Amendment decisions on media ownership); Balkin, *Digital Speech*, *supra* note [x], at 19-21 (discussing present judicial equation of speech with property in telecommunications policy disputes).

²⁰⁷ "The real question is whether in general legislatures or courts make more, and more important, constitutional mistakes." TUSHNET, *AWAY FROM THE COURTS*, *supra* note [x], at 57.

provide little to substantiate their low opinion of courts. Tushnet's extensive critique of judicial review concludes that courts generally do no more than reinforce the prevailing political order.²⁰⁸ Baker suggests, without going into detail, that "[c]onstitutional adjudication is poorly designed for crafting appropriate structural rules and media subsidies."²⁰⁹ Balkin takes a similar view, with particular reference to the complexities of advanced information technologies, in a similarly terse but sweeping manner.²¹⁰ The regulatory reformers' objection to judicial review may depend less on particular failings of courts than on the regulatory reformers' normative visions of institutional design. Balkin's and Tushnet's preference for a politically rather than judicially driven constitutional order corresponds with their aspirations toward greater political populism.²¹¹ Baker expresses the same preference, albeit limited to the context of media regulation.²¹²

B. *Courts, the Elected Branches, and Access Rights: The Failings of the Regulatory Reform Critique*

The regulatory reform critique depends on two complementary premises, both of which I believe contain useful insights but ultimately lead them to the wrong conclusion. First, regulatory reformers assert that legislators and regulators have the capacity and will to implement access reforms. That assertion ignores pathologies of our present electoral system that severely undermine the elected branches' incentives to pursue more informative and participatory public debate. Those pathologies take on added importance because they embody exactly the sort of failures of political debate that led Barron to advocate access rights. Second, regulatory reformers treat constitutional rights as a theoretical dead end, and courts as an institutional albatross, in the quest for more egalitarian access to public debate. Those views underestimate both the First Amendment's theoretical value for framing access interests and courts' utility for implementing a meaningful regime of access rights.

²⁰⁸ See *id.* at 152-53 (arguing that judicial deviations from prevailing political trends amount to random alterations with minimal normative consequences in the aggregate).

²⁰⁹ BAKER, *supra* note [x], at 199.

²¹⁰ See Balkin, *Digital Speech*, *supra* note [x], at 53-54.

²¹¹ See TUSHNET, *AWAY FROM THE COURTS*, *supra* note [x], at 177-94 (defending theory of "populist constitutional law"); Balkin, *Populism*, *supra* note [x], at 1985-90 (extolling virtues of populist satisfaction with sporadic political engagement as opposed to "elitist" preoccupation with ordinary politics).

²¹² See BAKER, *supra* note [x], at 213 ("[T]he Press Clause should be read to allow the government to promote a press that, in its best judgment, democracy needs but that the market fails to provide.").

1. *The Implications of Electoral Pathologies for Legislative and Regulatory Access Reforms*

Regulatory reformers, like access rights advocates, aspire to a more egalitarian distribution of opportunities to participate, and a broader range of ideas present, in public debate. Unlike access rights advocates, however, regulatory reformers place their faith in elected officials²¹³ to accomplish that distribution. Unfortunately, several prominent features of our electoral system discourage legislative and regulatory access initiatives. Some of those problems are permanent and inherent to the system but not fatal to the access rights agenda. Others are distinctive to our present political climate and, I believe, more toxic to hopes for legislative and regulatory access reforms. First, several pivotal restrictions on electoral competition operate to make elected officials unaccountable to their constituents. To the extent access reforms would serve a general interest in broadening public debate, these *pathologies of unaccountability* remove elected officials' incentives to advance that interest. Second, economically and socially marginalized members of the political community continue to face several formidable barriers to electoral participation. To the extent access reforms would serve to open opportunities for such people to participate in public debate, these *pathologies of exclusion* leave elected officials especially unmotivated to advance that interest. Beyond their destructive effects on elected officials' motivation to implement access reforms, all of these electoral pathologies underscore Barron's case for access rights in an even more direct way: each substantially diminishes the quality and openness of electoral debate.

a. *Inherent Disincentives to Access Reforms*

Public choice theory suggests one set of obstacles to legislative and regulatory access reforms: Elected officials typically act to advance their own self-interest, particularly the interest in holding on to power,²¹⁴ and powerful and well-organized interest groups can capture them.²¹⁵ These factors place two permanent, inherent obstacles in the path of access reforms. First, they create a strong disincentive for elected officials to impose reforms that would alter the status quo by bringing new voices and ideas into public debate. Second, and more ominous, they raise the danger that elected officials, if granted the power to distribute expressive opportunities, will abuse that power to advance their own interests or

²¹³ This discussion uses the term "elected officials" as shorthand for the full range of policymakers within the legislative and executive branches of the federal government. Although state elected officials have some capacity to impose access reforms and face some of the electoral pathologies I discuss in this section, I follow the regulatory reformers in focusing my attention on the federal government's appetite for access reforms.

²¹⁴ See generally DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

²¹⁵ See, e.g., Peter Aranson *et al.*, *A Theory of Legislative Delegation*, 69 CORNELL L. REV. 1 (1982).

those of capturing interest groups.

These obstacles warrant some concern, but we should not over-emphasize them. As to the disincentive concern, elected officials in the past have implemented access reforms, including limits on political campaign contributions,²¹⁶ mandates for access to private expressive property,²¹⁷ and allocations of mass media space and time.²¹⁸ Those reforms indicate that ordinary political self-interest can correspond with egalitarian aspirations toward broadened expressive access. As to the abuse-of-power concern, any suggestion that expressive distributions, including market distributions, could ever avoid government influence contradicts logic and history.²¹⁹ Moreover, the Supreme Court has upheld reforms of all the types just noted, finding no dark pattern of censorship or manipulation. Tushnet, the regulatory reformer who focuses most intently on institutional considerations, suggests that this compatibility of ordinary politics with progressive constitutionalism provides a sufficient basis for preferring elected officials to judges as guardians of constitutional rights.²²⁰ The present political culture of the United States, however, presents greater obstacles to access reform than just those inherent to electoral politics. Our present electoral system suffers from an amalgam of pathologies that dooms regulatory reformers' vision of legislative and regulatory access reforms.

b. Pathologies of Unaccountability

As discussed above, one benefit of a more egalitarian regime of media access accrues to the public generally.²²¹ More egalitarian access to expressive opportunities means that the media offer the public a broader range of ideas, which should in turn improve the quality of public debate and the public's level of confidence in the government decisions that public debate informs. Enhancing public debate generally cuts against elected officials' self-interest by encouraging challenges to the status quo. Thus, for elected officials to fulfill the role regulatory reformers assign them, they must have good reason to believe that betraying the public's interest in enriching public debate will cost them more than forestalling reform to preserve the status quo will gain them. They must, in other words, be accountable to the electorate. Electoral account-

²¹⁶ See, e.g., *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (upholding state contribution limits).

²¹⁷ See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (upholding property access requirement imposed by state constitution).

²¹⁸ See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (upholding must-carry rules for cable systems).

²¹⁹ See SUNSTEIN, *DEMOCRACY*, *supra* note [x], at 36-37 (explaining inevitable influence of government regulatory structures on legal rights).

²²⁰ See TUSHNET, *AWAY FROM THE COURTS*, *supra* note [x], at 95-128 (positing that important constitutional values are "incentive-compatible").

²²¹ See *supra* notes ___-___ and accompanying text.

ability requires a meaningfully competitive electoral process in which voters have realistic opportunities to unseat incumbent officials. Unfortunately, our electoral system in recent years has moved away from that competitive ideal. Three especially pernicious and prominent failures of electoral accountability that discourage media access reforms are partisan gerrymandering of U.S. House districts, the calcification of the two-party duopoly, and the dominance of political money.

In recent years, computer technology has transformed the power to draw electoral districts from a blunt instrument into a surgical scalpel. That transformation, in turn, has converted redistricting from a boost for challengers into a shield for incumbents.²²² The district-drawing process has an especially significant effect on elections for the U.S. House of Representatives.²²³ Consultants adept in the process can manipulate the lines to exert decisive influence over apportionment of legislative power between the two major parties.²²⁴ At times and in states where some measure of partisan balance prevails, legislatures bargain over redistricting to build “safe” districts for incumbents of both parties. Where one party dominates the state legislature, it often uses redistricting to disable the other party’s incumbents and/or to build “safe” districts for its own. Both of these “partisan gerrymandering” scenarios exploit the most predictable elements of the electorate to decrease the likelihood of electoral competition.²²⁵ The Supreme Court on three occasions has considered equal protection challenges to partisan gerrymandering, and three times it has declined to address the problem, in what stands as one of the least analytically satisfying lines of decisions in the Court’s recent history.²²⁶ Partisan gerrymanders undermine the cause of media access reform on two levels. First, diminished competition means that elected representatives need not account to the electorate for their actions, because most elections are decided long before the voters have their say. In the three national elections between 2000 and 2004, 87% of incumbent Senators and 97% of incumbent House members who sought reelection pre-

²²² See Sam Hirsch, *The United States of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L. J. 179, 182 (2003).

²²³ For a thorough and incisive account of the effect redistricting had on U.S. House races following the 2000 census, see *id.*

²²⁴ For a description of this process, see SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 17-27 (2006).

²²⁵ For a discussion of the threat that the systematic creation of safe electoral districts poses to the health of our democratic system, see Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253 (2006).

²²⁶ See *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2607-12 (2006) (plurality opinion) (finding no legally impermissible use of political classifications in off-year redistricting that increased Republican share of Texas’ 32-member House delegation from 15 to 21 seats despite small decrease in Republican vote percentage); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (finding no cause to grant relief for redistricting designed to increase Republican share of Pennsylvania’s House delegation from ten of 21 seats to 13 of 19 seats); *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion) (failing to settle on standard of review for partisan gerrymandering claims).

vailed.²²⁷ In addition, partisan gerrymanders directly subvert public debate by manipulating the process to decrease the likelihood that electoral debate can or will make a difference.²²⁸

Recent years have also witnessed a growing divergence of popular and elite sentiment about the two-party duopoly that dominates our electoral politics. Voters increasingly claim weak political party loyalties or identify as independent, rendering the parties more important as affinity groups within government than as engines for mobilizing public debate and participation in civic life.²²⁹ At the same time, the major parties have fought fiercely and successfully to preserve the mechanisms by which they control elections, resulting in an incongruous system in which two massive political organizations that command diminishing voter allegiance nonetheless hold governmental authority in a virtual hammerlock.²³⁰ The Supreme Court has allowed the two major parties to control primary elections as if they were private club meetings rather than forums for public debate and decision,²³¹ and it has let parties treat certain expenditures on behalf of their own nominees as “independent” under the campaign finance laws.²³² At the same time, the Court has taken great pains to suppress the meek challenges our system permits to the two major parties’ dominance. The Justices have upheld state prohibitions on fusion candidacies, which allow minor parties to increase their profiles by co-nominating major-party candidates,²³³ and it has permitted televised debate sponsors to enforce standardless exclusions of minor-party candi-

²²⁷ Center for Responsive Politics, *Center for Responsive Politics Predicts '06 Election Will Cost \$2.6 Billion* (Oct. 25, 2006), <http://www.crp.org/pressreleases/2006/PreElection.10.25.asp> (last visited Oct. 26, 2006).

²²⁸ In a broader view, the issue of partisan gerrymanders implicates the question whether our longstanding system of single-member geographic districts filled by “winner take all” plurality voting makes for an effectively representative House of Representatives. See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994).

²²⁹ See generally Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 SUP. CT. REV. 331, 351-55.

²³⁰ For a discussion of the two-party duopoly and its theoretical underpinnings, see Magarian, *Political Parties*, *supra* note [x], at 1959-65.

²³¹ See *Clingman v. Beaver*, 544 U.S. 581 (2005) (rejecting First Amendment challenge to state’s semiclosed primary system, which barred registrants of one party from voting in another party’s primary); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (sustaining First Amendment challenge to state’s blanket primary system, which allowed primary voter to select a candidate on any party line for each office). For further analysis of *Jones*, see Magarian, *Political Parties*, *supra* note [x], at 2011-23.

²³² See *Colorado Republican Fed. Campaign Comm’n v. FEC*, 518 U.S. 604 (1996) (striking down federal limits on expenditures parties make on behalf of candidates without direct coordination between party and candidate). For further analysis, see Magarian, *Political Parties*, *supra* note [x], at 2023-31.

²³³ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (rejecting First Amendment challenge to state ban on fusion candidacies). For further analysis, see Magarian, *Political Parties*, *supra* note [x], at 2031-37.

dates.²³⁴ Draconian ballot access laws in many jurisdictions continue to make minor party challenges all but impossible.²³⁵ The two-party duopoly's continued structural dominance of our electoral system, like the manipulation of district lines, scuttles the hopes of regulatory reformers both by diminishing electoral competition, thereby decreasing elected officials' accountability to voters, and by directly suppressing the multifaceted debate that an electoral system more open to dynamic competition would foster.

Our present electoral system further erodes political accountability through the ever-increasing dominance of political money.²³⁶ No one can mount a credible campaign for Congress without raising, or already possessing, enormous funds. On the eve of the 2006 midterm elections, the average House candidate had raised over three quarters of a million dollars, while the average Senate candidate had raised almost \$6 million.²³⁷ Incumbents could boast a nearly four-to-one fundraising advantage over challengers.²³⁸ Total expenditures for the midterms were on pace to shatter the record-breaking midterm expenditures of 2002 by eighteen percent.²³⁹ The Supreme Court has facilitated this state of affairs by holding campaign expenditure regulations categorically unconstitutional.²⁴⁰ My point here is not to revisit the question of campaign finance regulations' constitutionality, although the First Amendment theory that animates the case for access rights would permit significant limits.²⁴¹ Whether or not unfettered campaign spending deserves constitutional protection, it corrodes electoral accountability. Like district manipulation and the two-party duopoly, political money does not serve but rather supplants electoral competition and public debate. The allegiance elected

²³⁴ See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (rejecting First Amendment challenge to public broadcaster's standardless restriction of televised candidate debates to major parties' candidates). For further analysis, see Magarian, *Political Parties*, *supra* note [x], at 2038-42.

²³⁵ See generally Richard Winger, *More Choice Please! Why U.S. Ballot Access Laws Are Discriminatory and How Independent Parties and Candidates Challenge Them.*, in RONALD HAYDUK & KEVIN MATTSON EDS., *DEMOCRACY'S MOMENT: REFORMING THE AMERICAN POLITICAL SYSTEM FOR THE 21ST CENTURY* 31 (2002).

²³⁶ This article cannot undertake a thorough examination of campaign finance as an object of political and legal controversy. For an excellent introduction to the major issues, see Burt Neuborne, *One Dollar – One Vote: A Preface to Debating Campaign Finance Reform*, 37 *WASHBURN L.J.* 1 (1997). My position necessarily reflects normative and empirical premises about the role of money in the political process. For a concise and lucid account of a position based on very different premises, see Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049 (1996).

²³⁷ Center for Responsive Politics, *supra* note [x].

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976) (per curiam). The Court recently reaffirmed its prohibition on expenditure regulations in *Randall v. Sorrell*, ___ U.S. ___, 126 S. Ct. 2479 (2006) (plurality opinion).

²⁴¹ See Magarian, *Political Parties*, *supra* note [x], at 2028-30 (discussing consequences of a public rights First Amendment analysis for *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996)).

officials and political parties owe to the moneyed interests that finance their victories crowds out their concern for ordinary voters and gives them a huge incentive to protect the economic as well as political status quo.²⁴² Political money further decreases accountability by creating a climate of alienation among people of modest means, discouraging them from participating in the electoral process and thus from staking any claim to their representatives' attention.²⁴³ As for political discourse, our system of minimal constraints on turning money into electoral speech acts effectively as a debate tax, ensuring a high correlation between economic power and expressive volume and thus drowning out less lavishly financed ideas.²⁴⁴ Advocates of unrestricted political money intone the mantra that more money means more speech, conveniently ignoring the corollary that greater expense means numbing repetition of the same narrow range of ideas.

c. Pathologies of Exclusion

The other primary benefit of a more egalitarian regime of media access accrues to the particular people whose expressive opportunities such a regime enhances. Those beneficiaries, through meaningful participation in public decisionmaking, can fulfill their rights of equal citizenship and claim a greater stake in public decisions.²⁴⁵ In order for elected officials to care about that targeted benefit, however, they must represent the members of those socially marginal groups. The failures of general political accountability discussed above disproportionately affect members of socially marginal groups: drawing of electoral districts continues to undermine the democratic aspirations of people of color;²⁴⁶ the two "big tent" parties marginalize social and ideological outliers;²⁴⁷ and political money necessarily diminishes poor people's influence over elections. Even beyond those disproportionate failures of accountability, our electoral system has found distinctive ways to diminish the ability of poor and socially marginalized members of the political community to pursue

²⁴² See, e.g., Daniel H. Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301 (1989) (examining influence of political money on actions of elected officials).

²⁴³ See, e.g., J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 638 (1982) (justifying campaign finance regulation as a means to ameliorate voter apathy that corrodes democracy).

²⁴⁴ See, e.g., Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 111-16 (discussing "drowning out" effect of unregulated political money).

²⁴⁵ See *supra* notes ___-___ and accompanying text.

²⁴⁶ See generally GUINIER, *supra* note [x]. Once again, the Supreme Court in recent years has exacerbated this problem by weakening the legal basis for racially remedial redistricting. See, e.g., *Miller v. Johnson*, 515 U.S. 900 (1995) (striking down redistricting plan designed to remedy underrepresentation of black voters on ground that "bizarre" character of districts under plan indicated racial motivation behind its design).

²⁴⁷ See generally Terry Smith, *A Black Party? Timmons, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1 (1998).

greater political empowerment through media access reforms. Perhaps our electoral system's most appalling methods of discouraging elected officials from enhancing poor and marginalized speakers' expressive opportunities are outright intimidation and suppression of voters of color, burdensome electoral procedures and "antifraud" initiatives designed to disqualify poor and socially marginalized voters, and draconian felon disenfranchisement laws that disproportionately impact the poor and voters of color.

Our electoral system continues to tolerate a shocking degree of outright racial and ethnic discrimination. Voters of color frequently receive misinformation about times and requirements for voting.²⁴⁸ Mass mailings or telephone calls on numerous occasions have either given false advice or set voters up for special challenges and scrutiny at the polls.²⁴⁹ Some mailings have warned that undercover FBI agents or immigration officials intended to patrol polling places to enforce criminal penalties for voter fraud.²⁵⁰ At polling places, poll watchers have targeted African-American and Latino voters, taking their photographs and asking for identification, denying them assistance, and sometimes even openly intimidating them.²⁵¹ Such tactics take root more easily because few people of color work at polling places,²⁵² and poll workers receive inadequate training to assist non-English speaking voters.²⁵³ Laws in most states prohibit voter interference and intimidation, but few provide specific means of deterring or curbing these practices.²⁵⁴ Intimidation and thwarting of voters of color occurs even absent racist animus, because continued racial polarization in voting often makes racial targeting strategically useful.²⁵⁵ Gulfs in wealth, education, and English proficiency between white and nonwhite voters exacerbate the electoral system's capacity to exclude

²⁴⁸ See *People for the American Way Foundation and NAACP, The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today* 7 (2004) (hereinafter *Long Shadow*) (describing leaflet distributed in African-American communities in Louisiana in 2002 that encouraged voters to wait to vote until three days after election day); *id.* (describing notices posted in African-American precincts in Baltimore that listed the incorrect date for election day and warned that any parking tickets or overdue rent must be paid prior to voting)

²⁴⁹ See Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 361-62 (2002) (describing 1986 Louisiana mailing designed to challenge residency of African-American voters); *id.* at 362-63 (describing similar incident in North Carolina in 1990); *id.* at 365 (describing 1990 Texas mailing that told voters of color to destroy absentee ballots they had requested, which would bar them from voting under state law); *id.* at 365 (describing calls falsely attributed to NAACP on eve of 2000 election that urged African Americans to vote for George W. Bush).

²⁵⁰ See *Long Shadow*, *supra* note [x], at 9-11; Swirsky, *supra* note [x], at 359.

²⁵¹ See Laughlin McDonald, *The New Poll Tax*, AMERICAN PROSPECT (Dec. 30, 2002) at ___; see also Swirsky, *supra* note [x], at 363 (describing Republican "ballot security" program in California that hired uniformed security guards to patrol heavily Latino precincts).

²⁵² See Barry H. Weinberg and Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 420 (2002).

²⁵³ See *id.* at 422.

²⁵⁴ See *id.* at 426.

²⁵⁵ For illustrations of this phenomenon, see OVERTON, *supra* note [x], at 72-79.

voters of color.²⁵⁶ In addition, increasing attacks on provisions for bilingual ballots threaten further diminution of Latino and Asian-American voters' already low rates of electoral participation.²⁵⁷ All of these gambits make a mockery of any hope that elected officials will enact access reforms to increase the ability of voters of color to influence public debate. Barring or discouraging people from voting also alienates them from electoral and political debate, disproportionately skewing public discourse away from their perspectives and concerns and thus exacerbating the conditions that make access rights imperative.

Beyond outright intimidation and interference, local control over voting procedures creates endless opportunities for entrenched state and local authorities to throw hurdles in the way of voters who might oppose the status quo.²⁵⁸ The present trend toward more restrictive voting requirements represents a retrenchment after a period of greater inclusiveness beginning in the 1960s.²⁵⁹ An especially ominous addition to the procedural gauntlet is the present campaign, engineered by conservative groups, to impose state and local laws to require photo or other identification for voting. At least five states have added voter identification requirements since 2000, while political or judicial battles over identification laws continue in several others.²⁶⁰ Although advocates of identification requirements assert an intention to curb massive voting fraud, no evidence points to any serious problem.²⁶¹ Given U.S. citizens' low rate of voter participation, relative to earlier periods in our own history and to voting rates in other advanced democracies, imposing burdensome and unhelpful procedural constraints on voters seems perverse. The purpose and effect of identification laws, however, is to discourage and inhibit voters of color and the poor.²⁶² The fact that some laws provide more lenient standards for absentee votes, which carry stronger risks of fraud but find disproportionate use among white voters, underscores the racial strategy behind the antifraud smokescreen.²⁶³ The addition of identification requirements to our electoral system's already formidable gauntlet of voting requirements further frays the connection between elected officials

²⁵⁶ See *id.* at 82.

²⁵⁷ See *id.* at 131-47.

²⁵⁸ See *id.* at 45; Ronald Hayduk, *The Weight of History: Election Reform During the Progressive Era and Today*, in HAYDUK & MATTSON, *supra* note [x], at 29, 40-42. Even a seemingly basic component of our electoral process such as mandatory preregistration for voting disproportionately deters the poor and people of color from the polls. See *id.* at 31.

²⁵⁹ See J.M. Kousser, *The Voting Rights Act and the Two Reconstructions*, in BERNARD GROFMAN & CHANDLER DAVIDSON EDS., *CONTROVERSIES IN MINORITY VOTING* 135-39 (1992) (discussing historical trends in voting requirements).

²⁶⁰ See Peter Wallsten, *Parties Battle Over New Voter ID Laws*, L.A. TIMES (Sep. 12, 2006) at ____.

²⁶¹ See OVERTON, *supra* note [x], at 161-63.

²⁶² See *id.* at 153; Swirsky, *supra* note [x], at 367-68.

²⁶³ See OVERTON, *supra* note [x], at 164 (describing Georgia identification law's more lenient standard for absentee ballots); Wallsten, *supra* note [x], at ____ (noting Arizona identification statute's exception for absentee voting).

and the speakers whose contributions to democratic discourse access reforms would enhance.

An additional strategy for purging the rolls of poor and minority voters is legal disenfranchisement of convicted felons. Almost every state denies the vote to people presently incarcerated on felony convictions.²⁶⁴ More controversially, three states permanently disenfranchise ex-offenders,²⁶⁵ and nine others permanently disenfranchise certain categories of ex-offenders or impose waiting periods following the completion of an offender's sentence before allowing application for restoration of voting rights.²⁶⁶ Recent years have seen a modest trend toward loosening restrictions on felon voting,²⁶⁷ but several states have increased their restrictions.²⁶⁸ An estimated 5.3 million Americans may not vote as a result of felony convictions.²⁶⁹ More than two million of those ineligible voters have completed their sentences.²⁷⁰ The racial impact of felon disenfranchisement laws is particularly egregious, with black men disenfranchised at a rate seven times the national average.²⁷¹ Felon disenfranchisement laws deny the vote to thirteen percent of all black men – 1.4 million men who would otherwise be eligible to vote.²⁷² Convicted felons, widely despised and shunned for reasons that give them important and underpublicized perspectives on important public issues, epitomize the potential benefits of access reforms. Felon disenfranchisement laws, however, ensure that this is the last group of citizens to whom elected officials will ever feel responsible and from whom the rest of us will ever hear.

²⁶⁴ Laws in 48 states and the District of Columbia disenfranchise inmates incarcerated for felonies. The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, <http://www.sentencingproject.org/pdfs/1046.pdf> (last visited Oct. 26, 2006) (hereinafter Sentencing Project, *Laws*). Thirty-six states disenfranchise felons on parole, and 31 of those states also disenfranchise felons on probation. *Id.* Maine and Vermont extend voting rights to incarcerated felons. *Id.*

²⁶⁵ *Id.* Florida, Kentucky, and Virginia permanently disenfranchise any person with a felony conviction. *Id.* Restoration of voting rights in Florida and Kentucky must be approved by the governor. Marc Mauer and Tushar Kansal, The Sentencing Project, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States* (2005), <http://www.sentencingproject.org/pdfs/barredforlife.pdf> (last visited July 29, 2006). Ex-offenders in Virginia may petition courts to regain the right to vote, but persons convicted of violent offenses or of manufacturing or distributing drugs may not petition. *Id.*

²⁶⁶ Sentencing Project, *Laws*, *supra* note [x]

²⁶⁷ Of 13 states that have adopted changes to their felon disenfranchisement laws within the past ten years, eight reduced restrictions. Sentencing Project, *Laws*, *supra* note [x].

²⁶⁸ Massachusetts and Utah have recently disenfranchised incarcerated felons, and Kansas expanded disenfranchisement laws to felons on probation. Steven Kalogeras, The Sentencing Project, *Legislative Changes on Felony Disenfranchisement 1996-2003* 1 (2003), <http://www.sentencingproject.org/pdfs/legchanges-report.pdf> (last visited Oct. 26, 2006).

²⁶⁹ Sentencing Project, *Laws*, *supra* note [x].

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

Our electoral system's pathologies of unaccountability and exclusion make trusting elected officials to implement expressive access reforms an indefensible gamble. Accordingly, we should not be surprised that federal media regulations in recent years have dramatically diminished competition and diversity while further consolidating the dominance of the largest media corporations.²⁷³ An unfortunate irony of the regulatory reform critique is that our electoral system's failure to engage and represent the people, which regulatory reformers fail to address, ultimately reflects the same hegemony of economic power they attack so eloquently. Regulatory reformers' faith in the elected branches, like libertarians' faith in the economic market, leads to a dead end in the quest for more informative and participatory democratic debate. The two critiques' failures point that quest back toward the First Amendment. Even though the Supreme Court has exacerbated the electoral pathologies discussed in this section and built a discouraging record on media access issues,²⁷⁴ constitutional law and judicial review continue to hold great promise as engines of access reform.

2. *Putting the "Rights" Back in Access Rights*

The regulatory reform critique objects to judicially enforced First Amendment access rights on two distinct grounds: theoretical and institutional. On a theoretical level, regulatory reform critics reject the First Amendment as a legal basis for expanding access to the means of expression.²⁷⁵ On an institutional level, they question judges' capacity to develop doctrines of expanded access.²⁷⁶ Both of these objections rest on legitimate and substantial concerns. Regulatory reformers' discomfort with constitutional rights as vessels for social change responds to progressives' sometimes excessive reliance on litigation to implement policy agendas in the wake of the Warren Court's rights revolution and the subsequent conservative tilt in the country's political mood.²⁷⁷ Their institutional doubt about courts' capacity to effectuate social change responds to courts' failures to follow through on initially promising initiatives, such as integration of public schools, and reflect the rhetorical difficulty of defending judicially managed social reform.²⁷⁸ The regulatory reform critique, however, substantially overstates both the theoretical disadvan-

²⁷³ See Goodman, *supra* note [x], at 1446-48 (identifying recent regulations' contributions to increased media concentration); Moglen, *supra* note [x] (condemning corporatist character of 1996 Telecommunications Act).

²⁷⁴ See Magarian, *Colliding Interests*, *supra* note [x], at ___ (discussing Court's recent failures to implement or approve many access reforms).

²⁷⁵ See *supra* notes ___-___ and accompanying text.

²⁷⁶ See *supra* notes ___-___ and accompanying text.

²⁷⁷ See TUSHNET, *AWAY FROM THE COURTS*, *supra* note [x], at 141-43 (criticizing liberals' excessive resort to language of rights).

²⁷⁸ See *id.* at 177 (criticizing liberals' fear of voting and overreliance on judicial review to achieve social change).

tages of constitutional rights and the institutional disadvantages of courts.

The regulatory reform critics oppose framing media access in terms of constitutional rights because they mistrust both the general rhetoric of rights and the particular conception of the First Amendment that supports access rights. Both concerns implicate important normative controversies that I have addressed elsewhere, and I reprise my views only in summary fashion here. The regulatory reformers' general concern reflects a valuable insight that conceptions of "rights" necessarily depend on normative priorities in designing legal structures.²⁷⁹ The language of rights, however, remains crucial for arguments about expressive access as long as we acknowledge the underlying conflicts of interests and values those arguments necessarily embody. The First Amendment provides an analytic channel for courts' understandings of democratic values and the people's substantive ideals as well as a textual basis for judicial review that the people and our elected representatives consider legitimate.²⁸⁰ It also offers a unique source of rhetorical power for any argument about how speech should function in society, including arguments for access reforms.²⁸¹ Regulatory reformers' specific concern about the constitutional basis for access rights arises from the gulf between the autonomy-based theory of the First Amendment they largely accept and the egalitarian, democracy-focused First Amendment theory Barron and other proponents of access rights advance. Barron's sort of theory has the strong normative advantages of deepening constitutional protection for especially valuable and vulnerable expression²⁸² and providing a concrete, functional rationale for protecting speech that resonates with both our society's deep commitment to participatory democracy and the central purpose of the Constitution.²⁸³

Beyond their substantive concerns about the First Amendment as a basis for equalizing expressive access, the regulatory reform critics dispute courts' capacity to direct a regime of enhanced media access rights. This institutional competence argument has undeniable force; no system of constitutional adjudication could, or should, micromanage complex

²⁷⁹ See BAKER, *supra* note [x], at 193 (explaining that conceptions of rights vary with underlying normative theories of democracy); TUSHNET, *AWAY FROM THE COURTS*, *supra* note [x], at 13 (describing role of normative differences in opposing interpretations of constitutional rights); Balkin, *Digital Speech*, *supra* note [x], at 25-28 (describing effect over time of changes in prevailing normative values on changes in prevailing conceptions of constitutional rights).

²⁸⁰ See Magarian, *Political Parties*, *supra* note [x], at 1990 (contending that language of rights plays proper and useful role in disputes about political structures).

²⁸¹ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1789-90 (2004) (discussing the "magnetism" of the First Amendment).

²⁸² See Magarian, *Public-Private Distinction*, *supra* note [x], at 105-14 (describing utility of public rights theory of expressive freedom for effectively protecting wartime political debate).

²⁸³ See Magarian, *Political Parties*, *supra* note [x], at 1980-88 (describing key characteristics of public rights theory of expressive freedom).

social controversies. But no access rights advocate has ever pretended such micromanagement was necessary, let alone proper. Some access controversies – for example, whether a media corporation may refuse to sell advertising space to a political activist – lie fully within courts’ institutional capacities. In more complicated contexts, such as disputes about concentration of media ownership, a court could articulate a general First Amendment mandate aimed at enriching and diversifying debate, resolve the immediate dispute pursuant to that mandate, and leave the elected branches to enact and enforce regulatory structures that satisfy it. To the extent the elected branches did succeed in implementing access reforms, courts would play an essential role in articulating the First Amendment values behind the reforms and ensuring that regulatory enforcement advanced those values.²⁸⁴ Elsewhere I have contended that courts can and should apply to expressive access controversies a principle of “participation reinforcing review.”²⁸⁵ That extrapolation from the familiar idea of representation reinforcement would lead courts, in First Amendment disputes that set access interests against autonomy interests, to make rulings and develop legal standards that maximized opportunities for participation in public debate.

Even if we establish that courts can implement access reform under the First Amendment, the regulatory reform critique raises doubts about whether courts will do so. The Supreme Court’s record on access issues in both the electoral and media contexts appears to paint a gloomy picture. Paradoxically, however, the Court’s recent conservative activism illustrates the powerful effects that changes in prevailing legal theories can have on the distribution of expressive opportunities. Hope for changing courts’ theoretical orientation, now or at any time, rests on the insight that judges are less institutionally beholden than elected officials to entrenched interests. Perhaps, as regulatory reformers have argued, our era’s judicial conservatism actually reflects a historical norm against progressive change, interrupted only briefly by the Warren Court, that no appeal to reason can hope to dislodge.²⁸⁶ In my view, however, judicial attitudes are too mutable, and the stakes of the access rights issue too high, to give up the effort. I am not advancing the argument that “we have the wrong judges,” whose futility Tushnet rightly derides.²⁸⁷ I simply note that judges’ orientations do change, and have changed, through appeals and processes that circumvent the formidable pathologies of our electoral

²⁸⁴ See Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 GEO. WASH. L. REV. ____ (forthcoming 2008) (discussing importance of judicial review in any renewal of the broadcast fairness doctrine).

²⁸⁵ See Magarian, *Colliding Interests*, *supra* note [x], at ____ (proposing and describing participation reinforcing review of expressive access claims). The theory of representation reinforcing review does not suffice to justify adjudication of access cases, because access disputes generally present competing First Amendment interests. See *id.* at ____.

²⁸⁶ See SEIDMAN & TUSHNET, *supra* note [x], at 138 (suggesting that arguments for positive First Amendment rights “run up against the entrenched conservative bias in constitutional law”).

²⁸⁷ See TUSHNET, *AWAY FROM THE COURTS*, *supra* note [x], at 155-63 (expressing doubts about theoretical appeals to courts).

system. For now, at least, theoretical arguments about the constitutional wisdom of access rights may well face less resistance in the judicial sphere than political activism for access reform faces in the legislative and regulatory spheres.

Adroitly linking the conceptual limits of rights and the institutional limits of courts, Baker objects to access rights on the ground that the theoretical underpinnings of democracy, and thus the optimal distribution of media access for facilitating democracy, are highly contestable.²⁸⁸ He supports his premise with an account of the differences among interest group pluralism, civic republicanism, and a “best of both worlds” position he labels “complex democracy.”²⁸⁹ Baker’s argument transcends the partisanship of libertarian objections to the republican underpinnings of access rights²⁹⁰ by maintaining that no theoretical perspective should achieve hegemony through the force of constitutional law. No one could dispute Baker’s premise that democratic theory is endlessly contestable, but he fails to establish why courts cannot or should not join the contest. One relatively narrow problem with Baker’s argument is that his rigid distinction among democratic theories creates a distorted picture in which hidebound commitments to utterly antithetical views of democracy drive public debate – in which republicans, for example, care nothing for the presence in public discourse of clashing points of view.²⁹¹ Barron, in contrast, conceived the constitutional dimension of access rights as serving both the participatory values Baker associates with pluralist democracy and the informational values he associates with republican democracy.²⁹²

A deeper problem with Baker’s analysis is that courts neither can nor should resolve constitutional disputes without regard to democratic theory. Baker attempts to constrain judicial review in First Amendment cases by distinguishing “traditional censorship,” a matter about which he claims all salient democratic theories agree, from the structural architecture of media, a matter he calls too contestable and contingent for constitutional adjudication.²⁹³ Baker’s categories, however, are themselves far more contestable and contingent than he suggests. Is a purportedly neutral tax that disproportionately burdens particular publications censorious or architectural?²⁹⁴ What about a requirement that broadcasters must sell

²⁸⁸ See Baker, *Media Structure*, *supra* note [x], at 760; cf. Schauer, *Role of the People*, *supra* note [x], at 787 (criticizing efforts to distinguish democracy theoretically from majoritarianism).

²⁸⁹ See BAKER, *supra* note [x], at 125-213 (evaluating implications of different democratic theories for media policy).

²⁹⁰ See *supra* notes ___-___ and accompanying text.

²⁹¹ See BAKER, *supra* note [x], at 148-49 (positing republican ideal of media that excludes “[s]egmented, partisan media”).

²⁹² See *supra* notes ___-___ and accompanying text (discussing dual benefits of access rights for general public and marginalized speakers).

²⁹³ See Baker, *Media Structure*, *supra* note [x], at 761.

²⁹⁴ See *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (striking down

advertising space at market rates to political candidates,²⁹⁵ or that cable systems must devote part of their channel array to stations of the government's choosing.²⁹⁶ The media challengers to all of those regulations would (and did) complain of censorship, while the government would (and did) characterize its intervention as architectural. Both characterizations have force, and neither can save a court seriously committed to enforcing the First Amendment from having to consider how our democratic commitments require expressive freedom to work. In a broader sense, our constitutional jurisprudence simply has never treated the theoretical indeterminacy of a case as a basis for judicial abstention.²⁹⁷ If courts could not decide cases with contestable theoretical underpinnings, then they could not enforce constitutional rights at all.

Legal realism long ago established that courts operate within, not apart from, democratic politics. The regulatory reformers follow the line of judicial skeptics who consider courts' inevitably political nature a reason to constrain their use of constitutional mandates. If courts openly declared abstract democratic principles, and then forcefully invoked those principles to strike down a wide range of government actions, the skeptics' concern would carry great weight. Courts, however, do not operate that way. Instead, they sublimate the abstract theoretical grounds for their constitutional decisions, both because Article III limits their decisional ambit²⁹⁸ and because not even our system of strong judicial review confers the institutional fortitude courts would need to make such sweeping pronouncements. Courts can, and must, base their constitutional decisions on underlying democratic precepts that the people will accept – among which, I believe, is the principle that effective democracy requires a broad distribution of opportunities to participate in public debate. Because background precepts are not holdings, courts can test and alter the democratic underpinnings of their decisions through the dialogue in which they necessarily engage with other political actors and the people.²⁹⁹ The judicial branch, in its own way, is as much a creature of our

sales tax on magazines that exempted religious, professional, trade and sports magazines); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down use tax on paper and ink that affected only small number of newspapers); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (striking down tax on advertisements that applied only to high-circulation newspapers).

²⁹⁵ See *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (upholding regulation prohibiting broadcasters from denying advertising time to candidates).

²⁹⁶ See *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*) (upholding federal requirement that cable systems must carry local broadcast affiliates); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*) (applying intermediate scrutiny review to must-carry rules).

²⁹⁷ Affirmative action cases, with their fundamental tension between formal and substantive theories of equality, present an obvious example. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding affirmative action component of law school's admissions policy).

²⁹⁸ See U.S. CONST. ART. III (restricting federal courts to decisions of "Cases" and "Controversies").

²⁹⁹ See generally Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577

democratic system as Congress, and the judiciary's peculiar set of democratic constraints protects it, and us, from unduly hidebound constitutional decisions.

CONCLUSION

For at least fifteen years, judicial and scholarly attention to the idea of First Amendment access rights has ranged from dismissive to hostile. Far too often the critics have gotten a free pass. Libertarians deride access rights as an authoritarian plot against economic distributions of expressive opportunities. Their market triumphalism, however, papers over the severe doctrinal, theoretical, and above all normative failings of a constitutional vision that substitutes economic power for robust public debate. Regulatory reformers extol the possibilities of legislative and regulatory access reform while dismissing the prospects of judicially enforced access rights. Their inattention to our electoral system's pathologies of unaccountability and exclusion, however, fatally skews their institutional prescription. The time has come to reclaim and extend the trail Jerome Barron blazed forty years ago. Deploying an egalitarian First Amendment theory in pursuit of a democratic discourse that would better inform the political community while giving greater voice to that community's poor and marginalized members, Barron's case for access rights still offers a bold, optimistic blueprint for the expressive freedom a self-governing people needs and deserves.

Recent fashion's regrettable disdain for access rights has diverted attention from the pivotal questions of what forms access rights should take and which institution(s) should determine those forms. Although this article takes sharp issue with the regulatory reform critique of access rights, the regulatory reformers deserve credit for asking important questions. As Barron's own writings acknowledge, we cannot expect constitutional courts alone to transform the expressive landscape. Any effective broadening of expressive access will require the elected branches' political authority and policymaking expertise. Accordingly, access rights advocates might benefit in the near term from turning intellectual energy toward securing judicial scrutiny of the electoral pathologies that presently undermine aspirations toward legislative and regulatory access reforms. Legal theorists usually address what I have called the electoral pathologies of unaccountability and exclusion under equal protection principles. Because those pathologies directly impede informative and inclusive political debate, however, they also offend the same First Amendment values at stake in media access controversies. Pursuing judicial scrutiny of electoral structures in order to enable access reforms would acknowledge the elected branches' essential role in expanding media access while reaffirming Barron's wisdom in articulating a First Amendment foundation for that expansion – a foundation of access rights.