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Continuing the Path to Excellence: University of Minnesota Law School Dean Alex M. Johnson, Jr.

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Review Essay

The First Amendment's Biggest Threat

Free Culture: How Big Media Uses Technology and the Law To Lock Down Culture and Control Creativity. By Lawrence Lessig, The Penguin Press, 2004.

The Creation of the Media: Political Origins of Modern Communications. By Paul Starr, Basic Books, 2004.

Reviewed by Michael J. Gerhardt†

The biggest threat to freedom of speech and of the press in the United States may be different than you imagine. For many, if not most, people, the biggest threat to the First Amendment¹ comes from the government. Federal and state government officials have a long history of using their respective powers to silence their critics. For other people, factions interested in consolidating their political power are the most serious threat to the First Amendment. For many others, the American public poses the most serious threat to the First Amendment. Many Americans find a good deal of expression offensive, and many are hostile to opinions different from their own.

In two new books, Stanford Law School Professor Lawrence Lessig and Princeton Sociologist Paul Starr suggest that one of the gravest threats—if not the most serious threat—to the First Amendment may stem from a different source. In their judgment, this threat comes not from the federal govern-

† Arthur B. Hanson Professor of Law, William & Mary Law School; Visiting Professor, University of Minnesota Law School (Fall 2004). I am grateful to David Anderson, Deborah R. Gerhardt, and Bill Marshall for helpful comments on earlier drafts and to Brian Flaherty and Laura Weeks for valuable research assistance.

1. The First Amendment provides in pertinent part that the “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I.

ment or the American people, but rather, from the unique control over the media by a few large corporations. In *Free Culture: How Big Media Uses Technology and the Law To Lock Down Culture and Control Creativity*,² Lessig argues that the small number of corporations controlling the media is stifling creative expression. In particular, he argues that the convergence of three factors—changing law, concentrated markets, and changing technology—has produced a “permission culture” dominated by only a few businesses.³ This change necessitates “adjustments” in copyright law to “restore the balance that has traditionally defined” the relationship between the legal protections of creative property and the ability of anyone to engage in unfettered creativity.⁴ In *The Creation of the Media: Political Origins of Modern Communications*,⁵ Starr claims that the ownership of the media by only a few companies spells serious trouble for the freedom of the press. This arrangement, he argues, is likely to culminate in a lack of diversity in programming, resulting in the expression of fewer viewpoints in the national media. Even worse, the enormous costs of entry into the national media ownership market leave the power in this market to relatively few businesses.⁶ The latter are then driven by the need to maintain their market share and stifle competition rather than maintain high standards of news reporting. While acknowledging that the structure of modern mass communications is largely a function of policy choices, Starr worries that undoing these choices and making better ones may be extremely difficult at best if not completely impossible.⁷

Thus, for both Lessig and Starr, a major problem in contemporary America is that a few large corporations generally control the media. These corporations are disposed to use their market power to stifle competition, to maximize their profits, to receive favorable treatment from political leaders beholden to them, and to stop the free flow of ideas. The danger of this phenomenon is that big business wants to shape the news to suit

2. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004).

3. *Id.* at xiv–xv.

4. *Id.* at 261.

5. PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* (2004).

6. *See id.* at 399.

7. *See id.* at 401–02.

its own ends rather than to facilitate the ideal of freedom of the press. Corporate dominance of the media poses a serious threat to the values the First Amendment was supposedly designed to foster—from promoting a marketplace of ideas to serving as a check on governmental abuse.

In this Review Essay, I examine Lessig's and Starr's accounts of the threat posed to the First Amendment by the consolidation of corporate ownership of the media in the United States. After providing a brief overview of both books in Part I, I compare and contrast the case each author makes to support his perception of the threat big business poses to the First Amendment. The showing each author makes must fulfill the three basic requirements for establishing the existence of a genuine threat to First Amendment values: (1) the existence of a harm; (2) a causal relationship between that harm and the rise of consolidated corporate ownership of the media; and (3) a demonstration of which institutions should be responsible for monitoring and alleviating the harm, as well as their relative ability to adequately do so.

In Part II, I consider the first of these requirements—the demonstration of actual harm. Starr's meticulous history of the political origins of the modern media demonstrates far more convincingly than Lessig's anecdotal evidence the genuine harm that consolidation of corporate ownership of the media poses to at least some First Amendment values. Indeed, Starr's historiography undercuts Lessig's most dramatic claim that corporate domination of the media is a recent problem. Starr's historiography suggests such domination is neither novel nor, as Lessig claims, ever been worse.

Part III compares how well each author demonstrates the second requirement for demonstrating a threat to the First Amendment—the link between the rise of corporate media control and the harm it supposedly poses to First Amendment values. The causal connection is purportedly made possible by corporations' arranging for favorable treatment from government regulators and federal courts. While both accounts increase our understanding of the complex forces shaping modern mass communications, neither fully or convincingly demonstrates that Congress and the Supreme Court are truly captive to corporate interests.

In the final part, I examine the third requirement for showing actual harm to the First Amendment—demonstrating which institutions are best situated to monitor and to amelio-

rate the threat posed by corporate dominance of the national media. This examination requires exploring both the feasibility of particular reform proposals and, more basically, the significance of the impact of nonjudicial constitutional activity on First Amendment values. Interestingly, Lessig's proposed reforms are all addressed to Congress, despite his failure to recognize his mistake in first taking his case against the constitutionality of the Copyright Term Extension Act⁸ to the Supreme Court rather than to Congress. By initially taking his claims to the federal courts, Lessig unwittingly did what many conservative critics of liberal judicial activism have long condemned—trying to use the federal courts, particularly the Supreme Court, to adopt the policies liberals have failed or not taken the trouble to get Congress or other legislatures to adopt. The odds of Lessig's convincing Congress to revise the Copyright Extension Act along his suggested lines were never great, but going to the Court initially almost certainly lessened his chances for getting a receptive audience in Congress. It is not unreasonable to imagine he could have found a more receptive audience in Congress than the Court, for many conservative Republicans might have been inclined to agree on the need to increase the market power of individual citizens.

In another recently published book, First Amendment scholar Geoffrey R. Stone suggests that the most important way in which to protect First Amendment guarantees is to develop and maintain a national culture committed to the freedoms of speech and of the press.⁹ The biggest threat to the First Amendment may be the absence of the requisite elements and forces to cultivate a culture dedicated to nurturing and ensuring the nation's fundamental commitments to First Amendment values. One institution, whether it is Congress, the Court, or a major corporation, can pose a risk to that culture. But it is not the responsibility of any single institution or segment of society to nurture or sustain that culture. Instead, maintaining commitment to the First Amendment is a collective social, political, and legal responsibility. We must all rise to meet that challenge, or collectively suffer the consequences of falling short.

8. See The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.); LESSIG, *supra* note 2, at 275.

9. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

I. THE PROBLEM

The story of the rise of corporate control of the media is not new. Lessig and Starr tell that story from different perspectives, draw similar but not identical lessons from it, and assess different institutional responsibilities for ameliorating the First Amendment threats that concern them.

A. LESSIG'S *FREE CULTURE*

Lessig is an unabashed member of the so-called "copyright left," which is dedicated to eliminating, or at least restricting to a large extent, contemporary copyright protections.¹⁰ His book is a brief for his side of a very rich, rather complex debate about the extent to which the Constitution and other laws protect copyright. He begins each chapter with an anecdote that drives home his main point that corporate control of the media threatens creativity because corporations use their superior economic power to arrange for favorable treatment from the government. The latter includes increased legal protections for copyright, which have helped transform our culture from a free one to one requiring permission at almost every step of the creative process.

Lessig's book consists of four parts with a conclusion and an afterward. The first part, "Piracy," has five chapters, in which he describes how intellectual property in our tradition has been perverted of its original and primary purpose of serving as an instrument to facilitate creativity. In these chapters, Lessig builds a case for the virtues of creative destruction in the service of progress. Once upon a time, he notes, if you owned a plot of land, your rights extended down to the core of earth beneath your property and up to the heavens.¹¹ When the airplane came along, however, it became obvious something had to happen—those rights would have to be curtailed. In 1946, a pair of North Carolina farmers, the Causbys, challenged the government's right to "take" the property between their land and the heavens for the use of aircraft, leading the Supreme Court to declare that such an "ancient doctrine" had "no place in the modern world."¹² The Supreme Court came down on the sides of Congress and the future.

10. See LESSIG, *supra* note 2, at xiv (referring to himself as a member of the copyright left).

11. *Id.* at 1.

12. *United States v. Causby*, 328 U.S. 256, 260-61 (1946).

As Lessig recounts, the owners of today's entertainment industry are today's Causbys. He believes

it was right for common sense to revolt against the extremism of the Causbys. I believe it would be right for common sense to revolt against the extreme claims made today on behalf of "intellectual property." What the law demands today is increasingly as silly as a sheriff arresting an airplane for trespass.¹³

The danger of allowing the "silliness" of endless extensions of copyright protection to persist is that "we are allowing those most threatened by the changes [in copyright law] to use their power to change the law—and more importantly, to use their power to change something fundamental about who we always have been."¹⁴ Lessig believes that until recently we have been a "free culture," seeking to maintain

a balance between anarchy and control. A free culture, like a free market, is filled with property. It is filled with rules of property and contract that get enforced by the state. But just as a free market is perverted if its property becomes feudal, so too can a free culture be queered by extremism in the property rights that define it.¹⁵

The danger is that "modern-day equivalents of the early twentieth-century radio or nineteenth-century railroads are using their power to get the law to protect them against" digital technologies that could unfettered (or at least with far fewer constraints)

produce a vastly more competitive and vibrant market for building and cultivating culture; that market could include a much wider and more diverse range of creators; those creators could produce and distribute a much more vibrant range of creativity; and depending upon a few important factors those creators could earn more on average from this system than creators do today.¹⁶

The problem, for Lessig, is that "the law no longer [draws the] distinction between republishing someone's work on the one hand and building upon or transforming that work on the other. Copyright law at its birth had only publishing as its concern; copyright law today regulates both."¹⁷ He gives various examples to demonstrate how the "law's role is less and less to support creativity, and more and more to protect certain industries against competition."¹⁸ Today, in his judgment, the law burdens "an extraordinary range of commercial and noncom-

13. LESSIG, *supra* note 2, at 12.

14. *Id.* at 13.

15. *Id.* at xvi.

16. *Id.* at 9.

17. *Id.* at 19.

18. *Id.*

mercial creativity . . . with insanely complex and vague rules and with the threat of obscenely severe penalties."¹⁹

Lessig expresses a concern that the "war on piracy" will change the United States, creating "less and less a free culture, more and more a permissive culture."²⁰ To make advancements in this permissive culture, innovators are constantly forced to obtain permission from various sources.²¹ Large media companies have cultivated this cultural change to consolidate their power and to make it harder for innovators to create new inventions and interfere with their market share.

In chapter 5, Lessig explores further the role of piracy of intellectual property. Lessig suggests some forms of piracy are quite wrong, while others are "useful and productive" in producing new information.²² He takes a closer look at peer-to-peer exchanges of music, such as Napster, where it might be illegal to copy entire copyrighted CDs, but other uses, such as accessing uncopyrighted music, are not prohibited.²³ He compares the development of peer-to-peer with albums, cable television, and VCRs.²⁴ According to Lessig, "[i]n each case throughout our history, a new technology changed the way that content was distributed. In each case, throughout our history, that change meant that someone got a 'free ride' on someone else's work."²⁵ Lessig suggests that like the previous technologies, when it comes to peer-to-peer, courts should wait and let Congress develop a way to balance the interests of the new technology and the established companies.²⁶

The second part of *Free Culture* discusses "Property." With "few exceptions," Lessig believes "ideas released to the world are free."²⁷ Property law historically protected "tangible" property. Today, however, intellectual property law protects "the intangible."²⁸ In chapter 6, Lessig presents a historical account of copyright, culminating in a 1774 decision, *Donaldson v. Beckett*,

19. *Id.*

20. *Id.* at 8.

21. *Id.*

22. *Id.* at 66.

23. *Id.* at 67-69.

24. *Id.* at 70.

25. *Id.* at 77.

26. *Id.* at 77-79.

27. *Id.* at 84.

28. *Id.*

that recognized the concept of public domain.²⁹ The decision affirmed the Parliament's rule limiting copyrights to twenty-one years.³⁰

Lessig uses Clint Eastwood as an example in chapters 7, 8, and 9. Lessig describes the difficulty of a producer's attempt to make a CD-ROM about Eastwood, having to spend a year tracking down the rights to footage from Eastwood's movies.³¹

These costs mirror the costs with fair use: You either pay a lawyer to defend your fair use rights or pay a lawyer to track down permissions so you don't have to rely upon fair use rights. Either way, the creative process is a process of paying lawyers—again a privilege, or perhaps a curse, reserved for the few.³²

Lessig expresses concern that with the increasing ability of technology to archive and create a media record of the past, issues of determining fair use will become increasingly important.

In chapter 10, Lessig argues against the proposition that creative property owners should have the same rights as all other property owners. Lessig counters that the "Progress Clause" of the Constitution indicates that the Founders never intended intellectual property owners to have the same rights as other property owners.³³ He argues that enacting legal constraints to protect owners of intellectual property will have an unwanted effect on the cultural environment of creativity.³⁴

Lessig also criticizes the expansion of copyrights to protect derivative works, as well as the preoccupation of copyright law with the dangers of copying others' works.³⁵ This focus indicates the dangerous effect that this expansion has had on the Internet, which he suggests was never even imagined when copyright expanded to include copies.³⁶ He points to the current trend of allowing computer programs to enforce copyright law, stating that these programs often remove the option of fair use

29. *Id.* at 92; see *Donaldson v. Beckett*, 1 Eng. Rep. 837 (H.L. 1774).

30. LESSIG, *supra* note 2, at 92–93.

31. *Id.* at 102.

32. *Id.* at 107.

33. Article I of the Constitution provides in pertinent part that "Congress shall have the Power To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8 [hereinafter the Progress Clause].

34. LESSIG, *supra* note 2, at 128–29.

35. *Id.* at 136–39.

36. *Id.* at 146–47.

of many copyrighted materials.³⁷ The resulting effect is “[t]he control of copyright is simply what private owners chose.”³⁸ At the end of the chapter, he names the fear that led him to this book: “*Never in our history have fewer had a legal right to control more of the development of our culture than now.*”³⁹

In chapters 11 and 12, Lessig returns to the availability of copyrighted music online. He focuses on how online radio has essentially been chased out of production by the larger media industries, particularly by recording artists demanding compensation for every song played.⁴⁰ He suggests that these new developments created a situation where “this generation’s buggy manufacturers have already saddled Congress, and are riding the law to protect themselves against this new form of competition.”⁴¹ Lessig does not fault the recording industry for trying to preserve or increase their profits, but instead, blames Congress for failing to see the harm that its copyright laws are causing.⁴²

Chapters 13 and 14 examine in detail the case of *Eldred v. Ashcroft*.⁴³ In that case, Lessig defended a man who published online copyrighted poems of Robert Frost that were first published in 1923, and, due to the Copyright Term Extension Act, would not have their copyright expire until 2018 at the earliest.⁴⁴ Lessig based his arguments to the Supreme Court on *United States v. Lopez*.⁴⁵ He argued that the same principle that limited Congress’s power to extend the Commerce Clause beyond interstate commerce in *Lopez* should limit its ability to extend the Progress Clause beyond a fixed period of time.⁴⁶ If a limit were not set by the courts, he argued, then there would be no “stopping point” to Congress’s power.⁴⁷

Eldred lost the case, and Lessig blames himself for the loss. The Court refused to consider the comparison of the *Lopez* decision to the Progress Clause, ruling instead that Congress’s

37. *Id.* at 148–52.

38. *Id.* at 147.

39. *Id.* at 170.

40. *Id.* at 195.

41. *Id.* at 204.

42. *See id.*

43. 537 U.S. 186 (2003).

44. LESSIG, *supra* note 2, at 213–15.

45. 514 U.S. 549 (1995).

46. LESSIG, *supra* note 2, at 219–20.

47. *Id.* at 228–30.

power is not limited in this area.⁴⁸ Lessig believes, “[t]here was no reason to hear the case in the Supreme Court if they weren’t convinced that this regulation was harmful. So in my view, we didn’t need to persuade them that this law was bad, we needed to show why it was unconstitutional.”⁴⁹ Lessig miscalculated. Instead, the Supreme Court rejected his argument because he failed to persuade a majority of Justices that the harm to creativity was genuine and severe.

As a result of his losing his case in the Supreme Court, Lessig proposes a series of changes to the current copyright law. For instance, he proposes allowing a copyright owner after fifty years to pay a \$1 fee and register online to renew the copyright.⁵⁰ Any copyright owner who did not register his materials would see the materials enter the public domain until the registration form is completed.⁵¹ Lessig believes that this would protect copyright owners while allowing access of the public to materials copyright protection does not benefit.⁵²

In an afterward to his book, Lessig suggests several other short- and long-term options for improving the current copyright system. In the short term, Lessig advocates taking a step away from the extremes. He writes, “What’s needed is . . . a way to respect copyrights but enable creators to free content as they see fit.”⁵³ He suggests this could be accomplished by allowing copyright owners to determine the level of rights that they are willing to pass on to others.⁵⁴

Lessig identifies five long-term goals. First, he suggests creating a registration database for copyrighted material managed by private companies, similar to the companies that manage rights to Web addresses.⁵⁵ Currently, there is no database, the absence of which often adds to the legal difficulties associated with determining copyright ownership. Second, he recommends a system of marking materials to indicate the level of permission an owner is willing to grant someone who wants to

48. *Eldred*, 537 U.S. at 222 (“[The] Copyright Clause empowers Congress to determine the intellectual property regimes that overall, in that body’s judgment, will serve the ends of the Clause.”).

49. LESSIG, *supra* note 2, at 230.

50. *Id.* at 248–49.

51. *Id.*

52. *Id.* at 253.

53. *Id.* at 277.

54. *Id.* at 282–84.

55. *Id.* at 288.

access his work.⁵⁶ Third, Lessig advocates changing the current term of copyrights.⁵⁷ While Lessig does not insist on a particular time period, he is adamant that "a term once given should not be extended."⁵⁸ Fourth, Lessig would narrow the scope of derivative rights included in copyrights.⁵⁹ When it comes to the file sharing of music, Lessig favors "regulat[ion] to minimize the harm to interests affected by this technological change, while enabling, and encouraging, the most efficient technology we can create."⁶⁰ Finally, he recommends reducing the regulation of culture. He challenges his readers to "[s]how me why your regulation of culture is needed. Show me how it does good. And until you can show me both, keep your lawyers away."⁶¹

B. STARR'S *MASS MEDIA*

Starr provides an interdisciplinary account of the development of American media from the seventeenth to the mid-twentieth century. His thesis is that "constitutive choices" during this period created a "material and institutional framework of communications and information" in which the development of the "public sphere" was made possible.⁶² He suggests that these decisions fall into one of three categories: the formation of legal rules regarding free expression of ideas and information; the design of the communications networks themselves; or the institutions of human capital, in which education and literacy are stressed.

According to Starr, modern mass communications owes its distinctive origins in this country to the primacy of public policy.⁶³ He demonstrates that the development of the media was not inevitable in either the United States or elsewhere in the world. Starr's emphasis on public choice is distinctive from the outset, when he suggests that "the United States has followed a distinctive developmental path in communications ever since the American revolution."⁶⁴ This path was influenced to some extent by forces beyond the control of political leaders, such as

56. *Id.* at 290.

57. *Id.* at 292.

58. *Id.* at 293.

59. *Id.* at 295.

60. *Id.* at 303.

61. *Id.* at 306.

62. STARR, *supra* note 5, at 4.

63. *Id.* at 14.

64. *Id.* at 2.

the absence of guilds and other feudal restraints on commerce; geopolitical isolation from European conflicts; and a continental orientation that encouraged the creation of national networks. But the American path also stemmed from political choices that reflected the Founders' republican commitments—not simply to a decentralized free press but also to a strong public sphere populated by an informed citizenry.⁶⁵ This positive conception of liberty encouraged limited use of state power to promote communications through such diverse means as cheap postal rates, postal privacy, public education, and widespread literacy, as well as widely published constitutions and minutes of legislative meetings.⁶⁶

The first section of Starr's book examines the formation of "a new public sphere" during the seventeenth and early eighteenth centuries. Starr describes how England and France gradually shifted away from political secrecy as capitalism and a desire for knowledge fueled a rise in print newspapers.⁶⁷ This rise, however, was still stymied by both governmental use of informal restrictions, such as licensing and taxes, and the Catholic Church's censorship demands.⁶⁸ This period was also noteworthy due to some of the sharp differences in the colonies as New England showed great support for education and its literacy rates far surpassed the more commercially focused Virginia.⁶⁹

Starr shows how newspapers played an instrumental role as the press in the debate between the Federalists and the Anti-Federalists. Moreover, he demonstrates that the First Amendment was at least partly motivated by the desire to protect not only individual rights but also institutions performing the function of the press.⁷⁰ Newspapers began to flourish in the early nineteenth century in part due to the expansion of the post office system in the United States, as its low price distribution network allowed many papers to reduce subscription charges and increase circulation.⁷¹ Daily or "penny" papers with local news and independents' news-gathering capabilities began to emerge as well, as technological innovations lowered

65. *Id.* at 15.

66. *Id.* at 16.

67. *Id.* at 33–45.

68. *Id.*

69. *Id.* at 52–53.

70. *Id.* at 75–76.

71. *Id.* at 88–90.

the cost of printing and made papers affordable to the general public.⁷²

The second section of Starr's book details the rise of technological networks between 1840 and 1930. Even though the telegraph is not part of our modern communications network, Starr depicts its development in detail because it is an example of how early constitutive choices became the basis for future media-developing decisions.⁷³ Starr describes how Western Union gained prominence through its role in the Civil War, when its telegraph network carried important military news back from the front lines.⁷⁴ The Supreme Court was reluctant to interfere with this new technology. In *Ex Parte Jackson*, the Court refused to protect privacy rights in telegrams as it had done under the Fourth Amendment with sealed letters carried by the post office.⁷⁵ Similarly, it was not until 1945 that the government and the courts cracked down on the wire story monopoly enjoyed by the Associated Press, finally stating that requiring newspapers to enter into exclusive arrangements illegally restrained the trade.⁷⁶

The invention and spread of the telegraph indelibly shaped the development of the telephone. Due to antitrust concerns, American companies like Bell could not take advantage of existing telegraph lines like their counterparts in Europe could. Starr writes that by divorcing the two networks, the United States actually provided a strong incentive for the telephone to develop on its own.⁷⁷ As a result of significant scientific and technological research conducted by telephone companies, the American telephone system was more efficient and far more diffuse than that in Europe.⁷⁸ Antitrust was not the only reason for American's advantage in communication networks; judicial decisions guaranteeing free speech and privacy protections led to trust in communications systems.⁷⁹ Access to a large national market fueled the development of communications networks, whereas the Europeans were forced to deal with politically fragmented nations.

72. *Id.* at 124.

73. *Id.* at 155-65.

74. *Id.* at 173.

75. 96 U.S. 727 (1877).

76. *See* *Associated Press v. United States*, 326 U.S. 1, 21-22 (1945).

77. STARR, *supra* note 5, at 193.

78. *Id.* at 194-98.

79. *Id.* at 221-22.

The third and final section of Starr's book is entitled "The Making of the Modern Media, 1865–1941."⁸⁰ This period is especially significant because it involved the increasing application of moral regulations to communications. In the late nineteenth century, Congress enacted the Comstock Act, which criminalized sending obscene material through the mail.⁸¹ This wave of censorship did not carry over into the print media, as magazines and daily papers containing minority political views became plentiful.⁸² Around the turn of the century, competition and thus diversity flourished in the print media as there were relatively few barriers to entering the marketplace.

The First Amendment fared differently in the nineteenth than in the twentieth century. According to Starr, during the nineteenth century "no federal court struck down a law based on the basis of the free-speech protections of the First Amendment,"⁸³ but there was little debate about freedom of speech since there was little government crackdown on dissent. Starr notes that it was World War I and the subsequent "red scare" that "provoked the generative crisis of modern First Amendment law."⁸⁴ The leading advocates of free speech during the early twentieth century were newspapers defending the free press, conservative libertarian legal scholars, and individual citizens who formed the first civil libertarian organizations.

Starr observes that the Supreme Court was not eager in the early twentieth century to combat the censorship and obscenity arrests of the time. In *Patterson v. Colorado*, for example, the Court ruled that the First Amendment was only a

80. *Id.* at 231.

81. The Comstock Act, 18 U.S.C. § 1461 (2000). Starr's book is filled with fascinating data on each era in the evolution of modern mass communications. In discussing the prominence of censorship at the turn of the century, Starr explains, for instance, that public libraries evolved in this era as a way of controlling the books that people read. He explains:

The establishment of public libraries, like censorship laws, expressed a widely felt determination to impose moral direction on a cultural marketplace thought to be undermining cherished values. . . . In the 1870s, when the American Library Association was established, its members saw censorship as their professional responsibility. The purpose of libraries, in their view, was not entertainment but education and self-improvement, and they selected books accordingly, banning works that they and their governing boards deemed immoral or sensational.

STARR, *supra* note 5, at 249–50.

82. STARR, *supra* note 5, at 250.

83. *Id.* at 268.

84. *Id.*

shield from prior restraints, not from punishment after publication of unprotected speech.⁸⁵ Judge Learned Hand stated his "direct incitement" test in the *Masses* case,⁸⁶ only to have the United States Court of Appeals for the Second Circuit overrule him and adopt the "bad tendency" test, which was more deferential to government authority.⁸⁷ Subsequently, the Supreme Court, in an opinion by Justice Oliver Wendell Holmes, restated the "bad tendency" test using the phrase "clear and present danger."⁸⁸ Justice Holmes did not initially mean for this test to be more protective, but courts began to use it to uphold free speech. Eventually even Justice Holmes came around to this view, defecting from the then-conservative majority on the Court.⁸⁹ Starr suggests that the judicial reversal on free speech was apparent in *Near v. Minnesota*, a 1931 case in which the Supreme Court struck down a state law that had the purpose or effect of operating as a prior restraint on the press.⁹⁰

Government and the courts also had to decide how censorship and government regulation should apply to emerging new technologies such as movies and the radio. In 1915, the Supreme Court unanimously upheld movie censorship.⁹¹ The Court distinguished the movie business from the press and other organs of public opinion, and also distinguished ideas from entertainment.⁹² Starr concludes that movie censorship was ineffective, as film production and distribution were so fragmented as to impede governmental regulation of the movies generally.⁹³

The federal government had decided to take a balanced position with respect to the development of the radio, as it retained public ownership of the airwaves but distributed licenses to private companies. Unlike the press or movies, radio ownership became very concentrated, most likely due to the limited radio spectrum available for transmission.⁹⁴ The Communications Act of 1934 produced the Federal Communications

85. 205 U.S. 454, 462 (1907).

86. *Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917).

87. *See Masses Publ'g Co. v. Patten*, 246 F. 24, 38 (2d Cir. 1917).

88. *See Schneck v. United States*, 249 U.S. 47, 52 (1919).

89. STARR, *supra* note 5, at 282.

90. 283 U.S. 697 (1931).

91. *Mut. Film Co. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244 (1915).

92. *See id.*

93. STARR, *supra* note 5, at 296.

94. *Id.* at 328-30.

Commission (FCC), a regulatory commission that had broad powers to allocate licenses only to broadcasting companies that were in the public interest.⁹⁵ In the 1940s, the FCC took steps to increase diversity and promote competition; NBC, for example, had to give up its profitable Blue network, which later became ABC. Starr explains that mass media outlets arose partly in response to American society, which had become increasingly diverse, urban, and industrial.⁹⁶

Starr concludes his book with a somber warning. In the 1930s, several institutions came together—"a potent but still decentralized press," the "movie business," and "the world's only significant commercial broadcast industry"—as "the harbingers of a new era when the media were an independent factor in politics."⁹⁷ These institutions were "no less important, for example, than the political parties that had once held sway over many of them."⁹⁸ A momentous transformation was under way in this country's mass communications: from press to media, from print to broadcast journalism, and to an independent media dominated by only a few major corporations, driven by commercial interests, and protected by the constitutive choices that made its ascension possible. This transformation has had enormous ramifications for the First Amendment post-1941. In this era, the news media developed differently than the media. The new mass media "did not receive the same degree of protection from state supervision; control was more highly centralized; and advertising and mass marketing drove [its] content, particularly in the case of commercial radio in the United States. The origins of modern communications had been, in critical respects, liberal and democratic."⁹⁹ But

the media developed along lines that were so deeply in tension with those ideals[.] Could the mass media do the job that democracy classically assigned to the press—or did the commercially driven media and new techniques of mass persuasion so distort public knowledge and degrade public discussion as to make popular self-government impossible?¹⁰⁰

Starr's answer is not heartening. He expresses doubt that the political choices that made the transformation of mass media possible can ever be undone.

95. 47 U.S.C. §§ 151–610 (2000); STARR, *supra* note 5, at 360.

96. STARR, *supra* note 5, at 388–95.

97. *Id.* at 386.

98. *Id.*

99. *Id.* at 388.

100. *Id.*

II. DEMONSTRATING A GENUINE HARM TO THE FIRST AMENDMENT

There are a number of possible threats to the First Amendment guarantees of freedom of speech and of the press. The most obvious threat would come from the federal or state government. It is not unreasonable to fear that government officials have strong incentives to silence or punish their critics and are prepared to use whatever means they have available to do so. American history is replete with government attempts to sanction or harass its critics through such diverse means as lawmaking, prosecutions, and hiring or firing staff.

Another possible threat to the First Amendment may come from factions or well-organized groups within American society. Such groups may threaten First Amendment freedoms in their quest to consolidate their power, politically and socially, within American society.

Yet another possible threat to the First Amendment may come from the public. A majority of Americans, at any given time, may not want to be exposed to ideas or language that they dislike. Many people tend not to want to listen to criticism or contrary opinions, and people generally do not like to be exposed to expression or activity they find offensive. Many people may even support sacrificing some of their own freedoms for the sake of protecting national security. Thus, citizens may urge their leaders to take certain action or support action taken by their leaders to suppress expression with which they disagree or find offensive or threatening.

Neither Lessig nor Starr directly focuses on threats to First Amendment interests by the government or the public. Each focuses of course on another potential threat—corporations interested in preserving, if not expanding, their economic power.¹⁰¹ This threat differs from other possible threats to the First Amendment in terms of both its nature and its mechanics. Lessig suggests that four forces constrain social behavior: law, social norms (a community's informal understandings or traditions), architecture (the physical world around us), and the market.¹⁰² Public and private actors tend to constrain social behavior through each of these forces. Like the public, corporations wield no formal governmental powers and are incapable of state action which is subject to constitutional constraints.

101. See *supra* Part I.

102. See LESSIG, *supra* note 2, at 121–22.

Thus, the Constitution does not apply to private business. Yet, also like the public, corporations may not wield power by passing or making laws. They influence or coerce behavior through norms, architecture, and the market.

Moreover, corporations cultivate enough political and economic power to pressure government officials to adopt their policy preferences. What corporations do in the private sector, of course, does not violate the First Amendment in any formal way, but corporations do take actions with consequences in the public sector. They may use state and federal courts to protect their interests, and they may lobby (and provide financial support for) public officials to enact the laws that they prefer. Further, corporations often sponsor and otherwise engage in public discourse that can influence or shape social norms. A dramatic example is the gun industry. Manufacturers and distributors of guns purchase advertisements and even sponsor magazines that express their support for (and their reasons for supporting) the rights of citizens to own guns as provided for in the Second Amendment.¹⁰³ With the help of the National Rifle Association (NRA), they lobby federal and state authorities to take actions to preserve their Second Amendment freedoms (as, of course, they understand them), they sponsor academic research (that supports their interests), they contribute (through political action committees) to candidates who agree with their views, and they pay for advertisements for the candidates they support and against the candidates who they believe threaten their constitutional entitlements.¹⁰⁴ These actions, singly and collectively, have ramifications for expression, commentary, and reporting about gun control. No one—neither a public official nor private citizen—takes a public position on issues relating to gun control without facing the ire of the gun industry and the NRA, which are prepared to vilify anyone who threatens to tamper with Second Amendment liberties. This may not silence people, but it likely chills or influences what some people say and how they say it. There is nothing that the courts or any

103. The Second Amendment provides, "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

104. See *Analysis: What Is the NRA?*, BBC NEWS, at <http://news.bbc.co.uk/1/hi/world/americas/332555.stm> (Mar. 1, 2000); *Ashcroft's Ammo: NRA Spends Almost \$300,000 To Support Missouri Senator*, PUBLIC CITIZEN, at <http://www.citizen.org/pressroom/release.cfm?ID=250> (Nov. 3, 2000).

government can do about this chilling effect; it is a function of economic power.

As one shifts attention to the domain of intellectual property, corporations have all the means (and more) that the gun lobby and the NRA have at their disposal to protect their interests. While corporations do not wield any official powers over freedom of speech or the press, they nonetheless take actions that have ramifications for the quality, quantity, and diversity of political expression.

Lessig and Starr document the actual harms that corporations can impose upon First Amendment interests in their efforts to dominate the realms of intellectual property and mass communications. Since a threat is only meaningful to the extent that it poses a genuine or realistic harm, the first thing to do is to see which, if any, of the harms to First Amendment interests the author identifies is genuine. It is especially illuminating to compare the developments in intellectual property and mass media law that they both discuss to determine which, if either, scholar makes the more convincing case for the possible harm they posed.

A. PROVING THE LOSS IN CREATIVITY

As we have seen, a major purpose of Lessig's book is to make amends for losing the *Eldred* case, a loss he attributes to his failure to convince the Court of the genuine economic harm of endless extensions of copyright.¹⁰⁵ From Lessig's perspective, the costs of copyright extension are significant, and the benefits are slim.¹⁰⁶ It is unclear how much more creative work would be produced if people knew that they, as well as their heirs, would benefit economically from the copyrights they owned. The possible benefits hardly outweigh the costs, for copyright extensions not only artificially raise consumer costs but also have the effects of reducing innovations. Reducing innovations undoubtedly poses a serious threat to the national economy.

According to Lessig, endless or excessively long copyrights force new creators to pay the second- and third-generation offspring of the original innovators for the use of work that the recipients of these payments did not help to create.¹⁰⁷ The Copyright Term Extension Act covers all creative work product,

105. See Lessig, *supra* note 2, at 228–46.

106. See *id.* at 221–28.

107. See *id.* at 135.

regardless of whether it has retained its commercial appeal.¹⁰⁸ Such extensive coverage forces today's innovators to determine who owns those rights to negotiate with them, and maybe even to take out expensive insurance to protect themselves in case they make mistakes in the process. To do all this is time consuming and expensive when would-be innovators are dealing with famous artists and authors, but the problem is even worse when the former has to find relatives of obscure or unknown creators. These transaction costs raise the price of innovation, sometimes prohibitively. Moreover, there are cultural costs to extensive copyright terms. Rights holders not only set a price for the use of the creations they control, but they also get to decide who uses them and how. By controlling such decisions, they are able to skew the nature of what is actually produced. Excessive copyright protections increase the likelihood that the only derivative works produced are those that please the copyright holders. Thus, permission, Lessig notes, "is not often granted to the critical or the independent."¹⁰⁹ In addition, limiting the public domain—the inevitable consequence of copyright extensions—limits the range and depth of content available. If the public domain were to shrink, then, as Intel argued in its amicus brief in *Eldred*, "the need and demand for a full range of new technologies and innovation will also decline. One cannot exist without the other."¹¹⁰

No one knows whether the economic arguments Lessig makes in his book would have convinced the Supreme Court to strike down the Copyright Term Extension Act. It is possible that a majority of the Court would have rejected his claims as purely speculative. Lessig cannot say precisely—indeed, he does not say in his book—just how much creativity has been lost because of the Copyright Term Extension Act. Perhaps just as bad for Lessig, none of his horror stories of copyright abuses seems to match the injustices of the past that both he and Starr document. Starr cites no modern example of corporate harassment that quite matches the injustices of the London booksellers' monopolization of the printed word in the seventeenth century,¹¹¹ Edison's combative litigiousness in enforcing his

108. The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

109. LESSIG, *supra* note 2, at 10.

110. Brief of Amicus Curiae Intel Corp. at 10, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

111. STARR, *supra* note 5, at 33-35.

patents on the movie camera,¹¹² the resistance of sheet-music publishers to the player piano,¹¹³ the decades of suppression of FM radio,¹¹⁴ and the ironclad control of the movie and record businesses by just a few companies from the 1920s until after the Second World War.¹¹⁵ This is not to say that the Copyright Term Extension Act is problem free; it has produced problems, but none seems to be as serious or as consequential as those posed in less regulated eras.

Another problem impeding Lessig's demonstration of the economic harm from endless copyrights is that the current state of the law allows for considerably greater creativity than Lessig acknowledges. This undercuts his claim that "Never in our history have fewer had a legal right to control more of the development of our culture than now."¹¹⁶ Today's technology has made innovators much freer than ever before to devise and to distribute original works. Moreover, "fair use" exceptions in existing copyright law are so expansive that just about the only thing that people bent on stealing copyrighted work may not do is directly copy and pass off a sizeable portion of the copyrighted work as their own.¹¹⁷ Nor does Lessig once mention iTunes or the numerous other services for legally downloading music on the Internet. Nor, for that matter, does Lessig discuss the legal significance of the movie industry's efforts to overcome the piracy problem with MovieLink, by selling content over P2P, or programs allowing people to sample copyrighted content in their own creations.

There are several other reasons why Lessig may have overstated the harm of endless copyright extensions. First, the fragmentation of the media has arguably occurred much faster than did its consolidation, resulting in less market power not more. The same is true with respect to copyright law and changes in technology: the advent of new technologies means that intellectual property regulation covers some things that it did not cover before, but the realm of free and unregulated ac-

112. *Id.* at 302–05.

113. *Id.* at 303.

114. See LESSIG, *supra* note 2, at 3–7.

115. See STARR, *supra* note 5, at 319–20.

116. LESSIG, *supra* note 2, at 170 (emphasis omitted).

117. See Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61, 61–63 (1998) (listing the factual differences between cases in which copyrighted material was permitted to be utilized under the fair use doctrine and cases in which it was not).

tivity—as Lessig himself documents when he describes the explosion of the “blogs”—has grown much more quickly.¹¹⁸

Second, the consolidation of the media has unintended consequences. The relative uniformity in the reporting and programming of the national media has generated the need for alternative outlets. Almost every medium has competition. For instance, satellite radio offers a potentially significant alternative (arguably assisted by shock jock Howard Stern’s impending move there) to the AM and FM radio networks dominated by a few companies, while cable and Direct TV offer much broader choices for viewers than the three major television networks on broadcast television. And of course DVD players and TiVO offer additional alternatives to cable and Direct TV (not to mention Blockbuster).

Third, the consolidation and integration of the media may not be as bad as Lessig (or Starr, for that matter) suggests. By Lessig’s own count, there are thirty-eight major media voices, and his count does not include satellite and terrestrial radio, television broadcasters, cable programmers, and Internet content providers.

Fourth, Lessig cannot avoid at least some responsibility for the harm he claims to have found. I have suggested that possibly his biggest error was deciding not to take his case first to Congress. *Eldred* was the first time the Court ever considered “whether extending the duration of existing copyrights complies with the ‘limited [t]imes’ prescription” in the Progress Clause.¹¹⁹ In upholding the Copyright Term Extension Act, the Court has effectively empowered Congress to do precisely what troubles Lessig. Before the Court took the case, no one knew for sure whether Congress had this power. Now, thanks to Lessig’s loss, no one can seriously doubt that Congress has this power. As any experienced litigator will tell you, the risk in taking your case to court is that you might lose; and if you are litigating a constitutional matter the loss will be permanent unless the Court reverses itself or the Constitution is amended. Even if Lessig had gone first to Congress and lost, he could have stopped there. In so doing he would have allowed himself or others the chance to go back again without unintentionally helping to entrench a ruling upholding unlimited congressional power as a part of American constitutional law.

118. LESSIG, *supra* note 2, at 42–45.

119. *Eldred v. Ashcroft*, 537 U.S. 186, 202 (2003).

B. THE DIMINUTION OF THE FREEDOM OF THE PRESS

Lessig's account of the rise of contemporary corporate ownership of the media is a tale of woe, and Starr's story often matches its despair. In particular, Starr draws two significant lessons from historical events that have clear implications both for Lessig's analysis and for contemporary mass communications.

The first lesson, to be sure, is rather dire: only people or companies with substantial capital have the means to have a meaningful impact on mass communications in the contemporary United States. It is this fact that leads Starr to end his book with a pessimistic question: "[Have] the commercially driven media and new techniques of mass persuasion so distort[ed] public knowledge and degrade[d] public discussion as to make popular self-government impossible?"¹²⁰

Although most research on this question yields ambiguous or mixed results, it is clear that mass media has ultimately been better at reaffirming existing power relations than at challenging them. As early as the 1940s, Paul Lazarsfeld announced that radio listeners were not brainwashed by media messages, but merely confirmed in their existing prejudices.¹²¹ As Starr points out, neither Lazarsfeld nor any other media researchers took into account the "'agenda-setting' function of the media . . . [T]he media could not tell people what to think but strongly affected what they thought about."¹²² While "the media would likely have a much larger effect on public opinion"¹²³ with respect to matters on which people did not have strong or well-fixed feelings, its impact was "filtered through the honeycomb of social relations."¹²⁴

Since the 1920s, national advertising has supported the rise of corporate media.¹²⁵ With that rise, we have seen a steady "narrowing of ideological diversity" in the public sector.¹²⁶ The change is not due to technology, Starr insists, but rather to the consolidation of ownership of the media in just a few companies:

120. STARR, *supra* note 5, at 388.

121. PAUL F. LAZARSELD ET AL., *THE PEOPLE'S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL CAMPAIGN* 125 (1944).

122. STARR, *supra* note 5, at 398.

123. *Id.*

124. *Id.* at 399.

125. *See id.* at 363.

126. *Id.* at 399.

Before World War I, movies varied widely in viewpoint. With rising costs in the 1920s . . . the movies came under the control of a small number of large firms that dominated the entire industry from production to exhibition, and the next decade the industry succumbed to pressure to censor itself according to the Production Code. By the 1930s, broadcasting had followed the same course as the movies in going from an early pluralism to corporate consolidation and a narrowing of ideological boundaries.¹²⁷

For Starr, this transformation in the media imperiled the Founders' republican rationale for a free press—the need for open debate among an informed citizenry. The ascendance of film and broadcast journalism over print raised new entry-level costs for entrepreneurs. This created opportunities for large corporations to squeeze small operators, consolidate monopoly power, and sustain profits by selling airtime to advertising agencies—who in turn standardized the entertainment and the news to provide the most effective vehicle for selling their products.

Even worse, the public has few places to go for genuine news. Studies conducted within the past few years show an increasing trend among the media to report not hard news—facts and figures—but rather soft news, which consists of speculation and commentary.¹²⁸ The harm is the disintegration of public discourse. This phenomenon was apparent, for instance, throughout the coverage of the 2004 presidential election. After the third presidential debate, the media focused less on the substantive arguments and assertions made by the major candidates but rather on the wisdom and the fallout from Senator John Kerry's reference to the vice president's daughter as a lesbian.¹²⁹ Though she is, the news coverage focused on the propriety, not the accuracy, of the reference.

This is, as I say, discouraging, but it is hardly the full story. Starr cautions his readers to keep another dynamic in mind. In its early stages, each form of mass communication was dominated by a single company or an oligarchy. But over time

127. *Id.*

128. *See, e.g.*, Survey Report, Pew Research Center for People and the Press, How Journalists See Journalists in 2004, at 9–10, available at <http://people-press.org/reports/pdf/214.pdf> (May 23, 2004) (finding that 78% of national news media personnel think not enough attention is paid to complex issues and that 64% think that the distinction between reporting and commentary has been blurred).

129. *See, e.g.*, Adam Nagourney, *For Kerry, a Few Words That May Be Debatable*, N.Y. TIMES, Oct. 18, 2004, at A14; Joan Vennoch, *The Low Road to the White House*, BOSTON GLOBE, Oct. 19, 2004, at A23.

the company's or oligarchy's domination lapsed. One reason is that the

United States consistently barred organizations controlling a dominant network from extending their power to a newly emerging one. Congress declined to give the Post Office permanent control of the telegraph in 1846. Western Union lost control of the telephone in 1879, and a federal antitrust suit forced AT&T to separate itself from Western Union in 1913. . . . [W]hile allowing a high level of concentrated ownership within any mode of communications, American policy consistently favored "intermodal" competition.¹³⁰

Fostering such competition helped to preclude "legacy" institutions (those already dominant in one communication field) from controlling "new media."¹³¹ Moreover, the "trust" that dominated the movie industry in the early twentieth century

followed a conservative, risk-averse strategy, attempting to maintain not only its monopoly power but also the motion-picture business as it had evolved up to 1908, while the independents were more willing to make high-risk investments in pursuit of an enlarged audience that only a more ambitious conception of motion pictures could create.¹³²

In the early twentieth century, more creative and less risk-averse firms entered the movie industry and secured a significant portion of the market.

Starr acknowledges that American antitrust law and liberal constitutionalism have hugely impacted the evolution of mass communications in this country. First, antitrust law has put pressure on companies to do research to make innovations and maintain their competitive edge.¹³³ In fact, some companies failed to maintain control of their fields because they made bad business decisions, particularly by over-investing in the wrong technology.¹³⁴ Consequently, they lacked the resources (and the will) to develop newer, more superior technology. New technology gave its owners an upper hand in the market, and the way to develop new technology was to do research. The better the research, the greater the opportunities it promised for those doing it. Patent law protected many new innovations and helped to sink the companies that had neither made nor bought them.

Secondly, the nation's (including the Supreme Court's) commitment to freedom of the press ensured a "decentralized"

130. STARR, *supra* note 5, at 393-94.

131. *Id.* at 394-95.

132. *Id.* at 310.

133. *Id.* at 337-39.

134. *Id.* at 337-38 (citing AT&T as an example).

press less driven by the need to increase its market share.¹³⁵ This commitment prevented time and time again government efforts to impose special taxes on newspapers and other media outlets. The question considered in Part III is whether the freedom secured by certain constitutional commitments allowed forces besides the government to damage the very values that those commitments were made to protect.

III. PROVING CAUSAL CONNECTION

The second requirement for demonstrating a genuine threat to the First Amendment that Lessig and Starr have to fulfill is establishing the requisite causal connection between the consolidation of corporate control of the media and the harm to First Amendment issues of greatest concern to each of them—the diminution of creativity for Lessig and the compromising of the press's ability to keep the national government in check for Starr. A problem for both Lessig and Starr is that corporate control of the media does not necessarily produce any harm, given that the corporations in control of the media have some incentives to promote quality in news coverage. The drive to maximize profits may be more of a problem, because it might depend on satisfying audiences who want to be entertained. Moreover, neither Lessig nor Starr discusses a number of other possible causes for the harms they identify as well as the other harms resulting from the causes on which they have each focused.

A. THE REASONS FOR LOST CREATIVITY

While it is far from clear how much creativity has actually been lost as a result of the consolidation of corporate ownership of the media, Lessig identifies an inherent tension in information technology that is impossible to deny: technological innovations have increased the ability of people to do more, but the law has increasingly restricted what people may do with other people's work.¹³⁶ It is easy to see why this tension is likely to produce precisely the kinds of horror stories that Lessig discusses throughout his book. One can imagine further that the law provides the means for corporations to protect their corporate assets (including copyright interests) against not only rela-

135. *See id.* at 376–82.

136. *See* LESSIG, *supra* note 2, at 184–99 (explaining how the law constrains both creators and innovators).

tively powerless citizens but also against other corporations. And this is what we see. It is not an accident that intellectual property is the fastest growing field in the law. Both copyright litigation and the need for licensing are on the rise. New or smaller businesses and individual citizens with limited means face the stiffest challenges in creating new things. Licensing does not always come cheap, and the costs for legal representation are almost always high. In practice, this means that larger businesses, or wealthier individuals, have an edge in creating new things: they can bear the costs of creation better than smaller companies or relatively poor entrepreneurs, they can do the due diligence in obtaining all of the licensing necessary to do business, and they have the economic resources to cover whatever legal (and other) expenses are required for them to do so and to stay in business.

There are, however, at least four things missing from this picture. First, Lessig never demonstrates how corporate interests control Congress or the Supreme Court. He infers from the fact that Disney and other large corporations donate a lot of money to political candidates that these corporations must then control the lawmaking process.¹³⁷ No doubt, we ought to be concerned about the fact that the people and companies that contribute the most money to candidates appear to have special, or greater, access to those candidates once elected. It is also likely that they are at least sometimes able to use their access (and past support) to get favorable policies or treatment. An obvious example is the Bush administration apparently allowing energy companies the opportunity to participate in formulating its energy policies and even copying word-for-word (possibly technically violating copyright law) their specific policy recommendations.¹³⁸ But it does not necessarily follow that this ac-

137. *See id.* at 216–18.

138. *See* Natural Resources Defense Council, *The Cheney Energy Task Force*, at <http://www.nrdc.org/air/energy/taskforce/tfinx.asp> (last revised Apr. 5, 2004), and at <http://www.nrdc.org/air/energy/taskforce/doc121.html> (last revised Apr. 5, 2004) (revealing in the records of the Bush Administration Energy Task Force a March 2001 e-mail message from the American Petroleum Institute (API) containing recommendations on national energy policy). *Compare* Records of the Bush Administration Energy Task Force, 121, 140–42, available at <http://www.nrdc.org/air/energy/taskforce/doc.121.html> (Mar. 2002), with Exec. Order No. 13,211, 66 Fed. Reg. 28,355 (May 22, 2001) (illustrating that the Executive Order contains API's recommended requirement that federal agencies enacting significant energy action shall prepare a detailed statement concerning adverse effects on energy supply, distribution, or use).

cess always works to the advantages of those owning copyright interests. It is possible that many members of Congress might have supported the Copyright Term Extension Act because some of their biggest donors wanted it, but they also might have supported the extension of the Act for other reasons. They might even have figured that advancements in technology posed increased threats to copyright owners. Since everyone has a copyright in his or her own work, the extension ought to work to the advantage of all copyright holders, no matter how big or how wealthy.

Second, Lessig fails to show convincingly that corporate interests controlled the outcome in *Eldred*. The fact that Lessig had to show economic harm to convince the Court to overturn the Copyright Term Extension Act makes perfect sense. It is unlikely the Court would, or should, be disposed to strike down a law solely for abstract reasons. The only time this ever seems to make sense is in the realm of the First Amendment, and even then the Court is careful in certain cases to consider the substantial overbreadth of a statute in assessing its compatibility with the freedom of speech guarantee of the First Amendment.¹³⁹

Moreover, Lessig's textual argument was hardly as strong as he believed. Granted, the Copyright Clause empowers Congress to protect copyrights with "limited terms," but each congressional enactment extending the protection accorded to copyrights is, by definition, only for "limited terms."¹⁴⁰ "Limited terms" does not mean that Congress is restricted to protecting copyrights for only one or a few limited terms. A reasonable construction is that it allows Congress to determine the extent and the number of limited terms. The Copyright Term Extension Act may not be wise policy and may even reflect the possibility of endless extensions, but this possibility is just that; it is nothing more than the potential—not yet realized—for Congress to extend copyright interests forever. Even after *Eldred*, Lessig remains free to persuade a majority in the House and the Senate, as well as the president, on the need to revise copyright law as he would prefer. The failure to adopt his preferred reform, however, would not be unconstitutional.

The third problem with Lessig's perspective is his supposition that one needs to be aware of the intricacies of intellectual

139. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612–13 (1973).

140. U.S. CONST. art. I, § 8, cl. 7.

property law to comply with it. To be sure, most people probably have no idea what copyright law protects or allows. For instance, only intellectual property lawyers are likely to know the exceptions to copyright protection. If you knew that most works created before 1923 were unprotected by copyright law, you would then know from which works you could borrow without getting permission.¹⁴¹

But if you also knew that it is wrong to “borrow” (directly copy) another person’s work product, you would probably know when you needed to get permission requests. One does not have to be an expert in copyright law to know that stealing someone’s work—in whatever form—is stealing. Copyright law restricts what can be done with someone else’s creations. A major problem with copyright law is not the law but people’s apparent indifference to stealing other people’s work. Lessig worries about the barriers that corporations have established to protect their own intellectual property, but he fails to explore more deeply the questions of who is doing the plundering and why.

Statistics are striking, particularly in our schools, where students, contrary to honor codes and the Ten Commandments, come close to routinely stealing other people’s work.¹⁴² A study by the well-respected Josephson Institute reported that 35% of public high school students, 35% of private religious high school students, and 27% of private nonreligious high school students, have all copied an Internet document for a classroom assignment at least once.¹⁴³ Even worse, the same survey showed that, in 2004, 61% of public high school students, 66% of students in private religious high schools, and 46% of students in private nonreligious high schools, acknowledged cheating at least once on a test at school.¹⁴⁴ The survey further showed that 83% of students acknowledged copying another student’s homework at least once.¹⁴⁵ These statistics are disheartening. They show a younger generation already demonstrating dis-

141. See M. Scott McBride, *Bioinformatics and Intellectual Property Protection*, 17 BERKELEY TECH. L.J. 1331, 1346 n.100 (2002).

142. See generally Press Release, Josephson Institute of Ethics, 2004 Report Card: The Ethics of American Youth, at <http://josephsoninstitute.org/Survey2004> (last visited Mar. 3, 2005) (reporting high percentages of students copying other people’s work).

143. Report, Josephson Institute of Ethics, 2004 Report Card: The Ethics of American Youth, at http://www.josephsoninstitute.org/Survey2004/datatables_2004_behavior.pdf (last visited Mar. 3, 2005).

144. *Id.*

145. *Id.*

dain for a basic principle of intellectual property law—not to steal another person's work product.

It is not, however, just students who steal; sometimes people who should know better borrow without permission. Within the past year, a number of high-profile people have been charged with stealing other people's works—two were eminent professors at the nation's most prestigious university¹⁴⁶ while another was the author of a highly acclaimed play on Broadway.¹⁴⁷ In another case, a renowned architect has been charged with stealing one of his graduate student's designs and using it in his design for the memorial being built in the space once occupied by the World Trade Center.¹⁴⁸ In yet another disturbing case, the chairman of the Board of Education of Orange County, North Carolina, resigned after it was revealed that he had given a speech written and previously delivered by someone else.¹⁴⁹ Presumably, these people all should have known better. Each should have appreciated and internalized the importance of not stealing other people's written work. Lessig's book does not purport to answer this problem. At some point (and Lessig does admit this), copyright law's basic purpose makes sense: it exists to punish people for stealing other people's creations. Sometimes the thefts (as with the Bush administration's use of policy memoranda submitted by corporate officials) may be so trivial as not to merit any legal action, while sometimes litigation is necessary to sanction the breach and to recompense the losses.

B. EXPLAINING THE DEVOLUTION OF THE FREEDOM OF THE PRESS

For Starr, the First Amendment harm of greatest concern is the diminution of an independent press that is dedicated to checking government abuse and maintaining a high quality of

146. Nick Klage, *Barnard Addresses Plagiarism with Website Subscription*, COLUMBIA SPECTATOR, http://www.columbiaspectator.com/vnews/display.v/ART/2004/12/07/41b54bcdb60ba?in_archive=1 (Dec. 7, 2004) (recounting how Harvard Law Professors Charles Ogletree and Laurence Tribe both admitted to plagiarism, within two weeks of each other).

147. See Malcolm Gladwell, *Something Borrowed*, THE NEW YORKER, Nov. 22, 2004, at 40.

148. Yassmin Sadeghi, *Alum Alleges Stolen Design*, YALE DAILY NEWS, <http://www.yaledailynews.com/article.asp?AID=27255> (Nov. 10, 2004).

149. Darla Miles, *Orange Co. School Board Chairman Resigns After Plagiarism Scandal*, ABC 11 EYEWITNESS NEWS, at http://abclocal.go.com/wtvd/news/060804_NW_keithcook.html (June 8, 2004).

public discourse. The primary cause of this harm, in his judgment, is corporate domination of the media. He finds the seeds for the current problem sewn in the first quarter of the twentieth century, and he is not optimistic about the chances of salvaging the constitutional ideal of freedom of the press. He believes that corporate dominance of the media has become more entrenched than ever before and that antitrust litigation alone cannot topple corporate dominance.¹⁵⁰ Moreover, the impediments to entry into the market are quite high because of the enormous economies of scale required to compete nationally in the media. With entry into the market so difficult, it can no longer be as hospitable to innovation as Starr suggests it was during the first half of the twentieth century.¹⁵¹ For the few corporations already dominant in the marketplace, the incentives are to stifle further competition and to attract and maintain a firm grip on a market share. These incentives are a big part of the problem, for they compel the corporations in control of the media to make news coverage profitable. News is not profitable when it is boring or merely reports stale facts. News is profitable when it is entertaining or, as Starr suggests, when it reinforces what the audience already knows or believes.¹⁵² Fox, for instance, can declare itself "fair and balanced" not because it truly is balanced but because its viewers are inclined to believe that it is.¹⁵³

Interestingly, Starr's analysis leads him to bolster Lessig's case. The ownership of the media by just a few large companies comes at the expense of squelching originality. "[E]ntrepreneurial activity expands the scale and scope of the public sphere, extending its known frontiers."¹⁵⁴ According to Starr, it is the market that stimulates innovation:

Sometimes even a single influential work . . . can give a latent public its voice and bring it into full awareness of itself. The discovery of a new market may thereby trigger public (and private) self-discovery and alter what politics is about. . . . More amply capitalized organizations are better able to assume [the] kind of risk [necessary for innovation]—and are far more likely to do so in a legal environ-

150. See STARR, *supra* note 5, at 384 (arguing that the "system of power" in place in the media is inescapable).

151. See *id.* at 347–63.

152. *Id.* at 398.

153. Lisa de Moraes, *Three Little Words: Fox News Sues*, WASH. POST, Aug. 12, 2003, at C7 (reporting that Fox News filed a suit for trademark infringement for the use of the words "fair and balanced").

154. STARR, *supra* note 5, at 401.

ment that protects free expression. Moreover, the growth of markets does not extinguish noncommercial interests in culture and public life. The market, even when its products are distasteful, is a continual stimulus to innovation outside the market and in reaction to it. In a dynamic sense, markets in liberal societies enrich the public sphere far more than they impoverish it.¹⁵⁵

The problem is that “[if] all were left to the market—if government had not promoted communications networks, the press, education, and innovation while attempting to check tendencies toward excessive concentrations of power—the public sphere would be poor indeed.”¹⁵⁶

Starr is not alone in reaching this conclusion, and there is ample data from respected sources demonstrating the diminution of the quality of news reporting.¹⁵⁷ The problem for Starr, however, is that the diminution of the quality of news reporting may not be attributable to the number of corporations in control of the media but rather their economic incentives or other factors. David Anderson suggests, for example, that a major problem with mass communications today is that it might no longer make any sense to talk about “the press” as an institution worthy of its protection at the constitutional level.¹⁵⁸ The problem, in his judgment, is that it makes no sense to give organizations the protections of the First Amendment if they do not perform the traditional function of the press.¹⁵⁹ The problem is compounded by the fact that news organizations are operated by public companies, for which profitability is critical. In another study, Cass Sunstein has suggested that a major problem with the Internet is that people do not tend to use it to discover new things or be exposed to new ideas.¹⁶⁰ Instead, people tend to use the Internet for entertainment or to reinforce what they already believe. Thus, people appear to be gravitating toward Web sites with viewpoints and reporting that reinforces what they already believe and know. People do this in part because it is one way for them to keep the unwieldiness of the

155. *Id.* at 401.

156. *Id.* at 401–02.

157. See Leon Lazarus, *Panels See FCC as Lax: Would-Be Reformers Decry the Increasing Concentration of Broadcast and Print Ownership as the Senate Prepares To Take up the Question*, CHI. TRIB., Nov. 10, 2003, at 10 (elucidating a consolidation of ownership as a cause for the decrease in the quality of journalism).

158. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 528–30 (2002).

159. See *id.*

160. See CASS SUNSTEIN, REPUBLIC.COM 51–88 (2001).

Internet under some control. They also do it because it makes them feel better. Most people do not like to be exposed to ideas, arguments, or images that they find offensive, and many people often find disagreement offensive.

While this state of affairs is hardly encouraging, it is not the singular fault of the national media. What makes the diminution of the quality of public discourse especially troubling is the fact that many organizations and people besides the media are responsible. Once politicians understand (and support) what the media does, they speak and act accordingly. They learn not to release embarrassing information until late on Fridays after major news outlets have either completed their reports for the nightly news or produced the next morning's newspaper. They also tend not to release embarrassing information until after they have put a team of surrogates in place to make their case to the public through the ensuing media coverage. Moreover, the media is geared to report something flashy or dramatic, so candidates will struggle to say or do something flashy or dramatic. Politicians therefore have incentives to bury embarrassing facts in otherwise boring packages. Moreover, national political leaders and candidates have little incentive to engage in a protracted, thoughtful, or substantive discussion of an issue. Hence, both President Bush and Senator Kerry avoided holding official press conferences during the 2004 presidential campaign. Each felt more comfortable speaking from prepared texts and answering questions in friendly fora. When leaders or candidates do get pilloried, it is for their style. Throughout the 2004 presidential campaign, for example, Senator Kerry was often characterized in news coverage as ponderous.

An additional reason that news coverage focuses on scandal, drama, or personalities is that the alternative may turn people off. For instance, major news organizations devote extraordinarily little coverage to international news, except for the Iraq War. Many people are not interested in listening to or reading international news, because it is boring (to them) and irrelevant (to them). Educational professionals have observed that the American public has a limited attention span.¹⁶¹ Of-

161. See, e.g., *Full Committee Hearing on Intellectual Diversity Before the S. Comm. on Health, Educ., Labor & Pensions*, 108th Cong. (2003) (statement of Gilbert Sewall, Director, American Textbook Council), at http://help.senate.gov/testimony/084_tes.html (testifying that publishers have been adjusting for the shortening attention spans of readers).

tentimes, people may not need much information to make decisions. Consider the act of channel surfing. People breeze by stations looking for something informative or entertaining. They are not likely to dawdle on any given station; something has to grab their attention. Consequently, small things like a candidate's expression to a staged landing of a jet plane on an aircraft carrier to celebrate the end of the Iraq War may go far in shaping some people's attitudes or opinions.

Starr's book suggests that, at least as a comparative matter, the United States in the past had a better balance than it does today between the economic and political activities of mass communication firms, on the one hand, and preserving constitutional values, such as freedom of the press, on the other.¹⁶² No one can say—and indeed Starr does not say—that there has ever been a perfect or ideal balance, though he suggests there has been a better balance in the past than in recent years. This leaves us with the question of whether we can improve the quality of public discourse or press coverage. Would education make a difference? Is better dialogue possible? We likely will not achieve a better balance without better understanding which institution(s), if any, are best able to address the diminution of creativity or public discourse in our society. I turn to that question in the final part.

IV. THE POSSIBILITY OF REFORM

The final question to consider is which institutions, if any, have special responsibility to monitor and redress the threats of primary concern to both Lessig and Starr. If eliminating a particular threat to the First Amendment was not possible, then we need to consider whether the issue is not so much a threat to the First Amendment but rather a problem with the First Amendment. For Lessig, the challenge is to restore America's lost tradition of balancing creativity with protecting property rights. Starr's challenge is to find ways to restore the constitutional ideal (and tradition) of the freedom of the press. Neither is terribly optimistic about the prospects of success. Each recognizes that reform will be difficult, if not impossible, to achieve. Each also recognizes the limits of constitutional law and constitutional authorities. Reducing or eliminating the problems each identifies might require the impossible—a radi-

162. See STARR, *supra* note 5, at 12–19.

cal change in our culture's commitment to the First Amendment.

A. TURNING BACK THE CLOCK

Starr, the sociologist, recognizes better than Lessig, the legal scholar, that American intellectual property law derives its uniqueness from a number of forces, including but not limited to, certain constitutive choices made by government and society over two centuries. Starr is not confident that any particular institution has the means to redress the current threat to the freedom of the press, because it is the consequence of a peculiar mix of social, political, and economic forces that are not all subject to governmental control.

Interestingly, neither Lessig nor Starr seems to think making recourse to the states would do any good. Yet, one possibility ignored by Lessig in his long list of policy proposals is a uniform act that would protect copyright at the state level. It may be that concerns about possible preemption by the federal law would make such protection difficult if not impossible. But state laws protect trade secrets and other business interests without conflicting with otherwise applicable federal law. It would be interesting to know if there is any room left for the states to act constructively in this realm.

To be sure, Lessig proposes various remedies. "Common sense must revolt. It must act to free culture."¹⁶³ In general, this means turning the clock back on legal restrictions and learning to live with (and understand) new technologies. For instance, to ensure that works enter the public domain more quickly, Lessig advocates shortening copyright terms and restricting the ability of owners to renew their copyrights after a certain period of time. Further, he suggests reinstating some early copyright requirements that were abandoned because they were perceived as onerous. His goal is to make databases for people who want to create a digital library or produce a film clip that uses clips from other movies: they will know what works are copyrighted and who to contact for permission to use them. Lessig also proposes narrowing the original creator's rights over works that derive from an original, such as a movie based on a book.¹⁶⁴ Moreover, he explores ways to redefine the basis of intellectual property—applauding how some rights

163. LESSIG, *supra* note 2, at 271.

164. *Id.* at 294–96.

holders, from the BBC to Brazilian pop musician Gilberto Gil, are offering more flexible use of their copyrighted films, music, and written words.¹⁶⁵

In addition, Lessig spells out a personal tenet with respect to file sharing and the control of digital music: government should not attempt to restrict the use of technology that is in the midst of rapid change.¹⁶⁶ He claims that over time, more and more people will opt to pay for music subscription services. Until the market gets to the point at which it is more appealing to rent than to own, Lessig endorses compulsory licensing; a file-sharing service would track downloads and charge a fee at the end of each month.

All of Lessig's proposals reflect that meaningful reform depends principally on motivating the American public to shape the balance between the freedoms allowed and the limits placed on digital reproduction. No doubt, his book is part of that effort. Through its publication, he has gone over the heads of the Court and Congress to try to build support from the ground up for meaningful copyright reform.

The question remains, however, whether Lessig can persuade members of Congress of the need to enact his proposed reforms. Thus far, he has yet to succeed. It is not unreasonable to think his arguments may find a surprisingly sympathetic reception among Republicans in Congress. For instance, lawsuits for copyright violations are increasing. Lessig describes the recording studios' assault on MP3.com, which launched a service that let customers listen to songs online if they had purchased the CDs.¹⁶⁷ Within a year, the studios sued MP3.com into bankruptcy; one studio then purchased the remnants of the business and, on behalf of the insolvent company, sued MP3.com's lawyers for malpractice because they had counseled that the online listening service was lawful.¹⁶⁸ Using similar tactics, other studios sued to put Napster out of business and then sued 753 illegal file sharers.¹⁶⁹ Recently, David Boies filed a lawsuit claim-

165. *Id.* at 270.

166. *See id.* at 193–98 (giving the example of Internet radio).

167. *Id.* at 189–93.

168. *Id.* at 190.

169. *See Copyright Infringement Lawsuits Brought Against 753 Additional Illegal File Sharers*, Recording Industry Association of America, at <http://www.riaa.com/news/newsletter/022805.asp> (Feb. 28, 2005); *Napster Case*, Recording Industry Association of America, at <http://www.riaa.com/news/filings/napster.asp> (last visited May 6, 2005) (detailing the history and development of the suits against Napster, Inc.).

ing Linux open-source software violates his client's copyright,¹⁷⁰ and he has launched test cases against DaimlerChrysler and AutoZone for purchasing Linux services.¹⁷¹

These kinds of lawsuits ought to concern Congress, particularly its conservative members. It is likely that at least some Republicans would be as interested in protecting businesses promoting technological advancements as much as in protecting gun manufacturers or tobacco companies. Moreover, social conservatives ought to be concerned not just with programs or images they find offensive on network programming; they should also recognize the connection between the rise in offensive mass entertainment and the expanded reach of copyright law. It is reasonable to expect that the more powerful the entertainment industry becomes, the more likely it will influence our culture. Any people offended by what they see on television ought to wonder why obscene and indecent performances are given ninety-five years of statutory protection. In addition, capping damages for downloading ought to be an appealing issue to many members of Congress, particularly because it is a common activity among people under forty years old.

Importantly, Congress has shown some receptivity to the kinds of problems that bother Lessig (and many others). For instance, when the FCC issued an ill-considered decision in June 2003 that would have allowed big media to become even bigger, members of Congress joined the public outcry against it.¹⁷² To be sure, some of Lessig's proposals are unworkable and unappealing. Indeed, many of his proposals would consistently deny payments to creators who have been ripped off, reward infringers, and put the United States at odds with international law. Some of his proposals might even help big media by offering it the chance to take material for which it once would have had to pay. His scheme for regulating file sharing (in which owners would be paid out of the proceeds from unspecified taxes) "to the extent actual harm is demonstrated" is unworkable without

170. Quentin Hardy, *SCO Sues IBM over Linux*, FORBES.COM, at http://www.forbes.com/home/2003/03/06/cs_qh_0306unix.html (Mar. 6, 2003).

171. See Stuart Cohen, *How SCO's Threats Rallied Linux*, MAC NEWS WORLD, at <http://www.macnewsworld.com/story/40362.html> (Feb. 8, 2005).

172. William Safire, *The Great Media Gulp*, N.Y. TIMES, May 22, 2003, at A33 (referring to the FCC's "Media Ownership Policy Reexamination," which has been challenged in various federal courts); see Media Ownership Policy Reexamination, FCC, available at <http://www.fcc.gov/ownership/> (June 2, 2003).

providing a reasonable definition of the "harm" for which there could be redress.¹⁷³

At least one simple proposal that might help to eliminate some of the more absurd copyright actions is to simply provide an exception in copyright law for strictly private use. If private use were restricted to sharing otherwise protected copyright material only with family or perhaps only within a single household, it might be workable. The risk of course is that if private use were defined too broadly (as to include, for instance, all family and friends) it might allow for a relatively significant degree of pilfering copyrighted material when one considers its aggregated effects. The challenge is to adopt a reasonable scope of private use.

B. BUILDING A CULTURE OF THE FIRST AMENDMENT

Lessig and Starr provide intriguing perspectives on threats posed to the First Amendment from the top-down. The threats each perceives are posed by powerful institutions whose business practices influence public attitudes. Curiously, neither Lessig nor Starr discusses whether a different perspective is possible. Neither addresses the possibility of a threat posed from the ground rather than top segment of our society. Neither considers the possibility that people may not be as gullible or as easily manipulated as would have to be the case for supposed threats to First Amendment values from the media to be genuine. The question is whether threats to the First Amendment arise not only from the top-down but also from the bottom-up.

A change in perspective illuminates additional challenges to the First Amendment that are rarely discussed as constituting serious threats either to the First Amendment or to intellectual property. Yet, they are evident in society. The first is the ongoing movement to dismantle the FCC and particularly the grounds for national broadcasting regulation. Indeed, the three national networks indicated that they were seriously considering asking the Supreme Court to reconsider its unanimous decision in *Red Lion Broadcasting*.¹⁷⁴ *Red Lion* upheld the constitutionality of the fairness doctrine,¹⁷⁵ which, in a separate

173. LESSIG, *supra* note 2, at 300–04.

174. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969); *Mega-Giants and Scarcity*, BROADCASTING & CABLE, Dec. 6, 2004, at 53.

175. *Red Lion Broad Co.*, 395 U.S. at 367.

action, had been reversed by the FCC in 1985.¹⁷⁶ Reconsidering *Red Lion* is a critical step in eliminating federal authority (in Congress or elsewhere) to regulate national broadcasting. The reversal of *Red Lion* would, however, be far more harmful to the First Amendment than maintaining the alternative. For one thing, it would leave unchecked the political and legal developments that disturb Starr. Starr demonstrates that federal regulations and constitutional protections have had positive impact on First Amendment values.¹⁷⁷ Without federal regulation or constitutional protections, the marketplace of ideas is left not to the courts or to Congress but rather solely to the economic marketplace for safekeeping. Big government might be problematic, but it is far from clear why Americans ought to completely trust big corporations to safeguard the marketplace of ideas.

I hasten to add that not all business is bad. Indeed, Starr's concerns about the devolution of the freedom of the press are not necessarily borne out by all of the evidence he amasses. Instead, the evidence appears mixed. On the one hand, it is true that Sinclair Broadcast planned to air a pseudo-documentary hurtful to Senator Kerry shortly before the election on its more than sixty television stations.¹⁷⁸ The public outcry was so huge that Sinclair abandoned its plans.¹⁷⁹ It is also true that CBS Evening News aired, without proper vetting, a negative story about the president's National Guard service based on evidently forged documentation.¹⁸⁰ With the help of several blogs,¹⁸¹ the public outcry against CBS Evening News's airing of the story led CBS to order an internal investigation that concluded that the news organization had made a number of bad judgments. The report precipitated the firings of several high-

176. *Radio-Television News Dirs. Ass'n v. FCC*, 809 F.2d 860 (D.C. Cir. 1987) (per curiam).

177. See STARR, *supra* note 5, at 205–12 (citing telecommunications regulations as an example); *id.* at 274–94 (outlining a string of free speech decisions by the Supreme Court in the first half of the century); *id.* at 392 (summarizing the major developments in First Amendment values).

178. *Sinclair Amends Kerry Film Plans*, CBSNEWS.COM, at <http://www.cbsnews.com/stories/2004/10/19/politics/main650030.shtml> (Oct. 20, 2004).

179. *Id.*

180. Jim Rutenberg & Kate Zernike, *CBS Apologizes for Report on Bush Guard Service*, N.Y. TIMES, Sept. 21, 2004, at A1.

181. See Dave Eberhart, *How the Blogs Torpedoed Dan Rather*, NEWSMAX.COM, at <http://www.newsmax.com/archives/articles/2005/1/28/172943.shtml> (Jan. 31, 2005).

ranking people in the news division.¹⁸² Even before the internal investigation had been concluded, CBS Evening News's principal anchor and editor—Dan Rather—announced an early retirement in an apparent attempt to avoid any formal reprimand or disciplining.¹⁸³

On the other hand, Frank Rich of the *New York Times* reports several disturbing incidents in which television and radio stations have foregone some programming, including a national broadcast of Steven Spielberg's Oscar-winning movie *Saving Private Ryan*, because of possible backlash from conservative viewers who might have been offended.¹⁸⁴ While some viewers clearly recoil at the broadcast of a sexually suggestive scene like Nicolette Sheridan's campy seduction of a football star as a teaser in the opening of a Monday evening NFL broadcast,¹⁸⁵ the same kinds of scenes (and even worse) are broadcast regularly on popular television shows without generating any complaints.

An additional problem with Lessig's and Starr's calls for governmental reform is that they ignore an arguably bigger threat to the First Amendment. Neither discusses the rise in plagiarism in our society, particularly in our schools and colleges.¹⁸⁶ No one knows for sure the causes of this disturbing trend. Some may blame the media, particularly Hollywood. Others may blame the courts for removing religion (and the moral values associated with it) from our public schools. Others may blame parents for neglect. Whatever the cause, the problem is clear and requires fixing.

The bottom-up perspective is also important for fashioning an appropriate remedy to what many others believe is the biggest threat to the First Amendment—hysteria during time of war. Geoffrey R. Stone suggests that the remedy for this is the

182. Jacques Steinberg & Bill Carter, *CBS Dismisses Four over Broadcast on Bush Service*, N.Y. TIMES, Jan. 11, 2005, at A1; *CBS Ousts Four for Bush Guard Story*, CBSNEWS.COM, at <http://www.cbsnews.com/stories/2005/01/10/national/main665727.shtml> (Jan. 10, 2005); see also Eberhart, *supra* note 181.

183. See *Dan Rather To Leave 'CBS Evening News'*, ABC NEWS, at <http://abcnews.go.com/US/story?id=276466&page=1> (Nov. 23, 2004) (relating that CBS made no mention of the Bush National Guard scandal in announcing Rather's decision to step down early).

184. Frank Rich, *Bono's New Casualty: 'Private Ryan'*, N.Y. TIMES, Nov. 21, 2004, § 2.

185. Mike Celizic, *ABC, NFL Reveal Their Hypocrisy*, MSNBC.COM, at <http://www.msnbc.com/id/6505419> (Nov. 21, 2004).

186. See *supra* notes 142–49 and accompanying text.

cultivation of a "culture of civil liberties," including a national commitment to honoring First Amendment values.¹⁸⁷ Stone offers a fascinating account of the evolution of constitutional doctrine on the power of the federal government to restrict First Amendment freedoms in times of war. He concludes his survey on the encouraging note that

the major restrictions of civil liberties of the past would be less thinkable today than they were in 1798, 1861, 1917, 1942, 1950, or 1969. In terms of both the evolution of constitutional doctrine and the development of a national culture more attuned to civil liberties, the United States has made substantial progress.¹⁸⁸

Of course, the cultivation of a culture dedicated to protecting First Amendment values is no mean feat. Arguably, the United States has yet to achieve such a culture, although Stone suggests it is developing in the right direction. A "culture of civil liberties" requires that a number of elements must coexist.¹⁸⁹ In general, Stone explains

Educational institutions, government agencies, political leaders, foundations, the media, the legal profession, and civil liberties organizations all can help cultivate an environment in which citizens are more informed, open-minded, skeptical, critical of their political leaders, tolerant of dissent, and protective of the freedoms of all individuals. Above all, as Judge [Learned] Hand observed, the "spirit of liberty is the spirit which is not too sure that it is right." These are values and capacities that can be learned, ingrained, and exercised over time. We see this clearly today in the effort to build democracy in Iraq. This is not a onetime event but a continuing process of reaffirmation and education.¹⁹⁰

Presumably, the culture Stone describes would have not just a rational law of intellectual property but also a public committed to respecting copyright. Indeed, the creativity of concern to Lessig and the freedom of press of concern to Starr are intertwined with the First Amendment values that can only be realized in a culture committed to civil liberties.

Precluding the losses of concern to Starr and Lessig requires a multifaceted approach from both public and private institutions. First, it depends on the courts performing their classical countermajoritarian function. They need not do this in every case, but they need to ensure that the government satisfies the stringent constitutional requirements for regulating otherwise protected speech in a time of war. For the courts to

187. STONE, *supra* note 9, at 537 (emphasis omitted).

188. *Id.* at 533 (emphasis omitted).

189. *Id.* at 537 (emphasis omitted).

190. *Id.* (emphasis, footnote, and citation omitted).

do this, a lot depends on who the judges and justices are. Interestingly, in his narrative Stone never attaches much weight to the composition of the Supreme Court at a given moment,¹⁹¹ but its composition is inexorably connected to the outcomes it reaches. So, we not only need courts committed to protecting First Amendment values, but also presidents and senators committed to appointing judges and justices with such commitments.

Second, political leaders need to be committed to respecting First Amendment values in ways beyond appointing judges and justices with the “right” kinds of commitments. The problem is that we lack consensus on what the full array of those commitments are. Not everyone in Congress, nor President George W. Bush, appears disposed to being persuaded by all of the First Amendment arguments made by Stone, Lessig, and Starr. Most political leaders have different ideas than these scholars about what the First Amendment protects and does not protect. One problem with a positive account suggesting First Amendment doctrine is evolving in the right direction is that it presupposes a set of easily identifiable guys who are good in perpetual combat with another set of just as easily identifiable guys who are bad. This is a problem because our leaders are not likely to accept their portrayal as the bad guys in the story. They believe that their construction of the First Amendment is the right one. Indeed, some leaders even believe that people with opposing or different views about the First Amendment are unwittingly helping our enemies.

A society committed to First Amendment values requires, thirdly, a change in corporate ethics. Starr demonstrates the pull of the profit motive, particularly how it leads corporations away from realizing the classical ideal of the freedom of the press.¹⁹² The challenge, perhaps insurmountable, is to find a way to make respecting the First Amendment, even in wartime, a profitable enterprise. No one has yet figured out how to do this.

Fourth, the importance of the public’s commitment to First Amendment values cannot be overstated. We cannot depend on the Supreme Court alone to protect the First Amendment, for it

191. See, e.g., *id.* at 13, 49, 58, 68, 85 (referencing various Justices and decisions of the Court, but not analyzing the composition of the Court at a given moment).

192. See STARR, *supra* note 5, at 395 (explaining how competition has given the communications industry its own imperatives).

is reluctant to interfere with military judgments, particularly in times of war. Nor can we depend on our national political leaders, because they are subject to majoritarian pressure and most people tend during times of war to favor restricting civil liberties for the sake of protecting national security. All of our political institutions (and their leaders) have important roles to perform in protecting the First Amendment. But they do not operate in a vacuum. They take their orders or signals from the American people. Hence, First Amendment freedoms depend, for their foundation, on the American people's unwavering commitment to maintaining the First Amendment. Without such commitment, political authorities do not need to worry about being held accountable for their intrusions upon the First Amendment.

Neither Starr nor Lessig opines on whether the American people are up to the task of providing rock-solid, consistent support for the First Amendment. The signs are mixed. On the one hand, the increase in plagiarism arguably reflects a failure, perhaps at home or in school (or maybe both), in encouraging young people to take chances and to be more creative. On the other hand, copyright law does not necessarily represent the restriction of creativity, while its violation does reflect the absence of it. Copyright law does not protect ideas. It does not restrict people from continuing to think freely and to build on the ideas of others as provocatively as they like.

CONCLUSION

Lawrence Lessig and Paul Starr use different methods to illuminate and suggest different reasons to fear the threat posed to the First Amendment by the ownership of the media by only a few corporations. Based largely on anecdotal evidence, Lessig argues that this phenomenon jeopardizes creativity in the United States. Based on a multidisciplinary approach, Starr worries that it has jeopardized both innovation and an independent press. Neither Lessig nor Starr is optimistic that the risk each fears can ever be abated, though each recognizes that an appeal to the public may help to motivate Americans to put pressure on their political leaders to restore our free culture (whose loss Lessig mourns) and to facilitate greater diversity in the viewpoints expressed in the national media (whose diminution Starr mourns).

Relying on the public to restore or to maintain a culture committed to protecting First Amendment values is risky. The

public has long gravitated toward the news sources that either reinforce their preexisting opinions or frame their thinking about public issues. With more than just big business threatening the First Amendment, it is no wonder that Lessig and Starr seem pessimistic about the chances for meaningful reform. Without the public's firm commitment to the First Amendment, national political leaders and the media can expect little downside to curtailing First Amendment freedoms. Moreover, our culture has never fully and consistently been committed to broadly interpreting the freedom of speech and press guarantees of the First Amendment. At least in times of war, courts and other authorities have tended to favor restrictive interpretations of First Amendment guarantees. That the First Amendment endures is a testament to its durability. But it is also a testament to evolving notions about what the First Amendment protects. With our national leaders and the American public never fully committed to its most robust interpretation, the First Amendment risks being the most unstable if not most vulnerable of all our constitutional commitments, regardless of the era in which we live.