2006

Copyright Lochnerism

Raymond Shih Ray Ku
Case Western University School of Law, raymond.ku@case.edu

COPYRIGHT LOCHNERISM

Raymond Shih Ray Ku[1]

INTRODUCTION

The idea of First Amendment *Lochnerism* is intriguing. Of course, *Lochnerism* refers to a series of Supreme Court decisions in which the Court interpreted the Fourteenth Amendment and substantive due process to protect a freedom to contract and the Court's use of that doctrine to strike down federal and state efforts to regulate the economy.[2] More importantly, *Lochnerism* is understood as a critique of this jurisprudence with Justice Holmes's dissent in *Lochner v. New York* representing the most cited example.[3] In that dissent, Justice Holmes criticized the Court for obstructing the will of democratic majorities based upon the Justices' personal preference for *laissez fair* economics rather than a limitation found in the text of the constitution or its original understanding.[4] More generally, because the Supreme Court subsequently rejected its foray into economic substantive due process, *Lochner* is recognized as standing for the proposition that courts should defer to legislative judgments except in cases involving fundamental rights and discrete and insular minorities.[5]

Given this general understanding of *Lochnerism*, First Amendment *Lochnerism* is intriguing because in one sense, it is incoherent. In First Amendment cases, judges arguably cannot be accused of engaging in *Lochnerism* because the First Amendment provides them with the textual basis for judicial review. While the judges may differ and have their own personal views on how to interpret that text, the First Amendment represents a clear textual limit upon majoritarian decision-making. However, when I began to consider the relationship between copyright and the First Amendment in greater detail, an example of First Amendment *Lochnerism* began to take shape.

The Supreme Court's decision in *Eldred v. Ashcroft* became the starting point.[6] In *Eldred,* the Court was asked to strike down the Copyright Term Extension Act (CTEA) in which Congress retroactively extended the length of

---

1. Professor of Law and Associate Director, Center for Law, Technology & the Arts, Case Western Reserve University School of Law.

2. *See* Lochner v. New York, 198 U.S. 45 (1905). *See also* Hammer v. Dagenhart, 247 U.S. 251 (1918). *See also* Adair v. United States, 208 U.S. 161 (1908). *See also* Coppage v. Kansas, 236 U.S. 1 (1915).

3. Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J. dissenting).

4. *Id.* at 75.

5. *See id.* at 75-76.

6. 537 U.S. 186 (2003).

copyright protection by twenty years.[7] Among other things, the challengers argued that the extension violated the First Amendment because of its impact upon expression.[8] As such, *Eldred* required the Supreme Court to address a long standing question: what is the relationship between copyright and the freedom of expression protected by the First Amendment?[9] The First Amendment provides that Congress shall make no law abridging freedom of speech and of the press.[10] Yet, the Copyright Act does just that. By creating exclusive rights in expression, copyright constrains the choice and limits the freedom of individuals engaging in expression.[11]

Despite the apparent conflict between copyright and the First Amendment, the Supreme Court in *Eldred* rejected the argument that the CTEA should be subject to First Amendment scrutiny.[12] According to the Court, there was no conflict. Instead, copyright and the First Amendment are complementary.[13] The Court's approach in *Eldred* is consistent with its only other decision in the area as well as with the seminal scholarship on the subject.[14] The complementary argument is based upon two propositions: 1) the Framers' intended both copyright and the First Amendment serve the same purpose, promoting free expression, and 2) conflicts between copyright and free speech are resolved within copyright through the idea/expression dichotomy, the fair use doctrine and copyright's other internal limitations.[15] Herein lies the problem. The argument that there is never a role for the First Amendment in copyright cases, a position taken by the D.C. Circuit in *Eldred*[16] and others, reeks of copyright *Lochnerism.*

As I argue elsewhere, we may readily draw valuable inferences of what the Framers' intended by adopting both the Copyright Act of 1790 and the First Amendment.[17] And, what I have described as the Framers' copyright provides a valuable frame of reference for evaluating potential conflicts between copyright and freedom of speech.[18] However, efforts to expand the complementary argument beyond the confines of the Framers' copyright suffer from the same

---

7. *Id.* at 193.
8. *Id.*
9. *See* 537 U.S. at 196-97.
10. U.S. CONST. amend. I.
11. *See* Jed Rubenfeld, *The Freedom of Imagination, Copyright's Constitutionality*, 112 YALE L.J. 1, 3 (2002). *See also* Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-pornography Laws, Campaign Finance Reform, and Telecommunications Regulations*, 42 B.C. L. REV. 1, 4-5 (2000).
12. 537 U.S. at 218-19.
13. *Id.*
14. *Id.* (citing Harper & Row v. Nation Enterprises, 471 U.S. 539, at 558 (1985)).
15. *Id.*
16. *Id.* at 197.
17. *See* Raymond Shih Ray Ku, *Copyright, Free Speech & the Framers* (forthcoming 2006).
18. *Id.*

jurisprudential infirmities as *Lochner*.[19] Arguments that all copyright cases should be insulated from First Amendment scrutiny are examples of copyright *Lochnerism* because they suffer from baseline problems similar to those in *Lochner*.[20] The complementary argument assumes that the relationship between copyright and the First Amendment is always consistent even when changes to copyright alter the baseline relationship between them. In turn, this dynamic baseline allows judges to embed a disputed economic vision into the Constitution by expanding copyright at the First Amendment's expense. In what amounts to *Lochner* in reverse,[21] those engaged in copyright *Lochnerism* are not reading something into the Constitution that is not there, but rather reading out the express limitations found in the First Amendment, all in the interest of protecting property.[22]

Part I of this essay outlines the conflict between copyright and the First amendment as well as, the complementary argument for reconciling copyright and free speech, as it has been formulated by scholars and the Supreme Court. Part II discusses what I have referred to as the Framers' copyright and the extent to which arguments based upon the Framers' intent in this area may reconcile copyright and free speech. Lastly, Part III argues that reliance upon the complementary argument to deny any role for heightened First Amendment review in copyright cases is subject to two interrelated criticisms of *Lochner*. By relying upon a dynamic baseline between copyright and the First Amendment, broad complementary arguments inject disputed economic theory into the constitution effectively repealing the First Amendment.

I. COPYRIGHT & FREE SPEECH: CONFLICT AND RESOLUTION?

Do copyright and free speech conflict? Article I, section 8 of the U.S. Constitution gives Congress the power, "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their ... Writings."[23] For over two hundred years, Congress has chosen to exercise this power though the Copyright Act which grants the copyright owner the exclusive right to reproduce, distribute, publicly perform and display certain works, and the exclusive right to create new works based upon her existing work[24] for the life of the author plus 70 years.[25] Violators are subject to civil and criminal penalties including imprisonment.[26] Based upon these exclusive rights,

19. *Lochner*, 198 U.S. at 74 (1905) (Holmes, J. dissenting).
20. *Id.*
21. *See id.*
22. *See* U.S. CONST. amend. I.
23. U.S. CONST. art I, § 8, cl. 8.
24. 17 U.S.C. § 106 (2000).
25. 17 U.S.C. § 302(a) (2000).
26. 17 U.S.C. §§ 502-504 (2000) (civil remedies). 18 U.S.C. §§ 2319 (2000) (describing prison terms).

copyright owners may prevent others from delivering Martin Luther King's "I Have a Dream" speech,[27] creating and distributing documentaries,[28] prevent fans from creating alternative stories based upon their favorite characters,[29] prevent the press from publishing stories incorporating copyrighted materials,[30] and with the assistance of federal marshals, seize and destroy unauthorized works and the machines used to reproduce those works.[31] These legal rights appear contrary to the First Amendment clear command that "Congress shall make no law ... abridging the freedom of speech, or of the press."[32] As Rebecca Tushnet suggests, "If the justification were anything other than copyright, these sweeping powers would be seen as a gaping hole at the heart of free speech rights."[33]

The heart of the First Amendment's guarantee of freedom of speech is that the government may not dictate the content of a speaker's message.[34] Yet, this is exactly what copyright does. Copyright's array of exclusive rights limit the freedom of subsequent speakers to incorporate copyrighted expression as part of their speech.[35] As such, copyright restricts a speaker's freedom to determine the content of her message by making it illegal to express oneself with copyrighted expression without the authorization of the copyright owner.[36]

Rather than acknowledge that copyright and the First Amendment may conflict, and thus acknowledge a role for the First Amendment in copyright cases, the principal response has been to deny any conflict.[37] The seminal works on the subject argued that copyright and free speech do not conflict, but are,

---

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

28. *See* DeNeen L. Brown & Hamil R. Harris, *A Struggle for Rights: "Eye on the Prize" Mired in Money Battle*, WASHINGTON POST, Jan.17, 2005, at C1.

29. *See* Anderson v. Stallone, No. 87-0592 WDKGX, WL 206431 (C.D. Cal. Apr. 25, 1989). *See also* Rebecca Tushnet, *Legal Fictions, Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 664 (1997). *See also* http://www.chillingeffects.org/fanfic (describing the legal issues surrounding fan fictions).

30. 17 U.S.C. § 503 (2000).

31. *Id.*

32. U.S. CONST. amend. I.

33. Tushnet, *supra* note 11, at 5.

34. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (stating that at "the heart of the First Amendment" is "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."). *See also* Baker, *infra* note 35, at 899 ("Freedom to speak presumptively means freedom to say absolutely *anything* one wants without any limit on content.") (emphasis in original).

35. C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 900 (2002) ("Even if the original text were written by someone else, a person may want to quote the poem privately other beloved or publicly at the protest rally, to give another person a copy that she has made of a meaningful piece of writing, or to sing the song or perform the play "owned" by another, or even to write down or copy the expression for her own personal use.... In each case, ... the individual's expression constitutes speech from the perspective of the First Amendment.") *See also* Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L. J. 535 (2004).

36. 17 U.S.C. § 106 (2000).

37. Eldred v. Ashcroft, 537 U.S. 186 (2003).

instead, complementary.[38] According to this view, there is no conflict because both copyright and the First Amendment promote speech and the free marketplace of ideas.[39] The First Amendment promotes speech by restricting government interference in the marketplace of ideas, and copyright promotes speech by restricting individual acts that make the marketplace of ideas prone to market failure.[40] By creating economic incentives to speak and publish, copyright establishes a robust market for expression independent from the government.[41]

To the extent that occasional conflicts arise, the complementary approach argues that those conflicts are resolved through "definitional balancing."[42] In other words, copyright's internal limits, especially those found in the idea/expression dichotomy and fair use, eliminate residual conflicts.[43] Under the Copyright Act, copyright protects only an author's expression (and original expression at that),[44] and does not extend to the ideas, principles, and concepts in such works.[45] Because copyright does not prohibit others from copying and using the ideas[46] (or facts)[47] embodied within copyrighted expression, Melvin Nimmer argued that copyright serves, rather than frustrates, the free speech.[48] The fact that copyright limits an individual's choice of expression is of little significance. Adopting a largely Alexander Meiklejohn, marketplace of ideas interpretation of the First Amendment, Nimmer argued that "It is exposure to ideas, and not to their particular expression, that is vital if self-governing people are to make informed decisions."[49] Accordingly, whatever is "lost through the copyright prohibition on reproduction of expression, is far out-balanced by the public benefit that accrues through copyright encouragement of creativity."[50]

---

38. *See* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970). *See also* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979). *See also* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

39. 537 U.S. 186.

40. *Id.*

41. *See, e.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283 (1996).

42. Nimmer, *supra* note 38, at 1184.

43. Nimmer, *supra* note 38, at 1189. *See also* Denicola, *supra* note 37 at 293-99. *See also* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL. STUD. 325 (1989).

44. 17 U.S.C. § 102(a) (2000) ("Copyright protection subsists ... in original works of authorship").

45. 17 U.S.C. § 102(b) (2000) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery.").

46. 17 U.S.C. § 102(b) (2000). *See also* Baker v. Selden, 101 U.S. 99 (1879).

47. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

48. Nimmer, *supra* note 38, at 1189-92.

49. *Id.* at 1191.

50. *Id.* at 1192.

Unwilling to dismiss the First Amendment value of adopting someone else's expression, Robert Denicola added that copyright's fair use doctrine picked up where the idea/expression dichotomy left off.[51] According to Section 107 of the Copyright Act the use of copyrighted material for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[52] However, in order to determine whether "the use made of a work in any particular case is fair use," courts must consider at least four factors:

> 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> 2) the nature of the copyright write;
> 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4) the effect of the use upon the potential market for or value of the copyrighted work.[53]

Based upon these factors, a court may conclude that an unauthorized use of copyrighted expression that falls within one of the exclusive rights provided by the Act is, nevertheless, non-infringing. Fair use is an affirmative defense with the defendant bearing the burden of proof.[54] Citing several decisions in which courts found a defendant's unauthorized use to be fair including quoting magazine stories for an unauthorized biography of Howard Hughes and the publication of parodies of popular song lyrics Denicola argued that the doctrine was capable of reconciling copyright law with free speech even if the idea/expression dichotomy represented "the basic internal mechanism" to accommodate the two.[55] According to Denicola because fair use focuses a court's attention on "the public interest in the flow of information, it seeks to further many of the same interests as the right of free speech."[56] Taking this line of reasoning to its logical conclusion some have argued that fair use should be considered a constitutional doctrine whose scope is determined by the First Amendment.[57]

---

51. Denicola, *supra* note 38, at 293 ("In some instances, however, the values inherent in the rights of free speech and free press demand more than access to abstract ideas – they require the use of the particular form of expression contained in a copyrighted work.").

52. 17 U.S.C. § 107.

53. *Id.*

54. *See* Harper & Row v. Nation Enters., 471 U.S. 539 (1985).

55. Denicola, *supra* note 38, at 293.

56. *Id.* at 297.

57. *See* Harry N. Rosenfeld, *The Constitutional Dimensions of Fair Use in Copyright Law*, 50 NOTRE DAME L. REV. 790, 796-98 (1975). *But see* Denicola, *supra* note 38, at 306-15 (Denicola rejected such an approach arguing instead for the recognition of a limited First Amendment privilege based upon necessity and the public interest.).

In two cases, the Supreme Court refused to subject copyright to any First Amendment scrutiny.[58] In so doing, the Court relied upon a modified version of the complementary approach and definitional balancing. In *Harper & Row, Publishers v. Nation Enterprises,* the Supreme Court upheld a trial court ruling that the publication of quotations from President Ford's yet to be published memoirs in a magazine story discussing his decision to pardon President Nixon constituted copyright infringement.[59] The Nation argued that the quoting of approximately 300 words from President Ford's manuscript should be considered fair use or protected by the First Amendment because the publication of story addressing an historical event based upon the President's own account was newsworthy.[60] In rejecting the Nation's contentions, Justice O'Connor's majority opinion emphasized that: "In our haste to disseminate the news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[61] The Court went on to note that copyright already embodied First Amendment protections, "in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use."[62] After concluding that the Nation's use was not fair, the Court rejected the Nation's argument that the First Amendment required a different rule or result.[63] Under *Harper & Row,* not only is there no conflict between copyright and free speech as Nimmer and others suggested, according to the Court, this lack of conflict was the intent of the Framers.[64]

More recently, the Supreme Court once again rejected efforts to subject copyright to First Amendment scrutiny.[65] In *Eldred v. Ashcroft,* the Court rejected a constitutional challenge to Congress' decision to extend the term of copyright protection by an additional twenty years under the Copyright Term Extension Act ("CTEA").[66] Among other things, petitioners argued that the CTEA represented a content-neutral regulation of speech that could not satisfy heightened judicial scrutiny.[67] In rejecting the First Amendment argument, the Court refused to apply heightened scrutiny to a copyright which it characterized as incorporating "its own speech protective purposes and safeguards."[68] Once

58. *See* Harper & Row v. Nation Enters., 471 U.S. 539 (1985). *See also* Eldred v. Ashcroft, 537 U.S. 186 (2003).
59. *Harper & Row*, 471 U.S. at 548-49 (1985).
60. *Id.*
61. *Id.* at 558.
62. *Id.* at 560.
63. *Id.*
64. *Id.* at 558.
65. Eldred v. Ashcroft, 537 U.S. 186 (2003).
66. *Id.* at 193-95.
67. *Id.* at 218-19.
68. *Id.* at 219.

again, copyright's purpose of promoting speech and its "built-in First Amendment accommodations" – the idea/expression dichotomy and fair use – insulated the law from First Amendment scrutiny.[69] Following *Harper & Row,* Justice Ginsburg's majority opinion once again justified this method of reconciling copyright and free speech by relying upon the intent of the Framers.[70] According to Justice Ginsburg, "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles."[71]

II. THE FRAMERS' INTENT?

Reconciling copyright and free speech by referring to the intent of the Framers of the constitution is an intriguing prospect. Reference to the Framers and first principles are useful starting points in any legal analysis. With respect to the proper relationship between copyright and free speech, and how conflicts between the two should be reconciled, the Supreme Court keeps referring to the Framers' intent.[72] Yet, to borrow from Inigo Montoya and *The Princess Bride*, "I do not think [the Framers' Intent] means what you think it means."[73] Given the limited scope of copyright in the 18th Century, reference to the Framers' intent does little to alleviate the First Amendment concerns raised by copyright as it exists today. To the contrary, reference to the Framers' intent highlights the genuine First Amendment concerns generated by copyright's expansion beyond its original limits and perhaps beyond its "traditional contours."

Historically, there is very little evidence regarding the Framers' intent in this area. While we know a little about what the Framers thought about copyright and why it was adopted and that the Act was patterned after the English Statute of Anne,[74] there is no evidence revealing what they thought about the relationship between copyright and free speech or how to resolve conflicts between the two.[75] Instead, we are left with the approach taken by the Supreme Court in *Harper & Row* and *Eldred.*[76] We must infer the Framers' intent based upon their actions.[77] And, the major piece of evidence from which we can infer

69. *Id.*
70. *Eldred*, 537 U.S. at 219.
71. *Id.*
72. *See id. See also* Harper & Row v. Nation Enters., 471 U.S. 539 (1985).
73. The PRINCESS BRIDE (Metro-Goldwyn-Mayer 1987).
74. THE FEDERALIST No. 43 (James Madison). *See* L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concering the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L. J. 909 (2003).
75. *Id.*
76. *See* Harper & Row v. Nation Enterps., 471 U.S. 539 (1985). *See also* Eldred v. Ashcroft, 537 U.S. 186 (2003).
77. *Id.*

intent is the fact that the first Congress of the United States adopted both the first Copyright Act and the First Amendment.[78]

Reliance upon the Framers' intent provides only a partial solution to the copyright and free speech problem because the Framers' copyright was extremely limited and did little to threaten free speech even as the First Amendment is interpreted today.[79] Following its English predecessor, the Copyright Act of 1790 was entitled "An act for the encouragement of learning" and granted copyright owners the exclusive right to "print, reprint, publish or vend" their works for an initial term of 14 years renewable for another 14 years.[80] It applied to books, maps, and charts, and required a copyright owner to comply with various formalities including registering and depositing the work to obtain copyright protection.[81] Limited to the right to "print, reprint, publish or vend," the Act prohibited only a single species of uses: selling copies of the work in competition with the copyright owner.[82] This meant that subsequent authors and speakers were free to use copyrighted expression as their own in all other respects. This was true even when that expression "merely" abridged, translated, or performed the original.[83] Moreover, the right to "print, reprint, publish or vend" was never understood to apply to non-commercial copying including the personal copying of an entire work by hand.[84]

Given the extremely limited scope of the Framers' copyright, it is unlikely that its restrictions in 1790 would trouble the First Amendment even as it is interpreted today. While the First Amendment guarantees individuals the freedom to determine the content of their expression, it does not guarantee a right to profit from expression. As Professor Baker, argues, "Freedom of speech gives a person a right to say what she wants. It does not give the person a right to charge a price for the opportunity to hear or receive her speech."[85] Moreover, to the extent that the Framers' copyright suppressed expression, courts could readily conclude that such a narrowly defined right would withstand heightened

78. *See* Act of 1790, ch. 15, 1 Stat. 124 (1790). *See also* U.S. CONST. amend. I.

79. Act of 1790, ch. 15, 1 Stat. 124 (1790) (current version at 17 U.S.C. §§ 101-304 (2000)).

80. *Id.*

81. *Id.*

82. *See* Baker, *supra* note 35, at 901. Cf., BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 9 (Columbia University Press 1967) (1966) (noting that the draftsman of virtually identical language in the Statute of Ann were "the thinking as a printer would – of a book as a physical entity; of rights in it and offenses against it as related to 'printing and reprinting' the thing itself; of punishment for illicit reprinting involving the first instance destruction of the very duplicating book.").

83. *See* Kaplan, *supra* note 82, at 9-12. *See also* Stowe v. Thomas, 23 Fed. Cas. 201 (C.C.Pa. 1853).

84. William & Wilkins Co. v. United States, 487 F.2d 1345, 1350 (Ct. Cl. 1973), *affirmed,* 420 U.S. 376 (1975). *See also* Patterson & Lindberg, The Nature of Copyright; Jessica Litman, *Revising Copyright Law for the Information Age,* 75 OR. L. REV. 19, 40-43 (1996). *See also* Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective,* 10 J. INTELL. PROP. L. 319, 326 (2003).

85. Baker, *supra* note 35, at 903.

First Amendment scrutiny.[86] The Framers' copyright promoted speech by creating an independent market for expression, and limited to the commercial right to sell copies was narrowly tailored, if not the least restrictive means, to achieve that objective.[87] Consequently, the idea that copyright and free speech did not conflict from the Framers' perspective is quite convincing. In fact, one can argue that copyright and the First Amendment were "cut from the same bolt of English cloth," and "recognized and respected the same delicate balance of interests necessary to maintain and enhance the public domain through the vigorous encouragement of a free press."[88] Unfortunately, today's copyright bears little resemblance to the Framers' copyright.[89]

In marked contrast with the Framers' copyright, today's copyright restricts virtually all of the expression and uses of copyrighted works permitted by the Framers.[90] Today, copyright prohibits the abridgement, translation, and public performance of copyrighted works without the copyright owner's permission.[91] Both the reproduction right and derivative work right prohibit the creation of new works that do not literally copy a copyright work, but are "substantially similar"[92] or based upon the original work.[93] And, copyright has been interpreted to apply to personal uses as well.[94] Despite the idea/expression dichotomy, courts have relied upon copyright to protect fictional characters,[95] an artist's style,[96] "expressive" facts,[97] and the "look and feel" of copyrighted works.[98] Moreover, courts have largely limited fair use to circumstances in which an opportunity to obtain a license is not readily available either because of high transaction costs or because copyright owners are not likely to license such uses, as in the case of a negative review or scathing parody, even when the

86. *Id* at 903-04.

87. *Id.*

88. Patterson & Joyce, *supra* note 74, at 950.

89. Act of 1790, ch. 15, 1 Stat. 124 (1790) (current version at 17 U.S.C. §§ 101-304 (2000)).

90. 17 U.S.C. §§ 101-304 (2000).

91. 17 U.S.C. § 106 (2) & (4)(2000) (providing copyright owners with the exclusive right to create derivative works and to public perform those works). *See also* 17 U.S.C. § 101 (2000) ("A derivative work is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.").

92. *See* Nichols v. Universal Picture Corp., 45 F.2d 119 (2d Cir. 1930).

93. 17 U.S.C. § 106(2) (2000). *See also* 17 U.S.C. § 101(2000) (defining derivative works).

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

95. *See* Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995).

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

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

98. *See* Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).

expression is for the purposes of the news,[99] education,[100] and scientific research.[101]

What the Framers' intended, therefore, has only limited applicability. Arguments relying upon the Frames' intent to reconcile copyright and free speech rest on fundamentally shaky ground if they attempt to extend this line of reasoning beyond the restrictions established in 1790.[102] It is one thing to suggest that the Framers considered copyright as they defined it to be consistent with the First Amendment. It is quite another to suggest that the Framers would consider copyright as it has evolved to be consistent with the First Amendment. The former is supported by the historical record. The latter is purely speculative.

III. COPYRIGHT LOCHNERISM

Despite the fundamental differences between the Framers' copyright and copyright today, there are those that still argue that the First Amendment should play no role in copyright cases. However, efforts to minimize free speech concerns raised by copyright beyond the context of the Framers' copyright, represent a modern day version of *Lochnerism*. This charge is leveled for two reasons. First, arguments rejecting the need for additional constitutional scrutiny when Congress expands copyright beyond its traditional contours, ignore or manipulate the baseline for evaluating the relationship between copyright and free speech. Second, ignoring the baseline problem ultimately allows judges to embed their own disputed vision of property within constitutional law at the First Amendment's expense. This copyright *Lochnerism* effectively transforms the constitutional relationship between copyright and the First Amendment from one in which the constitution defines the limits of copyright to one in which copyright defines the limits of the constitution.

Schwartz and Treanor's work illustrates the problems with efforts to insulate copyright from constitutional scrutiny.[103] While the authors' critique focuses upon efforts to interpret the exclusive rights clause embodied in Article I, Section 8 as a limit upon Congress' authority to retroactively extend copyright, their ultimate aim and conclusions are much broader.[104] Schwartz and Treanor argue that the Supreme Court in *Eldred* adopted the most deferential standard of review for constitutional questions, and that this standard of review should be applied in all intellectual property cases.[105] According to the authors, arguments

---

99. *See* Harper & Row v. Nation Enters., 471 U.S. 539 (1985).

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

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

102. Act of 1790, ch. 15, 1 Stat. 124 (1790) (current version at 17 U.S.C. §§ 101-304 (2000)).

103. *See* Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner, Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L. J. 2331 (2003).

104. *Id.* at 2413-14.

105. *Id.* at 2334.

in favor of greater judicial scrutiny suffer from the same flaws in logic and the same infirmities as *Lochner v. New York* and its progeny.[106] Specifically, they argue that heightened judicial review would elevate a particular economic policy not grounded in either the text of the constitution or its original understanding to constitutional status and prevent legislatures from innovating in response to economic change.[107] By rejecting the so-called IP restrictor's arguments in *Eldred*, the Supreme Court supposedly avoided creating a *Lochner* for the third millennium.[108] In defense of *Eldred*, Schwartz and Treanor argue that courts should interpret the constitution holistically and apply heightened scrutiny only under circumstances in which the political process cannot be relied upon to protect fundamental rights or discrete and insular minorities.[109] Assuming that this conclusion is appropriate with regard to the Copyright Term Extension Act's retroactive extension of the copyright term,[110] the argument that such deference should extend to all intellectual property questions is flawed because it fundamentally misconceives the problem and represents a form of Lochnerism of its own.

A.

First, Schwartz and Treanor's critique of heightened review in copyright cases, entirely ignores the conflict between copyright and the First Amendment. For example, they describe the classic critique of *Lochner* as "the Court should not second-guess legislative judgments and, in the absence of clear constitutional restrictions, it should let majorities govern."[111] As such, heightened judicial review is inappropriate unless there is an express constitutional limitation such as those embodied in the Bill of Rights or it is necessary to ensure the proper functioning of the democratic process. The latter proposition is based upon John Hart Ely's representation-reinforcement theory of constitutional interpretation.[112] According to Schwartz and Treanor, copyright is no different than other forms of property, and consistent with economic regulation in general, courts should defer to Congress.[113] While they are concerned with preserving a robust "public domain," protection of the public domain is left to fair use and more creative mechanisms for the licensing of copyrights.[114]

Constitutional challenges to copyright, however, are fundamentally different than the economic regulations challenged in *Lochner*. This is not a situation in

106. *Id.* at 2390-96.
107. *Id.* at 2393.
108. Schwartz & Treanor, *supra* note 103, at 2393.
109. *Id.* at 2406-07.
110. *See* Raymond Shih Ray Ku, *Copyright, Free Speech & the Framers* (forthcoming 2006).
111. Schwartz & Treanor, *supra* note 103, at 2409.
112. *Id.* at 2401.
113. *Id.* at 2334.
114. *Id.* at 2409.

which courts are asked to define the vague contours of substantive due process under the Fourteenth Amendment, but rather to apply, among other things, an express constitutional limitation embodied in the Bill of Rights. Copyright restricts expression and implicates the First Amendment. Presumably, the authors would agree that freedom of speech is a fundamental right, and that the First Amendment is a clear constitutional restriction upon democratic majorities justifying heightened scrutiny even under a representation-reinforcing theory of constitutional interpretation. While the IP restrictors challenged Congress' authority to adopt the CTEA under the Exclusive Right's clause, they also challenged term extension under the First Amendment. Yet, Schwartz and Treanor make no effort to distinguish between those two challenges. Their argument entirely ignores copyright's restrictions upon speech, and make no effort to explain why the First Amendment should not apply in copyright cases. Instead, they simply state that "while the grant (or denial or limitation) of copyright protection has consequences for speech, the petitioners' argument in *Eldred* concerning the Copyright Clause is not one that implicates free speech concerns."[115] I do not mean to single out Schwartz and Treanor's work in this area, or to suggest that the omission is specific to their argument. Rather, Schwartz and Treanor's position is representative of the dominant school of thought on this subject, and their omission reflects a fundamental failure with efforts to extend the complementary argument beyond the Framers' copyright.

B.

While there is a rich body of literature discussing and criticizing the Supreme Court's *Lochner* era jurisprudence, this essay focuses upon two specific criticisms of *Lochner*. The first criticizes *Lochner* for failing to recognize the appropriate analytical baseline for constitutional analysis. The second is represented by Justice Holmes's criticism that the Supreme Court imported a disputed economic policy into the constitution, and according to Holmes, the constitution "does not enact Mr. Herbert Spencer's Social Statistics."[116] While the latter is better known, this essay begins with the baseline criticism. Let me emphasize, that these two criticisms are not separate; instead, they are overlapping and interdependent criticisms of arguments denying any role for the First Amendment in copyright cases.

One of the principal criticisms of *Lochner* is provided by Cass Sunstein, who argues that *Lochner's* fundamental flaw was to rely upon common law

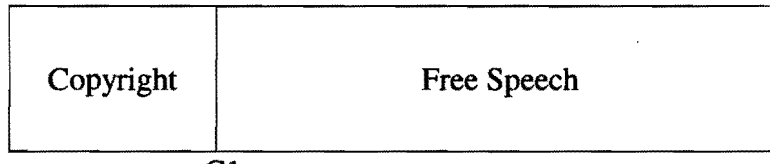
115. *Id.* at 2410. As should be clear from my earlier discussion to the extent that Schwartz and Treanor's argument is limited to the length of copyright's protection, I am inclined to agree with their conclusion though for different reasons. My disagreement stems from their effort to expand this argument and apply it to copyright in general. *See* Raymond Shih Ray Ku, *Copyright, Free Speech & the Framers* (forthcoming 2006).

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

entitlements as a natural baseline constitutional analysis.[117] When evaluating the constitutionality of economic regulations, the Supreme Court in the *Lochner* era based its decision upon *status quo* neutrality or, in his words, "a particular conception of neutrality, one based on existing distribution of wealth and entitlements."[118] The maximum hour and wage laws at issue in the *Lochner* era cases were considered unconstitutional because they altered existing economic rights, which were seen as natural.[119] In other words, the *Lochner* era decisions adopted a one-sided approach when defining state power in the economic realm, and this approach was fundamentally flawed because it refused to recognize the appropriate analytical baseline.[120] The subsequent rejection of *Lochner,* therefore, represents the rejection of status quo neutrality and the corresponding recognition that existing property and economics rights are themselves created and maintained by the power of the State and may, therefore, be modified and reallocated by the State.[121]

Dismissing First Amendment concerns in copyright cases based upon the complementary argument suffers from baseline problems as well. In general, arguments that copyright does not violate the First Amendment define away any problems by implicitly relying upon a dynamic baseline. We are told that copyright and free speech are consistent without regard to the actual scope of copyright law even when changes in copyright impose greater restrictions upon expression. In other words, copyright and free speech are consistent even when Congress and the courts change the *status quo.* That congressional and judicial decisions expanding copyright's exclusive rights or contracting its exceptions alter the relationship between copyright and the First Amendment is either not recognized or ignored. This is illustrated by the following tables. C1 and C2 represent changes to copyright.

Table 1.



C1

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

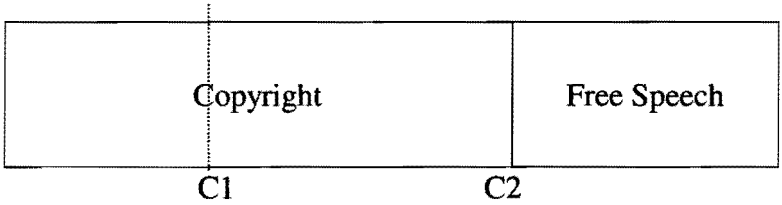
118. SUNSTEIN, *supra* note 118, at 45.

119. *Id.* at 40. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 132-33 (Duke University Press 1995) (1993).

120. *Id.*

121. SUNSTEIN, *supra* note 118, at 58 ("We must lay hold of the fact that economic laws are not made by nature. They are made by human beings.").

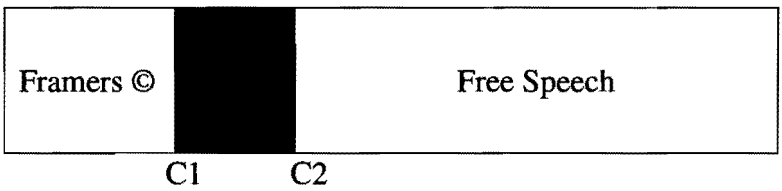
Table 2.



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

Consider Table 3. Assuming that the scope of copyright under the Act of 1790,[122] represented by C1, did not represent what the Framers' considered the full extent of congressional power, we may assume that there is room for copyright to expand consistently with the First Amendment. This is represented by the shaded area bounded by C1 and C2.

Table 3.



Nevertheless, a determination that copyright's expansion is within the permissible zone of expansion cannot be made without reference to the First Amendment. If the problem with *Lochner* was judicial reliance upon the common law as a baseline for evaluating the constitutionality of subsequent economic regulation, copyright Lochnerism occurs when copyright's constitutionality under the First Amendment is assumed without regard to subsequent changes in the relationship between the two.[123]

Second, the complementary argument's denial of any need for independent First Amendment analysis in copyright cases suffers from another fatal flaw. Broadening the complementary approach beyond the historical limits recognized by the Framers' embeds a disputed vision of property within the constitution.[124]

122. Act of 1790, ch. 15, 1 Stat. 124 (1790) (current version at 17 U.S.C. §§ 101-304 (2000)).
123. Reliance upon the Framers' copyright avoids this problem by establishing a fixed baseline.
124. *See* Raymond Shih Ray Ku, *Grokking Grokster*, 2005 WIS. L. REV. 1217.

In his famous dissent in *Lochner,* Justice Holmes criticized the majority's decision to strike down the challenged legislation on the basis that the Court was embedding a policy of *laissez faire* economics into the constitution.[125] According to Holmes:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics.[126]

In other words, because the constitution was silent on the question, the Supreme Court's decision impermissibly limited the people's right to adopt legislation based upon a different economic theory. [127]

By denying any role for the First Amendment, broad complementary arguments entrench their own disputed economic theory into the constitution. We are currently engaged in a global debate over copyright and its expansion. The two sides in this debate are represented by, what I have described as "property pragmatists" and "property idealists." The property pragmatist takes the position that:

> [P]roperty rules, like those created by copyright law, serve specific policy goals. When factual circumstances change because of shifting markets or new technology, the property pragmatist accepts that existing property rules may no longer fit the new circumstances, and may require modification or even abandonment. In other words, the property pragmatist acknowledges that the questions, "Should file sharing be prohibited?" and, "If so, what standard for secondary liability should be imposed upon the providers of goods and services that facilitate file sharing?," may require the resolution of complicated empirical and policy questions concerning the goals of copyright and how those goals are best achieved. For the pragmatist, property rights are not absolute, and recognizing a property right or expanding such exclusive rights may not be the best method for achieving the law's ultimate purpose. Instead, copyright's goal of stimulating the creation and dissemination of creative works may be better served by allowing certain unauthorized uses to go uncompensated or by compensating authors under a liability regime that might result in compulsory licensing or public funding. Because the pragmatist does not assume that property rights are always the best solution, it should come as no

125. *Lochner*, 198 U.S. at 75 (Holmes, J. dissenting).
126. *Id.*
127. *See id.* at 75-76.

> surprise that the pragmatist questions whether courts may competently and legitimately make such decisions.
>
> In contrast, the property idealist assumes that absolute property rights are always the best solution. Like the pragmatist, the property idealist recognizes that existing property rules may need to be modified to address changed circumstances. However, property rights remain the answer. Those advocating this position with respect to copyright have been described by Professor Julie Cohen as "cybereconomists." The idealist, or cybereconomist, proceeds under the assumption that "the most efficient legal regime, measured by its success at inducing the creation of digital works and increasing consumers' access to information, is that which permits copyright owners to maximize control over the terms and conditions of use of their digital property." According to these individuals, if technology or changing market conditions create new opportunities, property rights should be clarified in favor of granting control over those opportunities to copyright owners.
>
> Unlike property pragmatists, idealists do not question judicial resolution of these questions. To the contrary, property idealists argue that courts are well suited for making such decisions.[128]

Denying any conflict between copyright and the First Amendment, ultimately furthers the property idealist agenda. This is accomplished by eliminating a fundamental constitutional restraint upon legislative and judicial decision-making. As Diane Zimmerman observes:

> What seems to have happened in the course of this conflict is that an ever-expanding array of new or reconstructed property theories is cannibalizing speech values at the margin. In large part, this has occurred not because speech claims are inherently weaker than property claims, but because courts fail to think critically about the justifications for, functions of, and limitations on property rules in the sensitive arena of speech.[129]

By removing the constitution from the equation, Congress and courts are free to expand copyright without limit as advocated by property idealists either by granting new exclusive rights or by contracting fair use by limiting fair uses to transformative uses or uses in which licensing is not likely to occur. Obviously, this benefits property idealists because more property is always better. Under

---

128. Raymond Shih Ray Ku, *Grokking Grokster*, 2005 WIS. L. REV. 1217, 1230-32 (internal citations omitted).

129. Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665, 667 (1992).

this view, copyright and the policies it represents become the sole point of reference.

In turn, this shifts the terms of the debate. By denying any constitutional restraint upon copyright, broad versions of the complementary argument treat all opposition and challenges to copyright's expansion as questions of public policy. Schwartz and Treanor engage in this rhetorical slight of hand when they suggest copyright is no different than any other form of economic regulation, and that all arguments for heightened constitutional scrutiny in copyright cases are inconsistent with the lessons of *Lochner*.[130] Under this view, because copyright should be treated like all other forms of property, constitutional challenges to copyright represent the effort of "IP restrictors" to read into the constitution "a substantive vision of governance that was not grounded in either the text of the Clause or its original understanding."[131] As such, all disagreements over copyright are disagreements over public policy, and are best left to Congress and copyright.[132]

At this level, disagreements over copyright are generally confined to copyright's role in providing authors with financial incentives. This favors the property idealists' agenda because the primary incentive question is whether increased copyright protection will provide copyright owners with greater financial incentives. As Jessica Litman recognizes, the answer to this question is always yes.[133] The potential for greater financial rewards by allowing a copyright owner to maximize their financial return on a copyrighted work will always increase the incentive to create.[134] Challenges to copyright are then limited to arguing that existing incentives provide sufficient incentives or for alternatives methods for creating incentives that impose fewer costs than a property regime. Framed in these terms, courts almost automatically defer to Congress.

Again, *Eldred* and the CTEA are illustrative. As a result of the complementary approach, the question of whether Congress may legitimately extend the length of copyright protection retroactively is limited to whether the extension will provide copyright owners' with greater financial incentives to create new works. Because Congress heard testimony from authors and copyright owners that term extension would provide them with greater incentives to create new works or to improve existing works, the Court concluded that Congress's decision was reasonable and within its discretion.[135] In contrast, Justice Breyer argued that the financial incentives created by the CTEA were small enough to be illusory. According to Justice Breyer, some evidence

130. Schwartz & Treanor, *supra* note 103, at 2390.
131. *Id.* at 2393.
132. *Id.* at 2409-10.
133. Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 344 (2002).
134. *Id.*
135. *Eldred*, 537 U.S. at 205-08.

suggested that at best term extension would increase the financial incentives to a handful of authors by seven cents.[136] "What potential Shakespear, Wharton or Hemingway would be moved by such a sum?"[137] Even so, the majority concluded that "the CTEA reflects judgments of the kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain."[138] So long as there is some reasonable basis for such a conclusion, term extension is permissible even if, as Justice Breyer argued in dissent, such incentives are *de minimis*.

To be clear, I am not suggesting that the constitution prevents Congress or the courts from adopting the property idealist's position as a guiding or interpretive principle, only that the First Amendment will limit how far those institutions may go towards advancing that agenda. Nevertheless, for all practical purposes, by removing the limits established by the First Amendment, the complementary approach reinterprets the constitution to support the property idealist position. And yet, if the constitution does not enact Herbert Spencer's Social Statistics, it similarly does not enact the property idealist position.

CONCLUSION

As this essay suggests, the pitfalls of *Lochner* are contained within efforts to reconcile copyright and free speech. Arguments based upon the claim that copyright and free speech do not conflict, even as copyright expands beyond the Framers' copyright, implicitly resolve this conflict at the First Amendment's expense. Under this approach, property rights define the limits of the First Amendment rather than the other way around. In what amounts to *Lochner* in reverse, those engaged in copyright *Lochnerism* are not reading something into the constitution that is not there, but rather reading out the express limitations found in the First Amendment. This copyright *Lochnerism* effectively transforms the constitutional relationship between copyright and the First Amendment from one in which the constitution defines the limits of copyright to one in which copyright defines the limits of the constitution.

When one considers that it took the Great Depression, resolute state and federal legislatures, and a Presidential threat to pack the Supreme Court to achieve the switch in time that saved nine overruling *Lochner* and its progeny. If copyright *Lochnerism* becomes part of the Supreme Court's jurisprudence, it is doubtful that a similar constitutional moment is likely to occur for copyright. The power wielded by copyright owners and the rhetorical force of the property idealist position have yielded an almost unending string of judicial and legislative victories expanding copyright with little consideration of how that expansion impacts freedom of expression. The fact that on occasion courts are

136. *Id.* at 254-55.
137. *Id.* at 255.
138. *Id.* at 205.

willing to find certain unauthorized works to be fair uses, does not leave much room for optimism. Still, there is a glimmer of hope for those who believe that this relationship between copyright and the First Amendment deserves greater attention. In *Eldred,* Justice Ginsburg suggested that there may be a greater role for the First Amendment when Congress alters "the traditional contours of copyright protection."[139] However, what the court meant by "the traditional contours" and what role those contours would play in First Amendment analysis, remains to be seen.

139. *Id.* at 221.