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F(r)ee Expression - Reconciling Copyright and the First Amendment

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F(R)EE EXPRESSION? RECONCILING COPYRIGHT AND THE FIRST AMENDMENT

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INTRODUCTION

Modern copyright law and the freedom of speech protected by the First Amendment exist in an unresolved state of conflict. By definition, copyright's creation of judicially enforceable exclusive rights to creative works restricts the freedom of individuals to communicate with those works. By punishing speakers for their choice of message, authorizing prior restraints upon speech and the destruction of books, and imposing civil and criminal liability upon speakers and publishers, copyright appears to strike directly at the core of free speech rights. And, "[r]ead literally, the First Amendment would invalidate the Copyright Act."[1] Yet, copyright laws exist, and for over two hundred years, Congress has chosen to expand copyright.

Surprisingly, judicial and scholarly recognition of this conflict is a relatively recent phenomenon. Despite the fact that the principles embodied in copyright law and the First Amendment have been part of the U.S. Constitution since the late eighteenth century, almost two hundred years elapsed before courts and scholars began to examine their relationship. As illustrated by the seminal works of Professors

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[1] Brief of Gannett Co., Inc. et al. as Amici Curiae Supporting Respondents at *6, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (No. 83-1632), 1984 WL 566002.

Nimmer and Denicola, initially, the scholarly literature denied any conflict between copyright and the First Amendment, suggesting instead that the two are complementary.[2] According to this view, both promote speech. If the First Amendment prevents government interference in the marketplace of ideas, copyright makes such markets possible by creating economic incentives to speak and publish. To the extent that occasional conflicts may arise, the complementary approach argues that copyright's internal limits, especially those found in the idea/expression dichotomy and fair use, allay residual First Amendment concerns.

In the first case in which the Supreme Court was asked to reconcile free speech with copyright, the Court followed the complementary approach suggesting that there was no conflict or tension. In *Harper & Row, Publishers, Inc. v. Nation Enterprises,* Justice O'Connor's majority opinion emphasized that, "[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression."[3] The Court went on to note that copyright already embodied First Amendment protections "in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use."[4] Consequently, additional First Amendment scrutiny was unnecessary.

Despite, or arguably because of, the complementary approach and the Supreme Court's conclusion that the Framers intended copyright and free speech to be twin engines of free expression, the conflict between copyright and free speech remains. Moreover, with the introduction of the Internet and the growing use of digital technology, conflicts between the two are arguably increasing as individuals who prior to these technologies generally operated below copyright's radar become the targets of copyright claims for activities ranging from file sharing, creating pages on social networking sites like Facebook and MySpace, and blogging and posting content on YouTube. Not surprisingly, the continued conflict between the two doctrines has sparked a new generation of scholarship,[5] and litigation, as illustrated

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[2] Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); *see also* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (proposing that copyright laws accommodate first amendment freedom through the fair use doctrine).

[3] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

[4] *Id.* at 560.

[5] *See, e.g.*, C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV.

by the copyright infringement action against the author and publisher of *The Wind Done Gone*, a work based upon *Gone with the Wind* but told from the perspective of a slave[6] and the Supreme Court's decision in *Eldred v. Ashcroft* upholding the constitutionality of copyright term extension.[7]

This essay explores the relationship between copyright and free speech by critically evaluating the proposition that conflicts between the two can be eliminated because the Framers intended both to be engines for free expression. My purpose is not to set forth a comprehensive theory of copyright and free speech,[8] but instead is more modest. This essay argues that while useful, reference to the Framers' intent only goes so far in avoiding conflicts between copyright and free speech, and when viewed outside of the facts presented by *Harper & Row* and *Eldred,* reliance upon the Framers' intent arguably highlights such conflicts. Moreover, this essay suggests that efforts to minimize free speech concerns in copyright cases by relying upon the Framers' intent beyond *Harper & Row* and *Eldred* represent copyright *Lochnernism.*[9]

Part I of this essay outlines the potential conflict between copyright and the First Amendment. Part II discusses both judicial and scholarly efforts to evaluate and reconcile the conflict. Particular attention is paid to the Supreme Court's efforts to reconcile copyright and free speech by referring to the intent of the Framers. Part III evaluates and critiques efforts to avoid potential conflicts between copyright and free speech based upon what the Framers intended.

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891 (2002); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L. J. 909 (2003); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319 (2003); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommuncations Regulations*, 42 B.C. L. REV. 1 (2000); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

[6] Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

[7] 537 U.S. 186 (2003).

[8] For examples of such efforts see Baker, *supra* note 5; Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001), and Tushnet, *supra* note 5.

[9] Of course, such charges are quite common in legal academia, and have already been leveled in the debate over the future of copyright. *See, e.g.*, Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998); Paul M. Schwartz & William Michael Treanor, Eldred *and* Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331 (2003).

Given the limited scope of copyright in the eighteenth and even nineteenth centuries, reference to the Framers' intent does little to alleviate the First Amendment concerns raised by copyright as it exists today. To the contrary, reference to the Framers' intent highlights the growing First Amendment concerns generated by copyright's expansion beyond its original, historical limits. Part III ends by demonstrating that the Supreme Court's decisions in *Harper & Row* and *Eldred* can be reconciled with an approach based upon the Framers' copyright. Lastly, Part IV argues that broader efforts to minimize free speech concerns raised by copyright based upon definitional balancing represent a modern day version of *Lochnerism.* Broader arguments based upon the proposition that copyright and free speech are complementary with First Amendment concerns addressed within copyright ignore or manipulate the baseline for evaluating the relationship between copyright and free speech. This baseline problem ultimately favors copyright, and allows judges to embed what I have described elsewhere as the property idealists' position within constitutional law.[10]

I. VALUES IN CONFLICT?

Article I, Section 8 of the U.S. Constitution gives Congress the power, "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . ."[11] Today, the Copyright Act grants the copyright owner the exclusive right to reproduce, distribute, publicly perform and display certain works, and the exclusive right to create new works based upon her existing work[12] for the life of the author plus seventy years.[13] And, the Act subjects violators to civil and criminal penalties, including imprisonment.[14] Based upon these exclusive rights, copyright owners may prevent others from delivering Martin Luther King's "I Have a Dream" speech,[15] creating and distributing documentaries,[16] fans from creating alternative stories based upon their favorite characters,[17] prevent the press from publishing stories

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[10] Raymond Shih Ray Ku, *Grokking Grokster*, 2005 WIS. L. REV. 1217.

[11] U.S. CONST. art. I, § 8, cl. 8.

[12] 17 U.S.C. § 106 (2000 & Supp. IV 2001–05).

[13] 17 U.S.C. § 302 (2000).

[14] *Id.* §§ 502–504 (2000) (setting forth civil remedies); 18 U.S.C. § 2319 (2000 & Supp. IV 2001–05) (describing prison terms); 18 U.S.C. § 3571 (2000) (setting forth fines).

[15] *See* Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211 (11th Cir. 1999).

[16] *See* DeNeen L. Brown & Hamil R. Harris, *A Struggle for Rights: "Eye on the Prize" Mired in Money Battle*, WASH. POST, Jan. 17, 2005, at C01.

[17] *See* Anderson v. Stallone, No. 87-0592, 1989 WL 206431 (C.D. Cal. Apr. 25, 1989); *see also* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17

incorporating copyrighted materials,[18] and, with the assistance of federal marshals, seize and destroy unauthorized works and the machines used to reproduce those works.[19] As Rebecca Tushnet suggests, "[i]f the justification were anything other than copyright, these sweeping powers would be seen as a gaping hole at the heart of free speech rights."[20]

The heart of the First Amendment's guarantee of freedom of speech is that the government may not dictate the content of a speaker's message.[21] Yet, this is exactly what copyright does. Copyright's array of exclusive rights limit the freedom of subsequent speakers to incorporate copyrighted expression as part of their speech. As Edwin Baker observes:

> Even if the original text were written by someone else, a person may want to quote the poem privately to her beloved or publicly at the protest rally, to give another person a copy that she has made of a meaningful piece of writing, or to sing the song or perform the play "owned" by another, or even to write down or copy the expression for her own personal use . . . . In each case, . . . the individual's expression constitutes speech from the perspective of the First Amendment.[22]

Under copyright law, even Baker could establish a prima facie case of copyright infringement for the preceding use of his expression in this archetypal example of speech—a scholarly article. As such, copyright restricts a speaker's freedom to determine the content of her message by making it illegal to express oneself with copyrighted expression without the authorization of the copyright owner.

The negative consequences for free speech are threefold. First, copyright suppresses expression through threats of litigation and as a

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LOY. L.A. ENT. L. REV. 651, 664–78 (1997) (discussing fan fiction and fair use); http://www.chillingeffects.org/fanfic (last visited April 16, 2007) (describing the legal issues surrounding fan fictions).

[18] 17 U.S.C. § 502 (2000).

[19] *Id.* § 503.

[20] Tushnet, *supra* note 5, at 5.

[21] *See* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641 (1994) (stating that at "the heart of the First Amendment" is "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence"); *see also* Baker, *supra* note 5, at 899 ("Freedom to speak presumptively means freedom to say absolutely *anything* one wants without any limit on content.").

[22] Baker, *supra* note 5, at 900 (footnotes omitted); *see also* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

result of successful litigation. Second, copyright chills expression because speakers will alter expression or refrain from legitimate speech to steer clear of liability. Third, copyright increases the cost of expression by requiring subsequent speakers to subsidize the expression of copyright owners through the payment of licensing fees and through the transaction costs incurred to obtain a copyright owner's permission. Copyright, therefore, forces individuals to alter the content of their speech, increases the cost of speech, and suppresses speech, all of which are generally inconsistent with the principles of the First Amendment.

These speech concerns are even more troublesome because the burdens that copyright law imposes upon speech are more likely to suppress the speech of poor speakers or speakers not engaged in expression for commercial gain. Copyright's exclusive rights do not distinguish between the unauthorized use of copyrighted expression in a blockbuster motion picture from Walt Disney or as part of scientific research; between a commercial pirate and a classroom teacher; or between the *New York Times* and an amateur blogger. This equal treatment, however, yields unequal results. By tying the use of expression to a speaker's ability and willingness to pay for permission or to mount a successful defense to infringement claims, copyright represents a more significant obstacle for speakers with fewer financial resources and those who do not seek or are unable to obtain sufficient financial rewards to offset the costs of permission or litigation. The end result is that the home movie producer, teacher, and blogger are more likely to alter their expression or avoid speaking altogether. Yet, from a First Amendment perspective these and similarly situated speakers are entitled to the same, if not greater, protection as Disney or the Times.

To be clear, the First Amendment does not require government to provide would-be speakers access to copyrighted expression, but rather limits the government's power to enact laws restricting such uses. As such, freedom of speech does not require government to limit a copyright owner's ability to use self-help to prevent copying or to provide financial subsidies to enable speakers to use such expression. Justice Ginsburg, therefore, mischaracterized the First Amendment claim in *Eldred* as a "right to make other people's speeches."[23] Instead, the First Amendment restricts government's power to limit the use of expression. In Hohfeldian terms, this would be the difference between rights and privileges.[24] The First

[23] Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

[24] Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial*

Amendment does not create an affirmative right or claim to use copyrighted expression backed by state power against copyright owners. Instead, the First Amendment protects a speaker's privilege to use expression without being liable for damages to copyright owners and without copyright owners "being able to summon state power to prevent those acts."[25] In this light, can copyright and free speech be reconciled?

II. RECONCILIATION?

As noted earlier, the apparent conflict between copyright and free speech did not receive judicial and scholarly attention until the late twentieth century. And, the initial response could be considered quite surprising. The first significant scholarly works on the subject denied any conflict between copyright and free speech suggesting instead that the two are complementary.[26] According to this view, there is no conflict because both copyright and the First Amendment promote speech and the free marketplace of ideas. The First Amendment promotes speech by restricting government interference in the marketplace of ideas, and copyright promotes speech by restricting individual acts that make the marketplace of ideas prone to market failure. By creating economic incentives to speak and publish, copyright establishes a robust market for expression independent from the government.[27]

To the extent that occasional conflicts arise, this complementary approach argues that those conflicts are resolved through "definitional balancing."[28] In other words, copyright's internal limits, especially those found in the idea/expression dichotomy and fair use, eliminate residual conflicts.[29] Under the Copyright Act, copyright protects only an author's expression (and original expression at that),[30] and does not extend to the ideas, principles, and concepts in such works.[31]

Reasoning, 28 YALE. L.J. 16 (1913).

[25] Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986.

[26] *See, e.g.*, Denicola, *supra* note 2; Goldstein, *supra* note 2; Nimmer, *supra* note 2.

[27] *See, e.g.*, Netanel, *supra* note 5.

[28] Nimmer, *supra* note 2, at 1184.

[29] Denicola, *supra* note 2, at 293–99; Nimmer, *supra* note 2, at 1189; *see also* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

[30] 17 U.S.C. § 102(a) (2000) ("Copyright protection subsists . . . in original works of authorship . . . .").

[31] *Id.* § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . .").

Because copyright does not prohibit others from copying and using the ideas[32] (or facts)[33] embodied within copyrighted expression, Melvin Nimmer argues that copyright serves rather than frustrates free speech.[34] The fact that copyright limits an individual's choice of expression is of little significance. Following a marketplace of ideas interpretation of the First Amendment based upon the work of Alexander Meiklejohn, Nimmer argues that "[i]t is exposure to ideas, and not to their particular expression, that is vital if self-governing people are to make informed decisions."[35] Accordingly, whatever is "lost through the copyright prohibition on reproduction of expression, is far out-balanced by the public benefit that accrues through copyright encouragement of creativity."[36]

Unwilling to dismiss the First Amendment value of adopting someone else's expression, Robert Denicola adds that copyright's fair use doctrine picked up where the idea/expression dichotomy left off.[37] According to Section 107 of the Copyright Act, the use of copyrighted material for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[38] However, in order to determine whether "the use made of a work in any particular case is a fair use," courts must consider at least four factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality used, and the effect of the use upon the potential market for or value of the copyrighted work.[39] Based upon these factors, a court may conclude that an unauthorized use of copyrighted expression that falls within one of the exclusive rights provided by the Act is, nevertheless, non-infringing. Fair use is an affirmative defense with the defendant bearing the burden of proof. Citing several decisions in which courts found a defendant's unauthorized use to be fair, including quoting magazine stories for an unauthorized biography of Howard Hughes and the publication of parodies of popular song lyrics, Denicola argues that the doctrine is capable of reconciling copyright law with free speech even if the idea/expression dichotomy represents "the

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[32] *Id.*; *see also* Baker v. Selden, 101 U.S. 99 (1879).

[33] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

[34] Nimmer, *supra* note 2, at 1189–92.

[35] *Id.* at 1191.

[36] *Id.* at 1192.

[37] Denicola, *supra* note 2, at 293 ("In some instances, however, the values inherent in the rights of free speech and free press demand more than access to abstract ideas—they require the use of the particular form of expression contained in a copyrighted work.").

[38] 17 U.S.C. § 107 (2000).

[39] *Id.*

basic internal mechanism" to accommodate the two.[40] According to Denicola, because fair use focuses a court's attention on "the public interest in the flow of information, it seeks to further many of the same interests as the right of free speech."[41] Taking this line of reasoning to its logical conclusion, some have argued that fair use should be considered a constitutional doctrine whose scope is determined by the First Amendment.[42]

Largely skeptical of definitional balancing, more recent scholars have chosen to locate "copyright within the First Amendment skein."[43] In large part, the skepticism is due to the inherent limitations of definitional balancing. By addressing free speech concerns internally within copyright, definitional balancing leaves free speech at the mercy of copyright doctrine. When judges limit the idea/expression dichotomy or fair use in favor of expanding copyright's property interests, as they have done in recent years, they limit free speech. Accordingly, scholars have argued that copyright's restrictions upon speech must be subjected to the web of First Amendment doctrine as content neutral restrictions of speech subject to intermediate scrutiny,[44] evaluated consistently with other speech promoting regulations that restrict some speech in order to promote speech overall,[45] or subject to a full protection theory of the First Amendment invalidating certain aspects of copyright law such as its protection of derivative works[46] or its application to individual not-for-profit uses of expression.[47] While I agree with many of the arguments raised by these scholars, a full discussion of these approaches is beyond the scope of this essay. Moreover, courts, especially the Supreme Court, have yet to adopt them.

In two cases, the Supreme Court refused to subject copyright to any First Amendment scrutiny. In so doing, the Court relied upon a modified version of the complementary approach and definitional balancing. In *Harper & Row, Publishers, Inc. v. Nation Enterprises,*

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[40] Denicola, *supra* note 2, at 293.

[41] *Id.* at 297.

[42] Harry N. Rosenfield, *The Constitutional Dimensions of "Fair Use" in Copyright Law*, 50 NOTRE DAME L. REV. 790, 796–98 (1975). Denicola rejected such an approach arguing instead for the recognition of a first amendment privilege based upon necessity and the public interest. Denicola, *supra* note 2, at 306–15.

[43] Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

[44] *Id.*

[45] Tushnet, *supra* note 5, at 4–5.

[46] *See generally* Rubenfeld, *supra* note 5 (arguing that the derivative work right violates a freedom of imagination).

[47] *See* Baker, *supra* note 5 (applying a full protection theory based upon the speech and press clauses).

the Supreme Court upheld a trial court ruling that the publication of quotations from President Ford's yet-to-be published memoirs in a magazine story discussing his decision to pardon President Nixon constituted copyright infringement.[48] The Nation argued that the quoting of approximately three hundred words from President Ford's manuscript should be considered fair use or protected by the First Amendment because the publication of a story addressing an historical event based upon the President's own account was newsworthy.[49] In rejecting the Nation's contentions, Justice O'Connor's majority opinion emphasized that:

> In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.[50]

The Court went on to note that copyright already embodied First Amendment protections, "in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use . . . ."[51] Concluding that the Nation's use was not a fair use, the Court rejected the Nation's argument that the First Amendment required a different rule or result.[52] Under *Harper & Row,* not only is there no conflict between copyright and free speech as Nimmer and others suggest, but according to the Court, this distinction was what the Framers intended.

More recently, the Supreme Court again rejected efforts to subject copyright to First Amendment scrutiny. In *Eldred v. Ashcroft,* the Court rejected a constitutional challenge to Congress's decision to extend the term of copyright protection by an additional twenty years under the Copyright Term Extension Act (CTEA).[53] Among other things, petitioners argued that the CTEA represented a content-neutral regulation of speech that could not satisfy heightened judicial scrutiny.[54] In rejecting the First Amendment argument, the Court refused to apply heightened scrutiny to copyright which it characterized as incorporating "its own speech-protective purposes

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[48] 471 U.S. 539, 543–45 (1985).
[49] *Id.*
[50] *Id.* at 558.
[51] *Id.* at 560.
[52] *Id.*
[53] 537 U.S. 186, 193–95 (2003).
[54] *Id.* at 218–19.

and safeguards."[55] Once again, copyright's purpose of promoting speech and its "built-in First Amendment accommodations"[56]—the idea/expression dichotomy and fair use—insulated the law from First Amendment scrutiny. Following *Harper & Row,* Justice Ginsburg's majority opinion once again justified this method of reconciling copyright and free speech by relying upon the intent of the Framers. According to Justice Ginsburg, "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."[57]

In upholding the CTEA, the Court, nonetheless, rejected the D.C. Circuit's statement that copyrights are "categorically immune from challenges under the First Amendment."[58] Instead, Justice Ginsburg concluded that copyright's internal limits "are generally adequate" to address free speech concerns, "[b]ut when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."[59] Consequently, the Supreme Court's opinion in *Eldred* leaves open the possibility that First Amendment scrutiny may be appropriate under other circumstances. What changes to the "traditional contours of copyright protection" will trigger further First Amendment scrutiny, however, remains to be seen.

III. THE FRAMERS

Reconciling copyright and free speech by referring to the intent of the Framers of the Constitution is an intriguing prospect. Reference to the Framers and first principles are useful starting points in any legal analysis. However, to the extent that we can determine what the Framers intended, I do not mean to suggest that judges and society are bound by that intent. Rather, when our current understanding of the Constitution differs from the Framers, departures from what the Framers' intended should be acknowledged and justified. With respect to the proper relationship between copyright and free speech, and how conflicts between the two should be reconciled, the Supreme Court repeatedly refers to the Framers' intent. Yet, to borrow from Inigo Montoya and *The Princess Bride*, "I do not think [the Framers' intent] means what you think it means."[60] Given the limited scope of

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[55] *Id.* at 219.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 221 (quoting Eldred v. Reno, 239 F.3d 372, 375 (2001)).
[59] *Eldred*, 537 U.S. at 221.
[60] THE PRINCESS BRIDE (Twentieth Century Fox 1987).

copyright in the eighteenth and even nineteenth centuries, reference to the Framers' intent does little to alleviate the First Amendment concerns raised by copyright as it exists today. To the contrary, reference to the Framers' intent highlights the genuine First Amendment concerns generated by copyright's expansion beyond its original limits and perhaps beyond its "traditional contours."

A. The Framers' Intent

Historically, there is very little evidence regarding the Framers' intent in this area. While we know a little about what the Framers thought about copyright, why it was adopted and that the Act was patterned after the English Statute of Anne,[61] there is no evidence revealing what they thought about the relationship between copyright and free speech or how to resolve conflicts between the two. Instead, we are left with the approach taken by the Supreme Court in *Harper & Row* and *Eldred.* We must infer the Framers' intent based upon their actions. And, the major piece of evidence from which we can infer intent is the fact that the First Congress of the United States adopted both the first Copyright Act and the First Amendment.

There are several possible inferences that may be drawn from this fact. First, one may infer, as has the Supreme Court, that the Framers believed that copyright was consistent with free speech. Second, the Framers may not have anticipated nor been aware of any conflicts. Third, the Framers may have recognized an actual or potential conflict, and chose to leave the resolution for another day (or to someone else). Only the first inference supports the position that copyright's restrictions upon expression are by definition consistent with the First Amendment. For the purposes of this discussion, this essay assumes that the Framers considered copyright to be consistent with free speech because, by all accounts, the First Amendment was a direct response to the evils of censorship in England made possible by copyright's historical antecedents.[62] As such, it is unlikely that the

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[61] *See* BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW (1967); PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX (1994); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968); Patterson & Joyce, *supra* note 5; *see also* THE FEDERALIST NO. 43 (discussing copyright in the context of federal powers); NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (Ohio Univ. Press 1984) (recording founders' debates concerning copyright in the broader debates concerning the future of the U.S. Constitution from James Madison's perspective); THE RECORDS OF THE FEDERAL CONVENTION OF 1787 VOL. II (Max Farrand, ed., 1911) (providing the official report of the Constitutional Convention, including discussions on copyright law); EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT (2000) (exploring the evolution of copyright law in the U.S.).

[62] *See* Goldstein, *supra* note 2, at 983; Patterson & Joyce, *supra* note 5, at 948. In first amendment doctrine this is traced to John Milton's and Blackstone's critique of the prior

Framers would enable the very same evils through copyright that they were trying to prevent with the First Amendment.[63] Even this assumption, however, only provides a partial solution.

Reliance upon the Framers' intent is an incomplete solution to the copyright and free speech problem because the Framers' copyright was extremely limited and did little to threaten free speech, even as the First Amendment is interpreted today. Following its English predecessor, the Copyright Act of 1790 was entitled "An act for the encouragement of learning" and granted copyright owners the exclusive right to "print, reprint, publish or vend" their works for an initial term of fourteen years renewable for another fourteen years.[64] It applied to books, maps, and charts, and required a copyright owner to comply with various formalities, including registering and depositing the work to obtain copyright protection.[65] Limited to the right to "print, reprint, publish, or vend," the Act prohibited only a single species of uses: selling copies of the work in competition with the copyright owner.[66] This meant that subsequent authors and speakers were free to use copyrighted expression as their own in all other respects. This was true even when that expression "merely" abridged, translated, or performed the original.[67] Moreover, the right to "print, reprint, publish or vend" was never applied to noncommercial copying including the personal copying of an entire work by hand.[68]

Given the extremely limited scope of the Framers' copyright, it is unlikely that its restrictions in 1790 would trouble the First

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restraints upon speech imposed by the Licensing Acts. *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983).

[63] *See* Patterson & Joyce, *supra* note 5, at 942–45.

[64] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[65] *Id.*

[66] *See* PATTERSON, *supra* note 61, at 215 (arguing that copyright was originally designed to protect an "exclusive right to reproduce the work for sale"); Baker, *supra* note 5, at 901; *cf.* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 9 (1967) (noting that the draftsman of virtually identical language in the Statute of Anne were "thinking as a printer would—of a book as a physical entity; of rights in it and offenses against it as related to 'printing and reprinting' the thing itself; of punishment for illicit reprinting as involving in the first instance destruction of the very duplicating book.").

[67] *See* Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13514); Kaplan, *supra* note 66, at 9–12.

[68] Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1350 (Ct. Cl. 1973) (discussing Act of March 4, 1909, ch. 320, 35 Stat. 1075 (originally enacted as Act of May 31, 1790, ch. 15, 1 Stat. 124)), *aff'd*, 420 U.S. 376 (1975); *see also* L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT (1991); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 40–43 (1996); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 326 (2003).

Amendment, even as it is interpreted today. While the First Amendment guarantees individuals the freedom to determine the content of their expression, it does not guarantee a right to profit from expression. As Professor Baker argues, "[f]reedom of speech gives a person a right to say what she wants. It does not give the person a right to charge a price for the opportunity to hear or receive her speech."[69] Moreover, to the extent that the Framers' copyright suppressed expression, courts could readily conclude that such a narrowly defined right would withstand heightened First Amendment scrutiny. The Framers' copyright promoted speech by creating an independent market for expression, an important if not compelling governmental interest. And, limited to the commercial right to sell copies, the Framers' copyright was narrowly tailored, if not the least restrictive means, to achieve that objective. This narrow tailoring is especially noteworthy when one considers that in addition to the limited nature of the right, the Copyright Act of 1790 required authors to register the copyrighted work, affix copyright notices to the work, and deposit a copy of the work with what would become the Library of Congress, or lose copyright protection. Consequently, the idea that copyright and free speech did not conflict from the Framers' perspective is quite convincing. In fact, one can argue that copyright and the First Amendment were "cut from the same bolt of English cloth," and "recognized and respected the same delicate balance of interests necessary to maintain and enhance the public domain through the vigorous encouragement of a free press."[70] However, today's copyright bears little resemblance to the Framers' copyright.

In marked contrast with the Framers' copyright, today's copyright restricts virtually all of the expression and uses of copyrighted works permitted by the Framers. Today, copyright prohibits the abridgement, translation, and public performance of copyrighted works without the copyright owner's permission.[71] Both the reproduction right and derivative work right prohibit the creation of new works that do not literally copy a copyright work, but are "substantially similar"[72] or based upon the original work.[73] And,

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[69] Baker, *supra* note 5, at 903.

[70] Patterson & Joyce, *supra* note 5, at 950.

[71] 17 U.S.C. § 106(2), (4) (2000) (providing copyright owners with the exclusive right to create derivative works and to publicly perform those works); *see also id.* § 101 ("A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.").

[72] *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) ("But we do not doubt that two plays may correspond in plot closely enough for infringement.").

copyright has been interpreted to apply to personal uses as well.[74] Despite the idea/expression dichotomy, courts have relied upon copyright to protect fictional characters,[75] an artist's style,[76] "expressive" facts,[77] and the "look and feel" of copyrighted works.[78] Moreover, courts have largely limited fair use to circumstances in which an opportunity to obtain a license is not readily available either because of high transaction costs or because copyright owners are not likely to license such uses, as in the case of a negative review or scathing parody, even when the expression is for the purposes of the news,[79] education,[80] and scientific research.[81]

What the Framers intended, therefore, has only limited applicability. Arguments relying upon the Framers' intent to reconcile copyright and free speech rest on fundamentally shaky ground if they attempt to extend this line of reasoning beyond the restrictions established in 1790. It is one thing to suggest that the Framers considered copyright as they defined it to be consistent with the First Amendment. It is quite another to suggest that the Framers would consider copyright as it has evolved to be consistent with the First Amendment. The former is supported by the historical record. The latter is purely speculative. In fact, the Framers' intent may be relied upon to reach the opposite conclusion. Because copyright has expanded far beyond the Framers' copyright, reliance upon the Framers' intent may suggest a need for greater First Amendment scrutiny.

If one believes that the Framers' copyright represented a delicate balancing between copyright and free speech, then copyright's subsequent expansion may have upset that delicate balance. In other

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[73] 17 U.S.C. § 106(2) (2000); *see also id.* § 101 (defining derivative works).

[74] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2774 (2005) (noting that users of a file sharing network could be considered direct copyright infringers); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). *But see,* Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure,* 18 BERKELEY TECH. L. J. 539 (2003) (arguing that fair use is justified when consumers of work copy it).

[75] *See* Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc., 900 F. Supp. 1287 (C.D. Cal. 1995) (confirming the valid copyright of MGM's James Bond character).

[76] *See* Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987).

[77] *See* Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132 (2d Cir. 1998).

[78] Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109 (9th Cir. 1970) (holding that all the elements of a greeting card, including textual arrangement and artwork, should be considered as a whole when determining copyrightability).

[79] *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

[80] *See* Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1388 (6th Cir. 1996); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

[81] *See* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929 (2d Cir. 1994).

words, if the Copyright Act of 1790 was a carefully tailored response based upon the Framers' understanding of England's experience prompting the adoption of the First Amendment, then one may infer that expansions beyond the public, commercial right to "print, reprint, publish or vend" are suspect. This does not mean that subsequent expansions of copyright necessarily violate the First Amendment. To reach that conclusion, the Framers' copyright would have to represent their intent to exercise the outermost limits of congressional power. More likely, the Framers left room for copyright to expand consistently with the First Amendment. Nonetheless, it does suggest a significantly greater role for the First Amendment. And, the Framers' copyright provides the most logical starting point for evaluating whether Congress has expanded copyright beyond its "traditional contours" as suggested in *Eldred.*

B. The Framers' Copyright

Unless one believes that copyright (and the Constitution) should remain frozen in time, defining copyright's traditional contours by reference to the Framers' copyright readily lends itself to distinguishing between the expansion of copyright to protect new forms of expression versus the imposition of new limits upon expression. For example, one may argue that copyright has not expanded beyond its traditional contours as it has been applied to sound recordings, photography, motion pictures, broadcasts, and digital works. While copyright protection for these new forms of expression is literally an expansion beyond the Framers' copyright, this expansion does little to change the balance between copyright and free speech. As illustrated by Table 1 and Table 2, the law merely applies copyright's existing restrictions upon expression to new categories of works similar to the writings protected by the Framers. To be sure more speech is suppressed, however, standing alone, the suppression of speech accompanying the protection of new works, is no different in kind to what the Framers considered acceptable, and the Framers' balance is maintained.

Table 1.

© Books	Free Speech

Table 2.

© Books	Free Speech
© Photos	Free Speech

In contrast, changes in copyright that impose new limits upon expression are not as easily reconciled. The creation of new rights or the expansion of existing rights alter the balance between copyright and free speech struck by the Framers. Consider copyright's current protection of derivative works. By granting copyright owners the right to control derivative works, copyright restricts a tremendous range of expression previously unrestricted by the Framers. As illustrated by Table 3 and Table 4, the addition of the derivative work right to the exclusive rights created by copyright changes the relationship between copyright and free speech. While Congress's decision to grant authors the exclusive right to derivative works may be a wise policy choice, and may be consistent with the Constitution, by altering the original balance between copyright and free speech, Congress's decision should be subject to judicial review under the First Amendment.[82]

Table 3.

Right to Vend	Free Speech

Table 4.

Right to Vend & Derivative Works	Free Speech

The Supreme Court's decisions in both *Harper & Row* and *Eldred* are arguably consistent with evaluating First Amendment claims by reference to the Framers' copyright. Neither case represented a situation in which Congress or the courts expanded copyright by recognizing limitations of expression unknown to the Framers. Ultimately, *Harper & Row* turned upon an author's common law right

[82] For excellent discussions on how to approach that review see Baker, *supra* note 5; Netanel, *supra* note 5, and Tushnet, *supra* note 5.

to determine when and how to publish one's manuscript; a right predating copyright and unaltered by the Framers' adoption of statutory copyright.[83] Likewise, *Eldred* addressed Congress's decision to extend the length of copyright protection and not the substantive balance between copyright and free speech. While increasing the term of copyright protection has consequences for speech by limiting the amount of expression that will become part of the public domain, term extension is not a new form of restriction. Rather, term extension maintains copyright's existing restrictions upon expression, albeit, over a longer period of time.[84] As such, both cases can be reconciled with the Framers' copyright as a baseline for determining when additional First Amendment scrutiny is called for in copyright disputes. The same, however, cannot be said for the derivative work right, public performance right, or copyright's application to noncommercial expression and copying. Nonetheless, it remains to be seen whether the Supreme Court will rely upon the Framers' copyright to define copyright's traditional contours.

IV. DEFINITIONAL BALANCING AS COPYRIGHT *LOCHNERISM*

While the Supreme Court's decisions in *Harper & Row* and *Eldred* are arguably consistent with the Framers' intent, reliance upon definitional balancing, rather than the Framers' copyright, to establish the relationship between copyright and the First Amendment represents a modern day version of *Lochnerism*.[85] This charge is leveled for two reasons. First, by rejecting the need for additional constitutional scrutiny when Congress expands copyright beyond the Framers' copyright, definitional balancing ignores or manipulates the baseline for evaluating the relationship between copyright and free speech. Second, by ignoring the baseline problem, definitional balancing ultimately allows judges to embed their own disputed vision of property within constitutional law at the First Amendment's expense. This copyright *Lochnerism* effectively transforms the constitutional relationship between copyright and the First Amendment from one in which the Constitution defines the limits of

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[83] *Harper & Row*, 471 U.S. at 550–52.

[84] I do not mean to minimize the Constitutional concerns raised by term extensions. However, I do agree with the Court that those questions are best addressed under the "limited Times" provision of Article I, Section 8, Clause 8. *See* Eldred v. Ashcroft, 537 U.S. 186, 199–208 (2003).

[85] This discussion builds and expands upon an essay I presented as part of a symposium on First Amendment *Lochnerism*. *See* Raymond Shih Ray Ku, *Copyright Lochnerism*, 33 N. KY. L. REV. 401 (2006).

copyright to one in which copyright defines the limits of the Constitution.

The work of Paul Schwartz and William Treanor illustrates the problems associated with addressing First Amendment concerns in copyright cases through definitional balancing.[86] Schwartz and Treanor argue that the Supreme Court in *Eldred* adopted the most deferential standard of review for constitutional questions, and that this standard of review should be applied in all intellectual property cases.[87] According to the authors, arguments in favor of greater judicial scrutiny suffer from the same flaws in logic and the same infirmities as *Lochner v. New York*[88] and its progeny.[89] Specifically, they argue that heightened judicial review would elevate a particular economic policy not grounded in either the text of the Constitution or its original understanding to constitutional status and prevent legislatures from innovating in response to economic change.[90] By rejecting the so-called IP restrictor's arguments in *Eldred*, the Supreme Court supposedly avoided creating a *Lochner* for the third millennium.[91] In defense of *Eldred*, Schwartz and Treanor argue that courts should interpret the Constitution holistically and apply heightened scrutiny only under circumstances in which the political process cannot be relied upon to protect fundamental rights or discrete and insular minorities.[92] Assuming that this conclusion is appropriate with regard to the Copyright Term Extension Act's retroactive extension of the copyright term, the argument that such deference should extend to all intellectual property questions is flawed because it fundamentally misconceives the problem and represents a form of *Lochnerism* of its own.

A. What Problem?

First, Schwartz and Treanor's critique of heightened review in copyright cases entirely ignores the conflict between copyright and the First Amendment. For example, they describe the classic critique of *Lochner* as "the Court should not second-guess legislative judgments and, in the absence of clear constitutional restrictions, it should let majorities govern."[93] As such, heightened judicial review is

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[86] *See* Schwartz & Treanor, *supra* note 9.
[87] *Id.* at 2334.
[88] 198 U.S. 45 (1905),
[89] Schwartz & Treanor, *supra* note 9, at 2390–96.
[90] *Id.* at 2393.
[91] *Id.* at 2395.
[92] *Id.* at 2406–07.
[93] *Id.* at 2409.

inappropriate unless there is an express constitutional limitation such as those embodied in the Bill of Rights or one that is necessary to ensure the proper functioning of the democratic process. The latter proposition is based upon John Hart Ely's representation-reinforcement theory of constitutional interpretation.[94] According to Schwartz and Treanor, copyright is no different than other forms of property, and consistent with economic regulation in general, courts should defer to Congress.[95] While they are concerned with preserving a robust "public domain," protection of the public domain is left to fair use and more creative mechanisms for the licensing of copyrights.[96]

Constitutional challenges to copyright, however, are fundamentally different than the economic regulations challenged in *Lochner.* This is not a situation in which courts are asked to define the vague contours of substantive due process under the Fourteenth Amendment, but rather to apply an express constitutional limitation embodied in the Bill of Rights. Copyright restricts expression and implicates the First Amendment. Presumably, the authors would agree that freedom of speech is a fundamental right, and that the First Amendment is a clear constitutional restriction upon democratic majorities justifying heightened scrutiny even under a representation-reinforcing theory of constitutional interpretation. Yet, because of definitional balancing, they ignore entirely copyright's restrictions upon speech, and make no effort to explain why the First Amendment does not apply in copyright cases. Instead, they simply state that "while the grant (or denial or limitation) of copyright protection has consequences for speech, the petitioners' argument in *Eldred* concerning the Copyright Clause is not one that implicates free speech concerns."[97] In Schwartz and Treanor's defense, this omission reflects a fundamental flaw inherent in definitional balancing.

B. Of Baselines and Economic Theories

Moreover, definitional balancing represents a form of copyright *Lochnerism.* While there is a rich body of literature discussing and criticizing the Supreme Court's *Lochner* era jurisprudence, this essay focuses upon two specific criticisms of *Lochner.* The first criticizes

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[94] *Id.* at 2401.

[95] *Id.* at 2334.

[96] *Id.* at 2409.

[97] *Id.* at 2410. As should be clear from my earlier discussion, to the extent that Schwartz and Treanor's argument is limited to the length of copyright's protection, I am inclined to agree with their analysis. My disagreement stems from their effort to expand this argument and apply it to copyright in general.

Lochner for failing to recognize the appropriate baseline for analyzing economic regulations under the Fourteenth Amendment. The second, related criticism, is represented by Justice Holmes's charge that the Supreme Court imported a disputed economic policy into the Constitution, and according to Holmes, the Constitution "does not enact Mr. Herbert Spencer's Social Statics."[98] As discussed below, these two criticisms are interrelated. The baseline problem is the means by which judges embed disputed economic policies within the Constitution.

One of the principal criticisms of *Lochner* is provided by Cass Sunstein, who argues that *Lochner's* fundamental flaw was to rely upon common law entitlements as a natural baseline for constitutional analysis.[99] When evaluating the constitutionality of economic regulations, the Supreme Court in the *Lochner* era based its decision upon status quo neutrality or, in his words, "a particular conception of neutrality, one based on existing distributions of wealth and entitlements."[100] The maximum hour and wage laws at issue in the *Lochner* era cases were considered unconstitutional because they altered existing economic rights, which were seen as natural.[101] In other words, the *Lochner* era decisions adopted a one-sided approach when defining state power in the economic realm, and this approach was fundamentally flawed because it refused to recognize the appropriate analytical baseline. The subsequent rejection of *Lochner,* therefore, represents the rejection of status quo neutrality and the corresponding recognition that existing property and economic rights are themselves created and maintained by the power of the state and may, therefore, be modified and reallocated by the state.[102] Definitional balancing suffers from a similar baseline problem.

Like *Lochner* and economic substantive due process before it, definitional balancing relies upon its own version of status quo neutrality. Rather than viewing changes to the status quo as generating constitutional concerns, definitional balancing incorporates changes to copyright into the status quo to eliminate such concerns. This status quo, however, is not fixed. Definitional

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[98] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[99] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 45 (1993); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987). *But see* David E. Bernstein, Lochner's Legacy's *Legacy*, 82 TEX. L. REV. 1 (2003) (criticizing Sunstein's analysis).

[100] SUNSTEIN, *supra* note 99, at 45.

[101] *See id.* at 40; HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 132–33 (1993).

[102] SUNSTEIN, *supra* note 99, at 58 ("We must lay hold of the fact that economic laws are not made by nature. They are made by human beings." (quoting 2 The Public Papers and Addresses of Franklin D. Roosevelt 5 (1938))).

balancing does not examine the relationship between copyright and free speech at some fixed point in time to determine whether copyright was consistent with the First Amendment then and remains consistent now, as would an approach based upon the Framers' copyright. Instead, definitional balancing concludes that copyright and free speech are always consistent, even when changes within copyright impose greater restrictions upon expression. The current state of copyright is the only relevant state, and this is true even when, for example, the judges themselves are establishing the current state of copyright in the cases before them by denying fair use. As such, definitional balancing treats changes to copyright as First Amendment neutral even when those changes alter the relationship between copyright and free speech. If *Lochner* arbitrarily relied upon the common law as its baseline, definitional balancing arbitrarily relies upon copyright as it exists (even when it is in the process of being changed) as the baseline. Unlike the common law, the baseline established by definitional balancing is dynamic. The fact that congressional and judicial decisions alter the baseline between copyright and the First Amendment is either not recognized or ignored. This is illustrated by the following tables, where C1 and C2 represent changes to copyright.

Table 5.

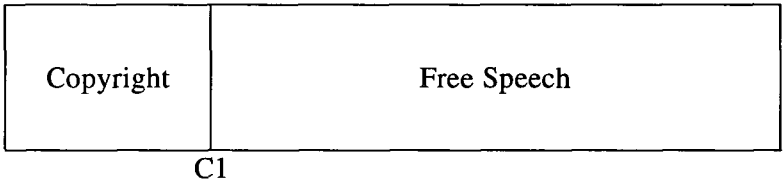
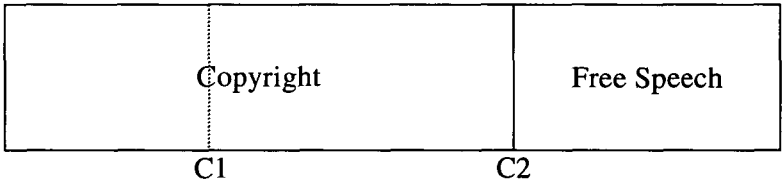


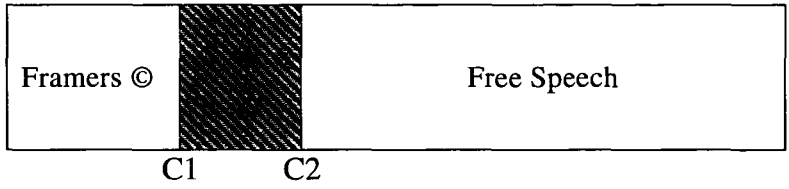
Table 6.



Despite clear changes in the relationship between copyright and free speech illustrated by the two tables, definitional balancing treats the two as equivalent under the First Amendment even though the baseline changes from C1 to C2. Yet, the change in relationship is precisely why First Amendment scrutiny is demanded.

Consider Table 7. Assuming that the scope of copyright under the Act of 1790, represented by C1, did not represent what the Framers' considered the full extent of congressional power, we may assume that there is room for copyright to expand consistently with the First Amendment. This is represented by the shaded area bounded by C1 and C2.

Table 7.



Nevertheless, a determination that copyright's expansion is within the permissible zone of expansion cannot be made without reference to the First Amendment. If the problem with *Lochner* was judicial reliance upon the common law as a baseline for evaluating the constitutionality of subsequent economic regulation, copyright *Lochnerism* occurs when copyright's constitutionality under the First Amendment is assumed without regard to subsequent changes within copyright that alter the relationship between the two.[103]

Second, judicial reliance upon definitional balancing suffers from another fatal *Lochner* flaw. By broadening the complementary approach beyond the historical limits recognized by the Framers, definitional balancing allows judges to import a disputed economic theory and vision of property into the Constitution. In his famous dissent in *Lochner,* Justice Holmes criticized the majority's decision to strike down the challenged legislation on the basis that the Court was embedding a policy of laissez faire economics into the Constitution.[104] According to Holmes:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The

[103] Reliance upon the Framers' copyright avoids this problem by establishing a fixed baseline.

[104] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

> Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.[105]

In other words, because the Constitution was silent on the question, the Supreme Court's decision impermissibly limited the people's right to adopt legislation based upon a different economic theory. By denying any role for the First Amendment, definitional balancing allows judges to entrench their own disputed economic theory into the Constitution.

We are currently engaged in a global debate over copyright and its expansion. Some prominent examples of this debate include the disagreements over fair use sparked by Internet search engine technology,[106] *Eldred* and the length of copyright protection, file sharing,[107] and the scope of secondary liability for companies that provide computer and telecommunications products and services.[108] The two sides in this debate are represented by what I have described as "property pragmatists" and "property idealists."[109] The property pragmatist takes the position that property rules, like those created by copyright law, serve specific policy goals. When factual circumstances change because of shifting markets or new technology, the property pragmatist accepts that existing property rules may no longer fit the new circumstances, and may require modification or even abandonment. In other words, the property pragmatist acknowledges that the questions, "Should file sharing be prohibited?" and, "If so, what standard for secondary liability should be imposed upon the providers of goods and services that facilitate file sharing?," may require the resolution of complicated empirical and policy questions concerning the goals of copyright and how those goals are best achieved. For the pragmatist, property rights are not absolute, and recognizing a property right or expanding such exclusive rights may not be the best method for achieving the law's ultimate purpose. Instead, copyright's goal of stimulating the creation and

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[105] *Id.*

[106] *See* Edward Wyatt, *Writers Sue Google, Accusing It of Copyright Violation*, N.Y. TIMES, Sept. 21, 2005, at C3.

[107] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *see also* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002) (discussing the issue of copyright protection for digital works).

[108] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 125 S. Ct. 2764 (2005); *see also* Ku, *supra* note 10 (discussing the role courts should play in the debate over secondary liability under copyright law).

[109] *See* Daniel A. Farber, *Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium,"* 89 MINN. L. REV. 1318 (2005) (discussing the difference between the Jeffersonian and the Hamiltonian philosophies of government regulation and applying those philosophies to intellectual property rights).

dissemination of creative works may be better served by allowing certain unauthorized uses to go uncompensated or by compensating authors under a liability regime that might result in compulsory licensing or public funding. Because the pragmatist does not assume that property rights are always the best solution, it should come as no surprise that the pragmatist questions whether courts may competently and legitimately make such decisions.

In contrast, the property idealist assumes that absolute property rights are always the best solution. Like the pragmatist, the property idealist recognizes that existing property rules may need to be modified to address changed circumstances. However, property rights remain the answer. Those advocating this position with respect to copyright proceed under the assumption that "the most efficient legal regime, measured by its success at inducing the creation of digital works and increasing consumers' access to information, is that which permits copyright owners to maximize control over the terms and conditions of use of their digital property."[110] According to this position, if technology or changing market conditions create new opportunities, property rights should be clarified in favor of granting control over those opportunities to copyright owners. "Unlike property pragmatists, idealists do not question judicial resolution of these questions. To the contrary, property idealists argue that courts are well suited for making such decisions."[111]

Definitional balancing furthers the property idealist agenda by minimizing if not eliminating First Amendment limits upon the expansion of copyright. Definitional balancing achieves this result in several significant ways. First, it obscures First Amendment concerns in copyright cases by shifting the focus of such decisions away from the relationship between copyright and the First Amendment to copyright exclusively. If copyright internally accommodates freedom of speech, as suggested by definitional balancing, there is no need for courts to conduct an independent First Amendment analysis or for judges to consider values outside of copyright. As Diane Zimmerman observes:

> What seems to have happened in the course of this conflict is that an ever-expanding array of new or reconstructed property theories is cannibalizing speech values at the margin. In large part, this has occurred not because speech claims are inherently weaker than property claims, but because courts

[110] Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 464 (1998).

[111] Ku, *supra* note 10, at 1230–32.

> fail to think critically about the justifications for, functions of, and limitations on property rules in the sensitive arena of speech.[112]

With its dynamic baseline, definitional balancing makes it possible for judges to "fail to think critically" because the approach assumes that any First Amendment problems that might exist are already addressed by copyright. Courts, therefore, tend to or are able to focus exclusively on interpreting copyright and copyright doctrine without considering how their decisions impact freedom of speech or recognizing their own role in the process.

One of Justice Holmes' famous copyright decisions illustrates the myopia brought on by definitional balancing. In *Bleistein v Donaldson Lithographing Co.,* Justice Holmes penned what is known in copyright law as the non-discrimination principle.[113] *Bleistein* addressed the unauthorized copying of illustrations that appeared on a poster advertising circus acts. The Circuit Court agreed with the defendant that because the illustrations were part of an advertisement, they were not protected by copyright because at the time, the Copyright Act of 1874 stated that it, "applied only to pictorial illustrations or works connected with the fine arts."[114] The Supreme Court reversed on the basis that illustrations used in advertisements could still be considered fine arts. According to Justice Holmes, "works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help make money. A picture is none the less a picture and none the less a subject of copyright. . . ."[115] Any other conclusion would impermissibly inject the aesthetic judgments and biases of judges into copyright law, and:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet, would have been sure of protection when

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[112] Zimmerman, *supra* note 5, at 667.
[113] 188 U.S. 239, 250 (1903)
[114] *Id.* at 250 (quoting 18 Stat. L. 78, 79, chap. 301, § 3, U.S. Comp. Stat. 1901, p. 3412).
[115] *Id.* at 250.

> seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than a judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.[116]

Internally, Holmes' logic is quite convincing, which is one of the reasons why it has withstood the test of time. As a policy matter, it is entirely appropriate to conclude that copyright law should apply to all illustrations without regard to their subjective artistic or aesthetic value. Likewise, it would be wholly arbitrary to allow copyright protection to turn about the individual preferences of judges.[117] Nonetheless, interpreting copyright to include illustrations produced for advertising necessarily reduces the opportunities for expression available to others which may or may not run afoul of the First Amendment. Yet, Holmes never considered or questioned whether his interpretation of copyright raised First Amendment concerns, and under definitional balancing such considerations were unnecessary.

In contrast, when presented with separation of powers questions, Justice Holmes was acutely aware of the limits imposed by the Constitution and upon judges to expand property rights. In *White-Smith Music Publishing Co. v. Apollo Co.,* Justice Holmes agreed with the majority that whether copyright should be applied to piano rolls was a decision for Congress and not the Court even though he believed that it was logically consistent to extend copyright protection under the circumstances.[118] Similarly, in *International News Service v. Associated Press,* Justice Holmes rejected the idea that the Supreme Court could recognize a quasi-property right in news between competing news services. According to Holmes:

> Property, a creation of law, does not arise from value, although exchangeable . . . . Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because some one

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[116] *Id.*

[117] It is equally plausible that Congress' reference to "fine arts" was not intended to discriminate between high value versus low value works, but instead, reflected Congress judgment that so called fine arts illustrations are more likely to be under-produced because of unauthorized copying than illustrations created for advertising.

[118] 209 U.S. 1, 19–20 (Holmes, J., concurring specially).

> has used it before, even if it took labor and genius to make it.[119]

And, if a property right were to be recognized under the circumstances, the decision would have to come from the Legislature.[120] While one might argue that Justice Holmes's differential treatment of First Amendment and separation of powers concerns was based upon a personal preference for separation of powers questions or a still-developing view of free speech, it is just as likely that Holmes, and so many other judges after him, simply failed to appreciate the free speech concerns in copyright cases. By obscuring the relationship between copyright and free speech, definitional balancing hides the problem even from our leading jurists.

Furthermore, definitional balancing undercuts the First Amendment as a means for questioning the legitimacy of subjecting copyright cases to heightened judicial scrutiny. If copyright and free speech are already balanced, then subjecting copyright to additional First Amendment scrutiny would be unwarranted. Once again, Schwartz and Treanor are representative. The authors engage in this rhetorical sleight of hand when they suggest copyright is no different than any other form of economic regulation, and that all arguments for heightened constitutional scrutiny in copyright cases are inconsistent with the lessons of *Lochner*.[121] Under this view, because copyright should be treated like all other forms of property, constitutional challenges to copyright represent the effort of "IP restrictors" to read into the Constitution "a substantive vision of governance that was not grounded in either the text of the Clause or its original understanding."[122] As such, all disagreements over copyright are disagreements over public policy, and are best left to Congress and copyright.[123] By making copyright and the policies it represents the primary, if not exclusive, point of reference, definitional balancing clears the way for Congress and courts to adopt the property idealist position.

In turn, the complementary approach shifts the terms of the debate to the level of public policy which increases: 1) the likelihood that the relevant decision-maker will adopt the idealist position, and 2) the likelihood that courts will not second guess such decisions. Both

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[119] 248 U.S. 215, 246 (1918) (Holmes, J., dissenting).
[120] *Id.* at 248–49.
[121] Schwartz & Treanor, *supra* note 9, at 2390.
[122] *Id.* at 2393.
[123] *Id.* at 2409–10.

legislators and judges are more likely to adopt the idealist agenda at the policy level because property idealists have been quite successful at confining the copyright debate to copyright's role in providing authors with financial incentives to create new works. And, the answer to the question, "will increasing copyright protection will provide copyright owners with greater financial incentives?" is always yes.[124] The potential for greater financial rewards by allowing a copyright owner to maximize her financial return on a copyrighted work always increases the incentive to create. Opponents must then explain why it would be unfair for those using the copyrighted work to pay for such a benefit. Unable to raise competing First Amendment interests, opponents are left to argue that existing financial incentives are adequate or to argue for alternative methods to create incentives that impose fewer costs than a property regime, neither of which directly refute the property idealist claim that greater protection creates greater incentives.

Furthermore, shifting the terms of the debate increases the likelihood of judicial deference. Again, *Eldred* and the CTEA are illustrative. As a result of the complementary approach, the question of whether Congress may legitimately extend the length of copyright protection retroactively is limited to whether the extension will provide copyright owners with greater financial incentives to create new works. Because Congress heard testimony from authors and copyright owners that term extension would provide them with greater incentives to create new works or to improve existing works, the Court concluded that Congress's decision was reasonable and within its discretion.[125] In contrast, Justice Breyer argued that the financial incentives created by the CTEA were small enough to be illusory. According to Justice Breyer, some evidence suggested that, at best, term extension would increase the financial incentives to a handful of authors by seven cents.[126] "What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum?"[127] Even so, the majority concluded that "[t]he CTEA reflects judgments of the kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain."[128] So long as there is some reasonable basis for such a conclusion, term extension is permissible even if, as Justice Breyer argued in dissent, such incentives are de minimis.

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[124] Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 344 (2002).
[125] Eldred v. Ashcroft, 537 U.S. 186, 205–08 (2003).
[126] *Id.* at 254–55 (Breyer, J., dissenting).
[127] *Id.* at 255.
[128] *Id.* at 205 (majority opinion).

To be clear, I am not suggesting that the Constitution prevents Congress or the courts from adopting the property idealist's position as a guiding or interpretive principle, only that the First Amendment limits how far those institutions may go towards advancing that agenda. Nevertheless, for all practical purposes, by removing the limits established by the First Amendment, definitional balancing reinterprets the Constitution to support the property idealist position. And yet, if the Constitution does not enact Herbert Spencer's Social Statics, it similarly does not enact the property idealist's economic theory. Arguments based upon the claim that copyright and free speech do not conflict, even as copyright expands beyond the Framers' copyright, implicitly resolve this conflict at the First Amendment's expense. Under definitional balancing, property rights define the limits of the First Amendment rather than the other way around. In what amounts to *Lochner* in reverse, definitional balancing does not read something into the Constitution that is not there, but rather reads out the express limitations found in the First Amendment. This copyright *Lochnerism* effectively transforms the constitutional relationship between copyright and the First Amendment from one in which the Constitution defines the limits of copyright to one in which copyright defines the limits of the Constitution.

CONCLUSION

Copyright and the First Amendment are twin engines for free expression. No doubt, the Framers intended both to promote expression. However, there is also no doubt that at times these engines pull in conflicting directions when fee expression conflicts with free expression. In this essay, I have endeavored to demonstrate the limits of relying upon the Framers' intent to resolve such conflicts. Copyright and free speech may be reconciled by relying upon what the Framers intended as suggested by the Supreme Court, but only to a limited extent. It is reasonable to imply from the near simultaneous adoption of the first Copyright Act and the First Amendment that the Framers considered their copyright—a right to prevent commercial vending of copies in direct competition with the copyright owner—to be consistent with freedom of speech. Copyright, however, has long since expanded beyond the Framers' copyright, and reliance upon what the Framers intended only highlights the First Amendment problems generated by copyright's expansion.

Rather than relying upon the Framers' intent to reconcile copyright and the First Amendment in all circumstances, the Framers' copyright

is a useful metric for determining when First Amendment scrutiny is justified. If one assumes that the Framers' copyright represented a careful balancing of freedom of speech and the need to compensate authors to encourage expression, the Framers' copyright becomes a valuable baseline for evaluating when changes to copyright should be subject to First Amendment review. An approach based upon the Framers' copyright differentiates between challenges to copyright based upon protecting new forms of expression versus imposing new limits upon existing expression. The former category of changes to copyright should not be subject to heightened First Amendment scrutiny and the latter should. As such, the Framers' copyright becomes a clear and powerful means for determining when changes to copyright may have altered the balance between fee expression and free expression, and provides substance to the Supreme Court's reference in *Eldred* to copyright's "traditional contours" in future cases.

Lastly, a careful evaluation of what the Framers intended reveals the fundamental flaws associated with the dominant judicial and scholarly approach to this problem represented by definitional balancing. By establishing a clear baseline between copyright and the First Amendment, the Framers' copyright unmasks definitional balancing as a form of copyright *Lochnerism*. First, by rejecting the need for additional constitutional scrutiny when Congress expands copyright beyond the Framers' copyright, definitional balancing ignores or manipulates the baseline for evaluating the relationship between copyright and free speech. Second, by ignoring the baseline problem, definitional balancing ultimately allows judges to embed their own disputed vision of property within constitutional law at the First Amendment's expense. Copyright *Lochnerism* effectively transforms the constitutional relationship between copyright and the First Amendment from one in which the Constitution defines the limits of copyright to one in which copyright defines the limits of the Constitution. And, this simply cannot be what the Framers intended.