Conflicting Visions and Contested Baselines: Intellectual Property and Free Speech in the "Digital Millennium"

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"Make no mistake: The digital age will change the meaning of freedom of expression. The only question is how it will change."¹

"It's déjà vu all over again"²

In the early years of the Republic, Thomas Jefferson and Alexander Hamilton did battle over the nation's future. Hamilton envisioned an activist government with an economic mandate to support investment and growth; he wanted the federal government to "deliberately and systematically promote the industrialization of the United States."³ Hamilton advocated protection for industry and a strong financial system.⁴ Jefferson's views were to the contrary. He was suspicious of business and feared large enterprises. To Jefferson, Hamilton's plans were a

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CONFLICTING VISIONS

recipe for disaster. It seemed the "road to moral ruin" for the government “[d]eliberately to create a huge manufacturing ‘interest,’ with thousands of money-grubbing manufacturers and merchants, clamoring for special privileges and tariffs.”5 Hence, Jefferson advocated limited government and foresaw a nation of small farmers and artisans.6 All of this is familiar fare to anyone who remembers American history from high school.7

Today’s public debate over intellectual property (IP) rights often looks like a replay of this battle—but one that is being fought over software and the Internet rather than factories and banks. To paint with a very broad brush, we can see a similar division among the most visible participants in current disputes. On one side are the neo-Jeffersonians. They look to a decentralized future—in which the Internet and other digital technologies will place public discourse and economic innovation in the people’s hands. More specifically, the people take the form of Linux users, Internet start-ups, computer hackers, public librarians, music-file swappers, and public school teachers who seek the fair use of copyrighted materials—the modern-day equivalent of Jefferson’s yeoman farmers. Besides echoing Jefferson, these authors’ views also resonate with those of later figures such as Louis Brandeis. What the Jeffersonians fear most is that the government will allow corporate leviathans to colonize the digital world, commodifying and then monopolizing control over information and innovation. Jedi-like, the Jeffersonians battle against the dark forces of the evil Emperor and Darth Vader.8 Leading legal scholars, particularly those whose focus is on broad public policy or constitutional questions

5. JOHNSON, supra note 3, at 179.
6. As Richard Hofstadter observed:
   By and large... when Jefferson spoke warmly of the merits and abilities of "the people" he meant "the farmers." He did not see a town until he was almost eighteen, and he believed deeply that rural living and rural people are the wellspring of civic virtue and individual vitality, that farmers are the best social base of a democratic republic. RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION 27 (1948). In Jefferson’s vision of the future, America “would be a nation of farmers, tilling their own soil, independent, informed, unexcitable, and incorruptible.” Id. at 30.
8. For discussion of the Jeffersonians, see Part I infra. It should be noted that the Jeffersonian/Hamiltonian split mirrored an even earlier split between “Court” and “Country” thinkers in England. See STANLEY ELKINS & ERIC MCKITTRICK, THE AGE OF FEDERALISM 13-29 (1993).
rather than on more technical IP issues, advance this perspective.

On the other side of the current debate are the neo-Hamiltonians. They are less of a presence in the academic world but are powerful in the courts and legislatures. Unlike the Jeffersonians, the neo-Hamiltonians view IP rights as generating a supply of investment funds for innovation. They are confident that economies of scale and large enterprises are the wave of the future, and they are unfazed by the prospect of economic dominance by massive enterprises. The neo-Hamiltonian worldview finds support among corporate heavyweights in the music and movie industries, some Federalist Society judges, giant Internet Service Providers (ISPs), established publishers, and often a majority of members of Congress. Just as Hamilton wanted government support for industry, the neo-Hamiltonians want protection from the government for IP rights so that the powerful acquisitive instinct can be harnessed to drive economic progress. Those whom the Jeffersonians consider brave rebels, the Hamiltonians view as pirates; what the Jeffersonians consider rampant corruption, the Hamiltonians consider the legitimate voice of important institutions in the political process. And like the original Hamiltonians and Jeffersonians, today's reincarnations are deeply suspicious of each other's motives. As Jane Ginsburg recounts, some have described current debaters over digital copying as "paranoid, each suspecting the other of bottomless malevolence."

As we will see, one of the most remarkable aspects of this debate over IP is that both sides portray themselves as defending the status quo ante—the IP regime as it existed before it was disturbed. For many, the status quo benchmark is defined as the situation before the digital age. In the case of some Jeffersonians, however, the true status quo baseline was in place before the twentieth-century media got their greedy hands on copyright law. Each side, then, is protecting some prior state of events from attack. Whether we are reading their views in legal scholarship or in legislative history, it is clear

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9. For discussion of the neo-Hamiltonians, see Part II infra.
10. If we wanted to complete the analogy to science fiction films, we could say that the Hamiltonians view hackers as being much like the invasive species in *Alien*.
12. This aspect of the debate is covered in Part III infra.
that both sides feel imperiled. They agree that the barbarians are at the gates, the city is under siege, and the situation is grave.

But what barbarians, and on which side of the gates? The Jeffersonians characterize the status quo in terms of the public domain and fair use rights, both of which they seek to defend against the incursion of stronger IP rights.\(^\text{13}\) Thus, for Jeffersonians, the crucial aspect of the status quo is users’ ability to make free use of materials. The barbarians are the greedy holders of IP rights, seeking to crush the public domain.

For Hamiltonians, on the other hand, the crucial aspect of the status quo is not legal but economic.\(^\text{14}\) They say the law could recognize fairly broad user rights in a predigital age because those rights did not undermine the ability of producers to obtain a fair return—in part because of the severe technological limits on copying. Copying is now a greater threat requiring more stringent remedies. Digital media make it possible to make a virtually infinite number of exact copies at little or no cost, an impossible feat in the predigital era. At the same time, the digital world also makes it possible for rights holders to use technological measures like encryption to control use without recourse to the copyright law, obviating some of the relevance of legal use rights. Thus, the Hamiltonians maintain, continuing the status quo of reasonable return to rights holders (and ultimately to the creators of IP) requires a different set of use rights today. For the Hamiltonians, it is the hackers and Internet copiers who are the barbarians, attacking the citadel of progress that is the IP system. What the Jeffersonians see as an aggressive invasion of public rights, the Hamiltonians view as a simple effort to protect themselves against a new threat.

What makes these various efforts to define and defend the status quo all the more remarkable is that both sides insist on the unprecedented newness of the digital world. In reality, there is no status quo, no preexisting regime that could potentially govern the digital domain. We have never before faced a situation in which information has so much economic value yet at the same time can be copied, modified, and transmitted without cost. It is pointless to ask what kinds of use rights people had in digital products before the relevant technology existed to create those products and use them. Nor is there an an-

\(^{13}\) See infra Part I.A.

\(^{14}\) See infra Part II.A.
swer to the question of what the creators of those digital works were entitled to expect in the way of a fair return before the works themselves were technologically possible. In this instance, the status quo baseline is constructed rather than being a simple matter of observation.

A new technology always presents the question of whether an existing legal regime should apply. This issue is especially acute here because the existing regime cannot even potentially be extended as a whole. Practices that happily coexisted in other settings are now in conflict, so we must choose which aspects of the prior regime to extend and which to abandon. In short, before we can speak about extending the copyright status quo to digital media, we must reconstruct that status quo. If “the significance of legal values is in fact always inseparably connected to the social practices that are the precondition for their actual realization,”15 and if those social practices are in flux, judges must somehow conceptualize the social practices before they can begin to decide First Amendment issues. When we define a baseline in this context, we claim to be describing the past, but we are really imagining the future.

This Article will explore different understandings of the IP status quo and how those views of the copyright baseline are embedded in broader economic, social, and constitutional commitments—in particular, in the worldviews that this Article links with Jefferson and Hamilton. In particular, we will see how different approaches to First Amendment issues flow from these different understandings of the baseline.16 The two perspectives offer very different ways of conceptualizing how IP relates to the digital world. From the Jeffersonian perspective, traditional use rights are critical to reconciling copyright and the First Amendment. These use rights have economic value, but they also have intrinsic value because of their connections with individual autonomy and initiative. From the Hamiltonian

16. There is considerable academic literature about the relationship between the First Amendment and copyright, tracing back to B. Melville Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and the Press?, 17 UCLA L. REV. 1180 (1970), and Paul Goldstein, Copyright and the First Amendment, 70 COLUM. L. REV. 983 (1970). For the present, at least, some of the fundamental questions seem to have been settled by the Supreme Court. Some significant First Amendment questions remain, however, and on these the modern-day Jeffersonians and Hamiltonians sharply disagree.
perspective, however, free speech is by definition furthered whenever Congress is providing rewards for creators of IP and thereby “promot[ing] the Progress of Science and useful Arts.”

User rights are secondary to property rights, and essentially consist of whatever Congress chooses to leave outside of the control of the IP owner. Each view entails a different baseline.

The clash between these worldviews reached the Supreme Court in *Eldred v. Ashcroft.* The outcome in *Eldred* was a victory for the Hamiltonians, as loudly lamented by the Jeffersonian camp. But the *Eldred* opinion held out hope for the Jeffersonians. The Court accepted the Jeffersonian view of the baseline as constituted by the legal distribution of use rights rather than their practical utilization and economic effects on IP owners. In doing so, the Court left open the door to constitutional challenges to changes in the legal status quo. In short, the Court did not accept the Hamiltonian position of First Amendment validity for any measure that increases returns to the creators of works. Instead, the Court accepted the Jeffersonian view that incursions on traditional use rights are constitutionally questionable.

Perhaps equally importantly, *Eldred* should be a reminder to lower courts that traditional use rights have a constitutional dimension and should be construed with more than investor return in mind. While the Court’s opinion was far from the kind of frontal attack on monopolistic rights that the Jeffersonians would have liked, it quietly endorsed a key part of their intellectual framework. Adoption of the Jeffersonian baseline may put at risk legislation such as the Digital Millennium Copyright Act (DMCA), a Hamiltonian favorite.

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20. See infra Part IV.A (discussing the *Eldred* litigation).
21. Compare Frederick Schauer’s observation that *Eldred* “can be considered not a defeat, but rather one further step toward the entry of copyright into the domain of the First Amendment,” simply because the Court acknowledged that the First Amendment does bear on copyright issues. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,* 117 HARV. L. REV. 1765, 1799 (2004).
This is not the place for a systematic investigation of the relationship between free speech and IP. But the Court was clearly correct in its perception that the Constitution values both the "Progress of Science and useful Arts" and the intrinsic value of free expression. The task after Eldred will be reconciling the two in statutory interpretation and (less often) in constitutional adjudication.

This Article will investigate the contest over baselines that define conflicts between free speech and IP. Parts I–III will illuminate the ways in which the current debate on these issues is polarized. The Article will begin with the Jeffersonians, who are the most vocal force in the legal academy, and then examine the Hamiltonians, whose influence is greater in courts and legislatures. Part IV will then consider the mix of Jeffersonian and Hamiltonian elements in the Supreme Court's major ruling on copyright and free speech, with some thoughts about the implications of the Court's decision for restrictions on digital technologies. In the long run, the fact that the Hamiltonians won in Eldred may be less important than the fact that the Court's opinion adopted a Jeffersonian baseline.

First, a caveat is in order: trying to make sense of intellectual disputes by constructing ideal types of the opposing parties is an old venture. This can be an illuminating exercise, but the risk is always that the nuances of individual positions will be lost along the way—what is intended to be an ideal type instead becomes a caricature. In particular, moderates are likely to feel that they have been unfairly lumped with more extreme views. This Article takes a gamble that the potential illumination is worth the risks, but one should not be deceived into a reductionist view of the debate. By comparing today's debate with an older, more famous one, I do not mean to imply that the participants are merely reciting tired old lines, nor do I mean to deny the diversity that exists within the current debate. Rather, I mean to show how, just as in the case of Hamilton and Jefferson, current constitutional perspectives are integrated with sophisticated social and economic visions. What animates the current public debate over IP and the Constitution are not merely different economic models or doctrinal interpretations, but different visions of the future.24


24. Another preliminary comment is also in order. I will speak generally of disputes over "intellectual property," even though most of the discussion will be focused on copyright and related issues, rather than patent or trade-
I. THE JEFFERSONIAN BASELINE: THE LEGAL STATUS QUO

The Jeffersonian perspective has fared well within the academy. It seems to be shared to varying degrees by most of the leading academic writers about IP. As one critic remarks:

[A]n entire vocabulary has been built to support this line of argument. Control-talk [i.e., Jeffersonianism] is of "the second enclosure movement," the lurking "tragedy of the anticommons," or the dangers of "patent thickets"—not to mention the phenomenon of litigation efforts (or perhaps social movements?). Sporting their own slogans (and logos), such as "Free the Mouse," "Create Like It's 1790," or "When Copyright Attacks."25

Clearly, what is happening here is more than a dispute over legal doctrine. This is a culture war of sorts, although it has not captured the public's attention so far.

I will begin by sketching this perspective on IP and examining how Jeffersonians define the baseline. Then I will show how understandings of IP issues fit into a broader worldview, one that would be familiar in its broad outlines to Thomas Jefferson himself.

A. DEFENDING THE INTELLECTUAL COMMONS

A good place to start in understanding the Jeffersonian perspective is an essay by Lawrence Lessig, in which he not only provides a vivid portrayal of the Jeffersonian vision but also meditates on what it means to maintain a baseline under changed circumstances.26 Lessig begins the essay by asking what it means to follow the eighteenth-century federalists today. Does it mean following their call for more centralized government? If so, he wonders, how can the Federalist Society be dedicated to states' rights? But being faithful to federalism may not be a matter of replicating the Founders' positions. The federalism of today, Lessig says, may not favor centralization: "If it is a balance of power between federal and state authority that is right, then Federalists might well need to push in dif-


ferent directions as the balance changes." 27 Lessig then turns to the topic of copyright and the First Amendment, where he makes a similar argument about the need to restore a historical balance. 28

According to Lessig, the balance in copyright has changed dramatically since the framing. The first copyright statute provided a relatively short, fourteen-year term of protection for maps, charts, and books. In the first decade of the statute less than five percent of published works were registered (not counting foreign works, which were not protected at all). 29 Copyright did not protect derivative works—you could translate or adapt or abridge or set to music copyrighted works, without the permission of the author. 30 In short, "[t]he message of the statute was simply this: Pirate presses, focus your energy on stealing from the British and French; leave Americans alone." 31 But that modest original vision of copyright has been swept away.

Lessig explains how today's system has changed:

Copyright no longer is limited to maps, charts and books. It now touches practically any creative work reduced to a tangible form. It protects music and performances and architecture and certain design. It protects machines written in words—we call that software—and words written on machines—we call that the Internet.

And it protects those creative acts no longer for an initial term of fourteen years. It protects these creative works for the life of the author plus seventy years—which means, for example, in the case of an author such as Irving Berlin, a term that exceeds 140 years. It protects this work not contingently—not, that is, upon registration. It protects it, and all creative work, automatically—for a term that does not have to be renewed, for a life that exceeds the author's.

And it protects not just against pirate publishers. The scope of copyright now protects an extraordinarily broad derivative right. The right to translate some works, the right to perform, the right to adapt a play, or to make a movie—all these are rights that are now included within the originally sparse "exclusive right" that the Copyright Clause granted. 32

27. Id. at 1057.
28. See id. at 1061.
29. Id.
31. Lessig, supra note 26, at 1062.
32. Id. at 1062–63. Particularly apt is Lessig's reference to software as "machines written in words," which seems to capture the somewhat ambiguous status of code as (partly) speech and (mostly) function.
In summary, the "tiny regulation of a tiny proportion of the extraordinary range of creative work in 1790 has morphed into this massive regulation of everyone who has any connection to the most trivial of creative authorship."\textsuperscript{33}

The Framers' vision, Lessig tells us, "was balance.... Limited protections, a vibrant public domain."\textsuperscript{34} But we now face a time of peril. That vision is threatened, ironically, just at the moment when the triumph of the Framers' vision seemed within reach because of the possibilities of the Internet.\textsuperscript{35} For "[j]ust as the moment when the creative potential of artists and innovators is greatest, the technologies that control the resources of that creativity are also at their peak."\textsuperscript{36}

The risk then is a radical shift in IP away from the balance seen not only by the Framers but also by such twentieth-century copyright experts as Melville Nimmer.\textsuperscript{37} The burden of proof, Lessig maintains, lies on those who would defend this sharp change in the status quo:

The first vision [one of IP hegemony] may well prevail. But it is our job as lawyers to make certain that we all understand the change this vision represents. Not just the change from the view of men who wore wigs two hundred years ago; but a change from the view of a man whose sense of balance and respect for the values of copyright defined the field just a generation ago.

\textsuperscript{33} Id. at 1063. It is easy to see the link with Lessig's earlier discussion of centralization. The Framers enacted the Commerce Clause, among other parts of the Constitution, to create more central authority, but their expectations about the use of the commerce power were far more modest than today's administrative state. To maintain the balance they originally had in mind between state and nation, according to Lessig, we must provide more constitutional protection for states as a counterweight to this increased national power.

\textsuperscript{34} Id. at 1072. Indeed, America's early IP policy has been described as the encouragement of piracy, particularly through obtaining trade secrets of European and British employers by encouraging immigration of their employees to America. See DORON S. BAN-ATAR, TRADE SECRETS: INTELLECTUAL PIRACY AND THE ORIGINS OF AMERICAN INDUSTRIAL POWER 78–93 (2004). This fits with the fact noted by Lessig that the copyright law did not protect foreign works, which could be pirated at will by American presses.

\textsuperscript{35} Lessig, supra note 26, at 1072.

\textsuperscript{36} Id.

\textsuperscript{37} Id. at 1070. The specific reference to Nimmer was partly due to his sheer eminence as a copyright scholar, but probably was also a gracious acknowledgment that Lessig was delivering a lecture in a series named for Nimmer.
If there are no limits [on IP rights], then those who would defend
the change; they need to show us, as a culture and as a tradition why
this new vision of state protection [for IP] is better than the old.\textsuperscript{38}

A similar alarm is sounded by Yochai Benkler, who argues
that we are in the midst of an effort to enclose the "public do-
main" of free speech by privatizing it in the hands of large cor-
\textsuperscript{39}p\textsuperscript{39} According to Benkler and Lessig, the status quo
(not just the balance of the Framers but the balance of IP rights
and user rights of "just a generation ago") is under siege.\textsuperscript{40} It is
up to us to defend it.

One particular source of alarm is the DMCA.\textsuperscript{41} The DMCA
prohibits the use of certain technologies to evade digital protec-
tion measures, as well as the production of or traffic in those
\textsuperscript{42} This would not be particularly troublesome if
the ban were limited to infringing uses. However, the statute is
not limited to the use of circumvention technologies for in-
fringement purposes, and also seemingly prohibits utilizing
these technologies to make fair use of material or to access ma-
terial in the public domain.\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{38} Lessig, \textit{supra} note 26, at 1072.
\item \textsuperscript{39} Yochai Benkler, \textit{Free as the Air to Common Use: First Amendment
Constraints on Enclosure of the Public Domain}, 74 N.Y.U. L. REV. 354, 359
(1999). No doubt if the DMCA had been passed a few years later it would have
been called the PDCA—short for Patriot Digital Copyright Act!
\item \textsuperscript{40} Lessig, \textit{supra} note 26, at 1072; see Benkler, \textit{supra} note 39, at 354–58.
\item \textsuperscript{41} Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17
U.S.C. §§ 101–505); see Pamela Samuelson, \textit{DRM (And, Or, Vs.) the Law}, 46
COMM. ACM 41, 42 (2003) ("The DMCA impedes the progress of science, is
economically unjustifiable, and lacks the balance the Constitution requires of
intellectual property legislation.").
\item \textsuperscript{42} A good description of the statute, along with an enlightening discus-
sion of the history of IP law, can be found in Robert Merges, \textit{One Hundred
2187 (2000). For a more detailed discussion of how the statute applies to ef-
forts to make fair use of materials, see David Nimmer, \textit{A Riff on Fair Use in
One of the DMCA’s exceptions is for encryption research, but the exception
may arguably warp the future progress of the field. See Joseph P. Liu, \textit{The
DMCA and the Regulation of Scientific Research}, 18 BERKELEY TECH. L.J. 501
(2003); see also Cassandra Imfeld, \textit{Playing Fair with Fair Use?, The Digital
Millennium Copyright Act’s Impact on Encryption Researchers and Academi-
\item \textsuperscript{43} Merges, \textit{supra} note 42, at 2202–03. Fair use is a defense to infringe-
ment. The leading Supreme Court case on fair use is \textit{Harper & Row Publishers,
Inc. v. Nation Enterprises}, 471 U.S. 539 (1985). For an argument that the
DMCA could be construed to allow such a defense, see Jane C. Ginsburg,
\textit{Copyright Use and Excuse on the Internet}, 24 COLUM.-VLA J.L. & ARTS 1, 8–9
(2000).
\end{itemize}
Thus, the DMCA may in effect allow the practical equivalent of copyright protection—sometimes called "paracopyright"—prohibiting fair use or even any use of noncopyrightable material. As Benkler explains:

The fundamental objection is that the anticircumvention provision would prohibit anyone from using materials protected by technological measures without permission, even for a privileged purpose. For example, a literary critic blacklisted by a publisher would be subject to the criminal provision if he uses circumvention software to read and review (with limited quotations) that publisher's new book. If the critic is paid for the review by a newspaper, he may have five years in prison to dull his critical faculties, so that when he is again free he can earn the $500,000 necessary to pay his fine without offending publishers.45

Even quite sober-minded IP traditionalists are concerned about the shift in power represented by such legislation, and fear that we are in the middle of a shift from a baseline of competition to one of "too much property."46

Indeed, there has been a flowering of new IP claims, although the courts do not always uphold them. Some examples given by Mark Lemley include the National Basketball Association's claim of copyright in the scores of games, a building owner's claim that a postmark of the skyline violates its trademark, and the right of a celebrity to "prevent anyone (or anything) from looking or sounding too much like them" (in the case of one celebrity, the anything being a robot in a blonde wig).47 These examples all express the "view that information is property and someone should own it."48 Conventional IP rights have also been increasingly broadly construed: "Trademark


45. Benkler, supra note 39, at 419 (citation omitted). As Benkler explains, the statute does contain a safeguard in the form of potential rule-making relief from the Librarian of Congress, but he sees this as an ineffective mechanism, and as being a further restriction on fair use in disguise. Id. at 416, 419–20, 428.


48. Id. at 900.
owners can prevent uses of their marks as obvious parodies or for entirely noncommercial purposes, and are well on their way to owning the exclusive right to pun." 49 And if the existing statutes fail to provide enough protection, the owner can use a shrink-wrap license—a classic contract of adhesion—"to disregard the limits imposed by the law, in effect rewriting the law by private contract to suit his needs." 50 With new technology, digital rights management may even make it possible to create self-enforcing restrictions, so that digital works simply cannot be copied or used even for purposes that are permitted by the copyright laws. 51 Compared with the classic contract of adhesion, this provides the "adhesion" without the bother of the "contract." It poses "a challenge to the very idea of the public domain as an intrinsic part of intellectual property law." 52

The concerns discussed in this section are not limited to IP specialists. For example, a leading free speech theorist has remarked on the "continual historical process of a copyright extension to encompass an increasing enclosure of the public domain of expressive content." 53 Another constitutional scholar with a special interest in cyberlaw proclaimed that the digital revolution "presents new dangers for freedom of speech, dangers that will be realized unless we accommodate ourselves properly to the changes the digital age brings in its wake." 54 In short, a close examination of what is happening at the intersection of IP law and free expression has left many observers with a sense of alarm.

49. Id.
50. Id. at 901.
51. As Jack Balkin explains:
    Digital rights management schemes, for example, can make digital content unreadable after a certain number of uses; they can control the geographical places where content can be viewed; they can require that content be viewed in a particular order; they can keep viewers from skipping through commercials; and so on.
Balkin, supra note 1, at 18. The likely effectiveness of this technology is a matter of debate. See Wagner, supra note 25, at 1015–16 (questioning its efficiency and effectiveness).
52. Lemley, supra note 47, at 902.
54. Balkin, supra note 1, at 3; see also Netanel, supra note 44, at 20 (criticizing "[t]oday's bloated copyright").
B. THE BRANDEISIAN VISION

In the essay discussed earlier, Lessig does not merely worry about changes in IP rights but about the changes in economic and social power that might go with them. He portrays a conflict between two visions—visions I have called Jeffersonian and Hamiltonian:

As this struggle plays out, there are two visions of the future. One in which the most significant aspects of our culture remain perpetually in the control of a relatively small number of corporations—the publishers of our day. And the other, where these elements of our culture, after "a short period" fall outside of exclusive control, free for anyone to take and use as they see fit.

Thus, his worry is not just that individual rights will be impaired but that the power of wealthy institutions will become yet more bloated. Similarly, Jack Balkin sees behind certain legal positions "a more basic agenda" of "the promotion and protection of the property rights of media corporations."

This fear of the power of the economic elite and of the corporations that they control goes back to the early years of the Republic. It was at the heart of the battle between Jefferson and Hamilton over the Bank of the United States. Jefferson and his allies, such as James Madison, saw in Hamilton's efforts the influence of "forces of speculation and commerce" that was only one part of a "web of subservience." Indeed, though it is less germane for our purposes than his general worldview, Jefferson was no great enthusiast for IP rights, which he feared as a form of monopoly. Though he recognized that limited monopolies might act as inducements, he found the benefit "too doubtful to be opposed to their general suppression."

55. See Lessig, supra note 26 and accompanying text.
56. Id. at 1072.
57. Balkin, supra note 1, at 24; see also Pamela Samuelson, The Copyright Grab, WIRED, Jan. 1996, at 134, 135 (attributing Clinton administration support for the proposal that became the DMCA to "campaign contributions" from "the copyright industry, especially members of the Hollywood community, who are vital to the president's reelection bid").
58. See ELKINS & MCKITRICK, supra note 8, at 224.
59. Id.; see also JOHNSON, supra note 3, at 242 (noting the "shudders of loathing" by Jefferson and Madison when they saw the bank in operation).
60. See Paul M. Schwartz & William Michael Treanor, Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property, 112 YALE L.J. 2331, 2377 (2003). Madison helped draft the IP clause of the Constitution, but appears to have thought that Congress had no power to protect IP beyond the limits of that clause. Id. at 2381–82.
In the twentieth century, the best-known proponent of the Jeffersonian side of this debate was Justice Brandeis. Much of his career was a battle against corporate power on behalf of individuals and small businesses. Not surprisingly, he also championed the individual against state power in the context of the First Amendment, most famously in his *Whitney* concurrence. Also not surprisingly, he was unenthusiastic about the creation of new IP rights. There is much of this preference for the "little guy" in the writings of the modern Jeffersonians (or perhaps one should say cyber-Jeffersonians).

On occasion, this perspective is explicitly linked with Brandeis. Yochai Benkler recalls Brandeis's statement that "once information is communicated to others it becomes 'free as the air to common use,'" and he calls for a return to "Justice Brandeis's conceptual baseline." Benkler fears that concentrated control of information resources is likely to "exclude challenges to prevailing wisdom" and to "translate unequal distribution of economic power in society into unequal distribution of power to express ideas and engage in public discourse"—both very Brandeisian concerns. Specifically, Benkler warns that what he calls enclosure of the public domain "is likely to lead, over time, to concentration of a greater portion of the information production function in society in the hands of large commercial organizations that vertically integrate new production with owner-information inventory management." Enclosure "therefore conflicts with the First Amendment injunction that government not prevent people from using information or communicating it," and violates the "First Amendment com-

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64. This vision of the "little guy" versus the corporations is clearly an oversimplification. Important corporate interests can be found on both sides of the debate, with the digital technology industry often aligned against content providers. *See* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 15 BERKELEY TECH. L.J. 519, 533 (1999).
66. *Id.* at 357.
67. *Id.* at 377–78.
68. *Id.* at 410.
mitment to attain a diverse, decentralized ‘marketplace of ideas.’”

Besides providing a striking metaphor for the reduction of user rights, the reference to enclosure also reinforces the theme of social exploitation by the rich and powerful. The metaphor of enclosure is historically freighted. It harkens back to the “enclosure” movement in English history when great lords drove small farmers off their lands and burned their houses to use the land for grazing sheep. These historical resonances are not lost on the Jeffersonians. Indeed, one can even find Jeffersonian praise for the “cyber-yeoman,” the independent Web publisher taking “power from large institutions such as government, corporations and the media,” who in turn are trying to enclose the public informational domain and force out the independents. Here, the threat is as much technological as legal. Reinforced by the DMCA, the use of “trusted system” technology may “afford complete control over access to a work,” leaving “the Net’s version of the English yeomanry” with “no means of resisting the theft of their monopoly-restraining rights, nor of preserving their valuable transformative works.” This rhetoric may not do justice to the economic complexities or the political nuances, which can align powerful Silicon Valley firms on the side of the yeoman. But oversimplified as it may be, the rhetoric is nonetheless powerful.

69. Id. at 358.
70. See Hannibal Travis, Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment, 15 BERKELEY TECH. L.J. 777, 787–88 (2000). One well-known IP scholar quotes poetry lambasting the enclosure movement:
  The law locks up the man or woman
  Who steals the goose from off the common
  But leaves the greater villain loose
  Who steals the common from off the goose.


71. See Travis, supra note 70, at 854 (quoting ANDREW SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW, at xiii (1999)). Some commentators criticize the public domain from the opposite side of the Hamiltonians, arguing that failure to award property rights privileges dominant groups in Western societies over indigenous peoples and other groups whose traditional knowledge can be taken free of charge by large corporations. See Anupam Chander & Madhavi Sunder, The Romance of the Public Domain, 92 CAL. L. REV. 1331, 1334–35 (2004).

72. See Travis, supra note 70, at 861.
Other scholars warn of the danger to the human spirit posed by enclosure. Jed Rubenfeld laments the expansion of the concept of infringement: "Today, reproducing a minute or two from a film (in a television broadcast) or a few hundred words from a book (in a news article) is unquestionably enough to constitute infringement." This broad understanding of reproduction, along with an expansive definition of derivative work (a new work created with the use of copyrighted elements of an older work) casts a pall over the ability to transform existing works through creative imagination. Rubenfeld denounces this development in ringing terms:

Unlike literal copying, derivative works always involve a fresh exercise of imagination.... The claim is that allowing others freely to imagine their own visualizations or continuations of an author's story, and to communicate these imaginings to others, will produce legally cognizable harms. But under the First Amendment, there can be no such thing as a harmful exercise of the imagination.

Discontent with seizing the intellectual public domain, the IP owners seek to strip us of the power of imagination and crush the spirit of individualism. Recall Jefferson's proclamation, now inscribed on his monument, that he opposed every form of tyranny over the human mind. His spirit is alive and well today.

Another Jeffersonian theme is the fear of corruption by moneyed interests. This theme, too, has resurfaced, in the form of warnings of "The First Deadly Sin: 'Pigging Out' at the IP Trough." Stories are legion of unsavory, though not necessarily illegal, influence over the legislative process—an influence stemming from the distribution of perks and campaign contributions to legislators. The result is legislation that is more the product of industry desires than of legislative deliberation.

Indeed, it is said that we have "reached a point where legisla-

74. Id. at 54.
75. Letter from Thomas Jefferson to Dr. Benjamin Rush (Sept. 23, 1800), in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 558 (Adrienne Koch & William Peden eds., 1944) ("I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man.").
76. See Merges, supra note 42, at 2233-40.
77. It is unclear whether this is a new development. Glynn Lunney speaks of the "constant clamoring of copyright's properties class," Glynn S. Lunney, Jr., The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act, 87 VA. L. REV. 813, 818 (2001), and says that "[p]olitical pressure, not technology, has driven copyright's expansion" over the past two centuries. See id. at 895.
tive history must be ignored because not even the hands of congressional staff have touched committee reports." Similarly, Jessica Litman argues that much modern copyright legislation is "overwhelmingly likely to appropriate value for the benefit of major stakeholders at the expense of the public at large." Students of eighteenth-century history will instantly recognize the familiar complaints of civic republicans concerning the danger of corruption, a complaint that Jefferson keenly voiced in his disputes with Hamilton.

This historical similarity tells us something about the structure of neo-Jeffersonian thought. It does not purport to tell us whether their view of contemporary society is valid. Even if we consider the original Jeffersonians' views to be a quaint aversion to the coming Industrial Revolution, that does not mean we can ignore the warnings of their modern counterparts. Concerns that may have been misplaced or overblown at the turn of the nineteenth century might be more solidly grounded at the turn of the twenty-first.

II. THE HAMILTONIAN BASELINE: THE ECONOMIC STATUS QUO

Today's Hamiltonians offer a much different perspective on IP and free speech issues. Rather than fearing IP rights, they view them as the engines of creativity and progress. What they fear is not the overextension of IP rights but rather that the economic value of those rights might be so degraded by new copying techniques that those rights can no longer perform their vital function of rewarding creators of new works. Their

78. See Merges, supra note 42, at 2235 (quoting William F. Paltry, Copyright and the Legislative Process: A Personal Perspective, 14 CARDOZO ARTS & ENT. L.J. 139, 141 (1996)). Merges himself provides some significant qualifications regarding countervailing forces, but the general concern he voices is widely shared, often more vehemently.

79. JESSICA LITMAN, DIGITAL COPYRIGHT 144–45 (2001). Litman's characterization of the resulting legislation as rent seeking may be open to dispute, but her historical account does clearly establish that Congress has relied on relatively formalized bargaining between interest groups in crafting copyright legislation.

80. See, e.g., JAMES H. READ, POWER VERSUS LIBERTY: MADISON, HAMILTON, WILSON, AND JEFFERSON 140 (2000) (citing Jefferson's belief that Hamilton's "commercial and manufacturing policies would have the effect of enriching the favored few at the expense of the independent farmer, the necessary social base of a republican political order"); see also CLAUDE G. BOWERS, JEFFERSON AND HAMILTON 168–72 (1925) (describing attacks appearing in various papers and journals).
baseline is not some preexisting set of user rights, but rather the incentive structure created by IP laws. They seek to shore up existing IP rights and, if possible, to extend them. They see no threat to free expression from this direction. Rather than viewing corporations and other large institutions as oppressive, the Hamiltonians view them as critical sources of resources for innovation, creativity, and dissemination. We explore their views in this part.

A. DEFENDING PROPERTY RIGHTS AND FAIR RETURNS

To the extent that the status quo is conceptualized in terms of fair returns to rights holders, technological changes determine user rights. From the Hamiltonian perspective, user rights are simply what are left over after IP rights are expanded to their natural limit, which is, in turn, set by the diminishing returns of increased protection to rights holders. Where this natural limit is found depends on how user rights impact the returns to IP holders. In the past, of course,

recognizing a First Amendment freedom to engage in noncommercial copying, performance, or distribution would have left by far the largest portion of the economic value of the ‘authored’ content in the hands of the copyright holder, thus adequately serving the primary function of copyright recognition—to provide incentives for creation and distribution of quality communications.\(^8\)

Thus, IP law could tolerate the possibility of First Amendment exemptions in the past. However, the situation is different today. For, as Mark Lemley (not himself a Hamiltonian) points out:

It costs essentially nothing to make and distribute a copy of a document on the Internet today; it costs a lot more to convey the same information by typesetting, printing, and binding a book, and then delivering it to a warehouse, which will deliver the book to a store, which will sell the book to a customer. . . . Counterfeiting offers some return if the “intellectual value” component of a book is twenty percent of the purchase price; it is much more lucrative if the intellectual value is ninety-five percent of the price. Hence, the “public goods” problem in economics is exacerbated as information itself increasingly becomes what is being sold.\(^2\)

It is because of these technological changes that IP holders feel threatened. Hilary Rosen, president of the Recording Industry Association of America, urged Congress to pass the

\(^2\) Lemley, supra note 47, at 876.
DMCA in 1998, arguing: "[O]ur members share a common thread—a fragile existence wholly dependent upon the protection of their IP. This fine filament upon which so much American creativity, ingenuity and commerce rests is under constant strain, and you have before you an unparalleled opportunity to strengthen it." Jack Valenti vividly expressed this same sense of threat when he appeared before Congress. To explain the need for new legislation to prevent illegal file sharing, Valenti analogized his position to that of a general under massive attack: "It is said [that during] World War I, [French General] Foch... was in a furious battle with the Germans, and he wired back to military headquarters, 'My left is falling back. My right is collapsing. My center cannot hold. I shall attack.' That, Valenti added, is "precisely the way I feel in confronting the assault on American movies and these file-stealing groups." Among the enemies that he mentioned were the "critics whose hidden objective is to brutalize and shrink the value of copyright if not totally banish it from the Constitution" (in other words, the academic Jeffersonians and their allies). Note that the baseline here, which Valenti portrays as be-

83. The WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Telecomms., Trade, and Consumer Prot. of the House Comm. on Commerce, 105th Cong. 43-44 (1998) [hereinafter WIPO Copyright Treaties Implementation Act Testimony] (statement of Hilary B. Rosen, President and Chief Executive Officer, Recording Industry Association of America). A similar view is expressed in a petition for certiorari on behalf of the motion picture industry, seeking to overturn a lower court decision allowing a form of file sharing:

Indeed, the Ninth Circuit’s decision threatens the very foundations of our copyright system in the digital era. The ease with which copyrighted works in digital form can be unlawfully copied and distributed millions of times over on the Internet makes it especially important that traditional principles of secondary copyright liability apply to enterprises that, like respondents, brazenly encourage and profit from infringement. Unless respondents and those like them can be held accountable, copyright will soon mean nothing on the Internet, and the incentives on which our copyright system rests will be imperiled.


85. Id.

86. Id.
ing under attack by the Jeffersonians, is not a specific set of copyright entitlements but rather the economic "value of copyright," which is strikingly portrayed as the innocent victimized by brutality. As Hilary Rosen described, the portent of the DMCA is its recognition that "content has value and it's worth protecting. And, the technology and consumer electronics industries—and ultimately consumers—all benefit by working with us to deliver secure content in the digital marketplace. This mutuality of interests has flowed from the DMCA framework." 87

More measured expressions of concern about the threat of copying can also be found. For example, the Register of Copyrights has recently spoken of the need to address "the most important issue facing our copyright system today: new services that employ peer-to-peer technology to create vast, global networks of copyright infringement." 88 Similarly, in a carefully reasoned report, the Congressional Budget Office (CBO) advocates strengthening the ability of rights holders to control use. The CBO concluded that although the economic analysis is complex, "the magnitude of illicit consumption of copyrighted works in digital form today—music files shared over the Internet, for example, or movie and software illegally reproduced and distributed on CD-ROM—suggests that potential efficiency gains can be realized by applying advances in digital technology to legal markets for creative works." 89

As one might expect, academics with Hamiltonian leanings are more balanced in their views and their rhetoric is more re-


89. CONGRESSIONAL BUDGET OFFICE, COPYRIGHT ISSUES IN DIGITAL MEDIA, at vii (2004). The report discusses a variety of factors, pro and con, that might be implicated by the use of digital rights management and other techniques to impose differential charges for different uses of materials. See id. at ix–x; cf. Trotter Hardy, Property (and Copyright) in Cyberspace, 1996 U. CHI. LEGAL F. 217, 219 (concluding that a "property regime more narrowly defined than under current copyright laws—more 'privatized'—would offer considerable savings in group negotiating and bargaining costs").
strained than that of industry advocates like Valenti. Nevertheless, similar themes can be found in the work of academic advocates of strong copyright protection. For example, Jane Ginsburg explains that the prospect of "mass uncompensated copying by the public" motivates "the feeling of desperation and even moral outrage that one senses pervades many of the copyright owners' actions." She warns of the risk that unstrained Internet use may "undermine the ability of copyright owners, and especially of individual creators, to make a living from their creativity." Ginsburg reminds us that "traditional copyright doctrine . . . does not compel, and should not counsel, socializing the fruits of new modes of copyright exploitation."

Congress seems to have shared such concerns. (That would be no surprise to the Jeffersonians, who would attribute it to illicit political influence by the media and entertainment industries.) As the Second Circuit said regarding the DMCA: "Fearful that the ease with which pirates could copy and distribute a copyrightable work in digital form was overwhelming the capacity of conventional copyright enforcement to find and enjoin unlawfully copied material, Congress sought to combat copyright piracy in its earlier stages, before the work was even copied." Thus, the DMCA is a monument to Hamiltonian fears (and, unsurprisingly, therefore a prime Jeffersonian target).

The historical parallel with Hamilton is again striking. A similar desire to use monopolies as incentives for economic progress was strong among Hamilton and his fellow members of the Federalist Party:

The Federalists, in general, believed monopolies could advance the commonweal. As their deep commitment to the federally incorporated Bank of the United States demonstrates, Hamilton and other members of the Federalist Party did not share the deep fear of government-created monopolies that plagued the Republicans [like Jefferson]. Similarly, at the state level, the debate about the legitimacy and the scope of state-granted monopolies in fields such as banking, steamboat franchises, bridges, ferries, and canals was a debate between Federalists [like Hamilton], who typically believed monopolies could be an engine of economic progress, and Republicans [led by Jef-

90. See Ginsburg, supra note 43, at 45.
91. See id. Ginsburg's emphasis on "individual creators" is a significant and arguably non-Hamiltonian element in her approach.
92. See id. at 41.
ferson], who typically viewed monopolies as vehicles for illegitimate creation of privilege.\textsuperscript{94} History, it seems, sometimes does repeat itself.

It is important to note that today's Hamiltonians, in their efforts to maintain incentives for rights holders, do not view themselves as upsetting the traditional balance of copyright law. Jane Ginsburg criticizes some cases of overreaching by rights holders, and observes approvingly that the courts applied the "fair use privilege" to limit such overreaching.\textsuperscript{95} (Note the terminology, however: what the Jeffersonian's view as a right she portrays as a privilege.) She views these cases as proving "The System Still Works."\textsuperscript{96} She also sees "little concrete evidence" that the DMCA has diminished fair use.\textsuperscript{97} Instead, she says, "whatever its many imperfections," the DMCA "endeavors to foster a digital environment in which enhanced security encourages the digital release of works, and limitation on service provider liability promotes their broad circulation."\textsuperscript{98}

B. HAMILTONIANISM AND SCHUMPETERIAN ECONOMICS

We have seen that today's Jeffersonians combine their view of IP and speech issues with a broader economic and social vision. The same is true of the neo-Hamiltonians. As with Hamilton, one of their primary appeals is to economic growth. Just as Hamilton applauded the Bank of the United States, so the head of the Motion Pictures Association touts his industry:

The Copyright Industries (movies, TV, home video, music, publishing and computer software) are America's greatest trade prize. We are creating jobs at three times the rate of the rest of the economy. We bring in more international revenues than aircraft, more than agriculture, more than automobiles and auto parts. What is more astonishing and more valuable is that we have a Surplus Balance of Trade with every single country in the world, while in 2000 this nation suffered an unholy rise to almost $400 Billion in Deficits. No other American business enterprise can make that statement, which is why we represent an economic engine of growth that is the envy of the known world.\textsuperscript{99}

\textsuperscript{94} See Schwartz & Treanor, supra note 60, at 2383–84.
\textsuperscript{95} Ginsburg, supra note 11, at 66–67.
\textsuperscript{96} Id. at 67.
\textsuperscript{97} Id. at 71.
\textsuperscript{98} Id. at 73.
"[I]f Copyright is allowed to decay," Valenti warned, "then this nation will begin the slow undoing of an immense economic asset"—for who, he asked, "will invest huge amounts of private risk capital in the production of films if this creative property cannot be protected from theft?" Hamilton, who worried continually about property rights, economic growth, and trade issues, could not have said it better.

Such economic growth, however, needed congressional protection. Hilary Rosen warned that

[i]n a global information network, protection of the creative materials that are such a critical part of this country's economic backbone is only as strong as the weakest link in the information communication chain. Thus, there is an absolute necessity to eliminate existing gaps in the international legal structure that undermine the protection enjoyed by U.S. copyright holders in national and international channels of commerce.

Among economists, the figure who best expressed this perspective was Joseph Schumpeter. He argued that in the modern world, innovation requires extremely expensive research and development. Developing and then marketing a new product or process requires massive resources, beyond those available to small firms or private individuals. Large corporations that can amass funds through the exercise of market power are in Schumpeter's view the true sources of economic progress under modern conditions. Schumpeter had quite possibly never heard of Hamilton, but there is an obvious kinship. Today, economists debate whether he was right about the positive correlation between market concentration and innovation, but his view continues to have support.

In this vision, the very forces that frighten the Jeffersonians are portrayed by Hamiltonians as sources of enlightenment and progress. Far from being the enemies of a rich and diverse public discourse, large firms are the engines of progress—supplying the capital and expertise necessary to reach global audiences with popular products. Similarly, major firms

Operating Officer, Motion Picture Association).

100. Id.
102. See WIPO Copyright Treaties Implementation Act Testimony, supra note 83, at 44 (prepared statement of Hilary B. Rosen, President and Chief Executive Officer, Recording Industry Association of America).
like Microsoft or Intel provide the world with the efficiencies of industry standards, while financing the huge investments needed to implement new ideas.\textsuperscript{104} Again, broad economic conceptions help motivate neo-Hamiltonians' views of IP law in general and its constitutional dimensions in particular.\textsuperscript{105}

This is hardly the right place (nor am I the right author) to evaluate the competing economic models. The economic arguments on both sides are subtle and sophisticated. Despite some brilliant efforts, economists still do not have a firm understanding of how IP rights and industry structure affect innovation. Thus, even for those of us with Jeffersonian inclinations, the Hamiltonian case cannot be rejected out of hand. Indeed, this uncertainty about the economic issues may make the assignment of the burden of proof—and thus the choice of baselines—all the more important.

\textbf{III. CHOOSING BASELINES}

What is at stake in the IP debates, at least in part, is the choice of baselines. Does the baseline consist of broad user rights, which cannot be curtailed without compelling reason, or of secure IP rights, whose investors must be securely protected?

Neither the Jeffersonians nor the Hamiltonians are content to look to popular opinion to set the baseline. Indeed, each side fears that the popular culture's view of the baseline has shifted against them. Consider Lawrence Lessig's lament that the IP owners have already won the battle for the hearts and minds of the American people:

The ordinary person believes, as Disney's Michael Eisner does, that Mickey Mouse should be Disney's for time immemorial. . . . [T]he ordinary person has become so accustomed to the idea that culture is managed—that corporations decide what gets released when, and that the law can be used to protect criticism when the law is being used to protect property—that the ordinary person can't imagine the world of balance our Framers created.\textsuperscript{106}

IP owners, however, fear that it is they who are losing the battle for the hearts and minds of the public. Consider the view

\textsuperscript{104} One imagines that the Jeffersonians use the Linux Operating System while the Hamiltonians favor Microsoft Windows.

\textsuperscript{105} For a critique of Hamiltonian-like arguments regarding the benefits of strengthened IP rights, see Lemley, \textit{supra} note 103, at 132–41 (suggesting that the arguments reflect a fundamental distrust of competitive markets—as opposed to managerial discretion—as a means for allocating resources).

\textsuperscript{106} Lessig, \textit{supra} note 26, at 1069. “Protect criticism” is probably a slip; the context suggests that Lessig meant “suppress criticism” or the like.
of Jack Valenti, speaking on behalf of the Motion Picture Association:

Creative property is private property. To take it without permission, without payment to its owners, collides with the core values of this society. Yet that is precisely what is happening. Otherwise rational people who would not dream of stealing a videocassette off the shelf of a Blockbuster store are using movies without permission or payment, which is, for many, the assumed normality of current Internet behavior. It is estimated that today some 370,000 movies are being downloaded, illegitimately, every day. By the end of the year it is estimated that one million illegal downloads will take place every day.107

Indeed, I have yet to meet anyone under thirty who sees any moral problem with Napster or similar file-swapping systems.

Both sides are right to worry about the baseline. But note that both sides also claim that their preferred baseline is not just a vision of the future but one that deserves to be treated as the status quo from which deviations must be judged. Lessig appeals to the Framers' world of balance. He says that this balance characterized copyright law as recently as a generation ago, until nefarious forces caused the balance to collapse. Valenti invokes the "core values of our society," which he alleges are now grievously under attack.108 These invocations are rhetorically powerful because they appeal to our sense that changes in the status quo need justification, and because they link the speaker's preferred viewpoint to revered traditions. These efforts to characterize positions as defending the status quo against dangerous threats are also heartfelt on both sides, not "mere rhetoric."

Yet oddly enough, while both sides insist they merely want to defend the status quo, both are quick to proclaim that in reality the Internet is a whole new ballgame. Here's Jack Valenti again: "The Internet, without doubt, is the greatest delivery system yet known to this planet. It has the potential to reshape how we communicate, how we buy and how to enlarge the dispatch of knowledge on a scale never before exhibited."109

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107. See Online Entertainment Hearing, supra note 99, at 12 (statement of Jack Valenti, Chairman and Chief Operating Officer, Motion Picture Association of America).

108. Id. Actually, all of society's core values seem to line up behind the content providers, they contend. In browsing through congressional testimony, I was struck by the way they invoked not only property rights but also the threats of terrorism and child pornography (yet another reminder that "there's trouble right here in River City") as support for their legislative initiatives.

109. Digital Future of Movies, supra note 84, at 95 (statement of Jack
On the other side, the Jeffersonians have waxed equally enthusiastically about the novel possibilities of the Internet and other digital technologies. For instance, postmodernists and feminists have characterized the Internet and its hypertext as inaugurating a new relationship between readers, authors, and texts.\textsuperscript{110} Others applaud the potential of the Internet to empower new social movements that could not previously have taken hold:

\begin{quote}
From neo-Nazism and Christian Identity to gay liberation and disability rights, from libertarians, home schoolers, and property-rights enthusiasts, to environmentalists, Zapatistas, and anti-corporate activists, it is hard to find an aspiring social movement, new or old, of left, right, or center, without a website, a bulletin board, and an e-mail list.\textsuperscript{111}
\end{quote}

Even observers who have concerns about potential negative side effects of the Internet speak of the “astonishing opportunities” it offers\textsuperscript{112} and of its “explosively changing social, economic, technological environment.”\textsuperscript{113}

Although both sides agree that the digital age brings unprecedented possibilities, they identify conflicting potentialities. Because the new technological environment has crosscutting effects, the stakes in controlling that environment are high. As Jack Balkin explains,

\begin{quote}
The digital revolution makes possible widespread cultural participation and interaction that previously could not have existed on the same scale. At the same time, it creates new opportunities for limiting and controlling those forms of cultural participation and interaction. The digital age makes the production and distribution of information a key source of wealth. Therefore it creates a new set of conflicts over capital and property rights that concern who has the right to distribute and gain access to information.\textsuperscript{114}
\end{quote}

Valenti, President and Chief Executive Officer, Motion Picture Association of America).

\textsuperscript{110} See generally Dan L. Burk, Copyright and Feminism in Digital Media (unpublished manuscript on file with the author).


\textsuperscript{112} Cass R. Sunstein, Republic.com 203 (3d prtg. 2001).

\textsuperscript{113} Wagner, supra note 25, at 1026.

\textsuperscript{114} Balkin, supra note 1, at 3. Balkin takes the Jeffersonian side of this conflict:

Thus, at the very moment when ordinary people are empowered to use digital technologies to speak, to create, to participate in the creation of culture, and to distribute their ideas and innovations around the world, businesses are working as hard as possible to limit and shut down forms of participation and innovation that are inconsistent.
If these were indeed a "new set of conflicts," it would be surprising if they could be settled by routine application of an existing legal regime grounded in an entirely different technological setting.

Because the Internet is such a radical new technology, it is hard to see how we can meaningfully speak as if the rights of users or content providers on the Internet had been determined ahead of time. We cannot meaningfully translate copyright rules to the digital world without considering the goals of the copyright regime. For example, there is no inherent logical answer to whether file sharing of music is like loaning a CD to a friend or like providing a facility for making hundreds of free copies. Even if we were sure of how the old rules applied to digital media, we might or might not want to follow them. Copyright established a balance between providing incentives to creators and empowering users. But simply transplanting the same set of rules to the Internet might not achieve anything like the same balance (and indeed, the same balance may or may not be appropriate). The dramatic increase in the potential for digital copying means that the same user rights cannot coexist with the same incentives for creators as in earlier media.

At the same time as it created an argument for decreased user rights to maintain producers' incentive, technology also created counterarguments for broader user rights. The Internet may create opportunities for forms of creativity that do not need the economic incentive created by IP, of which one possible example is the creation of open source software. Furthermore, the increased potential for copying also expanded the potential social value of a subset of those user rights (for example, by making possible the creation of online archives of historical materials). Thus, it is not entirely clear whether the Internet calls for stronger IP rights or weaker ones. In short, there is real work to be done in "translating" (or perhaps one should say "rewriting") the nondigital regime into the very different digital environment.

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with their economic interests.

Id. at 15.


116. The translation metaphor is of course Lessig's. See Lawrence Lessig, Translating Federalism: United States v. Lopez, 1995 SUP. CT. REV. 125, 130 (1995). Of course, unlike the metaphor, the activity is widely spread; many IP
The juxtaposition of pleas for the status quo and celebration of profound newness is jarring. Imagine settlers disembarking from a space ship onto an uninhabited planet. With no existing property regime on the planet, the settlers must draw their own lines. They are unlikely to do so from scratch; instead, they will most likely borrow from the practices of their home world to find a baseline in the new world. The trouble is that if the new planet is really different from the old, the old regime cannot be transplanted wholesale. Aspects of the regime that were consistent in the old world—in our case, strong incentives to create new works and broad rights for individual users of those works—may conflict in the new one, requiring us to choose which aspects of the old world we want to extend by analogy to the new. By picking and choosing, particular settlers construct their own preferred vision of the "status quo," and then accuse the other side of radical attacks on established principle. Thus it is for the settlers of cyberspace.117

Rather than confront this need for constructing a new regime out of parts of the old one, both sides of the digital debate have tended to deny the need for change—constructing their own version of the status quo to correspond with their desired legal regime. One version stresses the economic entitlement of creators to fair returns; the other stresses the legal entitlements of users to the public domain. Neither side can be fairly accused of dishonestly manipulating rhetoric when they portray themselves as beleaguered defenders of the status quo. Instead, they both seem entirely sincere—indeed, adamant—in their visions that it is they who are defending the true status quo and their opponents who are nefariously undermining it. For the same reason, each side seems honest in its belief that it is the defender of expressive freedom and its opponent a threat

scholars are engaged in the effort at translation, of whom Lessig is only one.

117. A less fanciful example would be the problem of water use in the arid western United States. As applied in England and in the East where water was plentiful, the existing water law regime allowed economically beneficial use of water while still according strong rights to downstream users. In the West, however, use of water meant consuming it for agriculture or other purposes, depriving downstream users of access. A new water regime—prior appropriation law—evolved under these conditions. It limited previous riparian rights (which are somewhat analogous to IP user rights). The situations are quite different, of course, and there is no reason to think that the solution, i.e., stronger rights of appropriation, ought to be the same. The point instead is that defining western water rights was not a matter of defending or attacking some existing status quo of water rights, but of creating a new regime to govern new bodies of water in a different climate.
to the rights of speakers. The disagreement over baselines helps frame the whole debate: each side tries to convince the other that its position is obvious and natural, whereas the other side's is radical and contrived.

IV. THE SUPREME COURT GETS IN THE BASELINE-CONSTRUCTION GAME

It was inevitable that this growing dispute about IP rights and their relationship to free speech would reach the Supreme Court. When the Court did rule on the subject, Jeffersonians were bitterly disappointed, believing the Court had upheld a blatant example of monopolistic greed. But in more subtle ways, there were significant Jeffersonian elements in the Court's analysis.

A. THE ELDRED LITIGATION

*Eldred v. Ashcroft* involved the Copyright Term Extension Act (CTEA), also known as the Sonny Bono law after one of its inspirations. CTEA extended the copyright term by twenty years, so that it is now in most cases the author's life plus seventy years. Even more notably, the extension was retroactive, so that copyrights that were about to expire were given a new lease on life. Ably represented by Lawrence Lessig, the plaintiff in *Eldred* contended that the retrospective extension exceeded Congress's power under the Copyright Clause and violated the First Amendment.

As the two dissenting opinions in *Eldred* make clear, the "limited Times" argument has real bite. The Constitution purportedly only gives Congress the power to grant copyrights for "limited Times." Yet today, for all practical purposes, the term might as well be forever. As Justice Stevens pointed out, "only one year's worth of creative work—those copyrighted in 1923—has fallen into the public domain during the last 80

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120. For an overview of the debate over the CTEA prior to *Eldred*, see Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 413–22 (2002).
121. 537 U.S. at 223-27 (Stevens, J., dissenting); *id.* at 242–67 (Breyer, J., dissenting).
years."\textsuperscript{123} CTEA assured that no other twentieth-century work would enter the public domain.\textsuperscript{124} The effect of CTEA will be, as Justice Breyer explained, "the transfer of several billion extra royalty dollars to holders of existing copyrights,"\textsuperscript{125} which obviously was not necessary to provide a retroactive incentive to create those works. Justice Breyer also observed that CTEA gave the average author 99.8\% of the economic value of a perpetual copyright.\textsuperscript{126} Also, it was no secret that some members of Congress would have preferred a perpetual term. In fact, the statute was named in honor of a member of Congress who "wanted the term of copyright protection to last forever."\textsuperscript{127} This is not a pretty picture.

Nevertheless, Justice Ginsburg's majority opinion rejected the "limited Times" argument. She relied on a history of previous retroactive extensions of the terms of IP protection and viewed Congress's purported desire to harmonize copyright terms with the European Union as a sufficient justification for the change.\textsuperscript{128} Fundamentally, the majority seemed to be unwilling to second-guess Congress in the inevitably uncertain enterprise of setting the copyright term. If it had not been for the history of prior retroactive extensions, the CTEA might have been at more serious risk of being struck down.

The plaintiffs also made a First Amendment argument. The extension of copyright terms had a significant effect on speech, making it impossible to offer cheap editions of early twentieth-century authors and hampering the ability to establish online archives with photos and letters from the same period.\textsuperscript{129} If, as Justice Breyer plausibly argued, CTEA had little

\begin{itemize}
\item \textsuperscript{123} Eldred, 537 U.S. at 241 (Stevens, J., dissenting).
\item \textsuperscript{124} On the positive side, the CTEA provides an indirect incentive to make adaptations of the work of Jane Austen and Charles Dickens, since their novels can be used for free while later works by authors such as Hemingway and Faulkner still have copyright protection and have to be paid for. If it weren't for the CTEA, perhaps we would see adaptions of twentieth-century authors instead of nineteenth-century ones—so perhaps the CTEA should be credited with helping to keep the classics alive!
\item \textsuperscript{125} Id. at 249 (Breyer, J., dissenting).
\item \textsuperscript{126} Id. at 255–56.
\item \textsuperscript{127} Id. at 256. Justice Breyer also expressed skepticism about the breadth of copyright protection during his earlier career as an academic. See generally Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 HARV. L. REV. 281 (1970).
\item \textsuperscript{128} Eldred, 537 U.S. at 200–06.
\item \textsuperscript{129} Id. at 250–53 (Breyer, J., dissenting). It should be noted that even the song "Happy Birthday to You," first copyrighted in 1935 but with a melody
to offer in the way of countervailing benefit, this burden on speech might seem hard to justify.

Yet Justice Ginsburg also rejected the First Amendment claim. She declined the invitation to apply "a heightened form of judicial review" to CTEA. Tracking language in earlier decisions, she relied on the purpose of the copyright law (which she considered friendly to the First Amendment because it is intended to promote speech), and on copyright law's "built-in First Amendment accommodations." By the latter, she meant the idea/expression distinction and the fair use doctrine, which she characterized as allowing "considerable 'latitude for scholarship and comment,' and even for parody."

This brings us to what is, for our purposes, the most significant passage in the opinion:

The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches. To the extent such assertions raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. Circuit spoke too broadly when it declared copyrights "categorically immune from challenges under the First Amendment." But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.

This passage bears every sign of careful drafting. The thrust in favor of immunizing traditional copyright is clear, but even with regard to traditional copyright there are hedges: the First Amendment "bears less heavily" (but still does presumably bear somewhat?) and copyright's safeguards are "generally adequate to address" free speech concerns (but perhaps not always?). Moreover, the Court spoke in terms of copying, which suggests that more transformative uses might come out differently under the First Amendment. Most significantly, there is the holding's limitation to cases where "Congress has not altered the traditional contours of copyright protection." The implication clearly seems to be that further First Amendment scrutiny is in order when Congress has altered those contours.

many years older, remains under copyright today. Id. at 261.
130. Id. at 218–19.
131. Id. at 219.
132. Id. at 220 (quoting Harper & Row Publishers, Inc. vs. Nation Enter., 471 U.S. 539, 560 (1985)).
133. Id. at 221.
B. *Eldred* and the Baseline Question

What makes *Eldred* particularly interesting for our purposes is its bearing on the baseline question. In its discussion of the "limited Times" argument, the Court seems to adopt a Hamiltonian perspective of broad congressional power to encourage investment in IP. At the same time, the Court disclaimed any real ability to determine the effectiveness of such measures or whether they provide an excessive return to IP owners. Correspondingly, the Court rejected Justice Stevens's quite Jeffersonian plea to police against the monopolistic possibilities created by copyright. To the extent Lessig and his fellow Jeffersonians were hoping to enlist the Court in an assault on the moneyed interests of media corporations, they were necessarily disappointed. It would, however, have been surprising for a court as conservative as this one to take up that task.

Having abandoned economics as a constitutional standard for the scope of the IP Clause, the Court was then faced with the speech issues. Once it had disclaimed any ability to judge the fairness of the return to copyright holders, the Court could not make the test for First Amendment validity turn on whether the measure maintains fair returns for copyright holders. (Or rather, if it did, it would have had to withdraw from the area entirely, leaving it up to Congress to decide on the boundaries of copyright protection free from any judicial scrutiny under the First Amendment.) Instead, the Court resorted to a baseline defined in terms of user rights. Those rights, according to the Court, are the limitation of copyright protection to forms of expression as opposed to the ideas or facts communicated, and the availability of the fair use defense which "affords considerable 'latitude for scholarship and comment' and even for parody."134 After *Eldred*, it appears that these rights have some First Amendment status.

The user-centered baseline is an important element of the Jeffersonian perspective on IP. The idea is that user rights are not leftovers, excluded from IP protection merely as inefficient and unnecessary to maintaining the necessary incentive level. Instead, the idea/expression distinction and the fair use defense are portrayed as being exemplified by constitutionally prized activities such as scholarship and comment, not to mention parody.

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Perhaps as important as its constitutional implications, *Eldred* seems to have an important message in terms of interpretation of the copyright statutes. If these user-friendly doctrines are not merely gratuitous privileges granted by Congress, but instead are constitutionally rooted in First Amendment values, it behooves courts to interpret them generously. Bearing in mind the free speech values of these exemptions could lead courts to steer away from some of the more expansive interpretations of copyright found in recent lower court opinions. Indeed, the Court seems to have given lower courts a strong signal to this effect. In a footnote discussing the plaintiff's attempt to distinguish his declaratory judgment action from the defense of an infringement action, Justice Ginsburg said: "In both postures, it is appropriate to construe copyright's internal safeguards to accommodate First Amendment concerns." This is a directive to interpret the statute to provide liberal protection for these user rights. Hopefully, lower courts will take the hint, as the Eleventh Circuit apparently has already done.

C. THE DMCA AND THE DIGITAL MILLENIUM

The natural next question is: Where does *Eldred*’s Jeffersonian baseline leave the DMCA at the dawn of the digital millennium for which it was named? Clearly, it leaves the statute in a position of some constitutional risk.

Much may depend on how the courts ultimately assess the factual justifications for the DMCA and its impact. That is a topic that goes well beyond the scope of this Article. One plausible possibility is that courts may adopt something like this middle-of-the-road assessment:

Industry representatives make personal digital copying sound like Armegeddon [sic]. User advocates make Congress and the industry sound like fascists or Javert-like monomaniacs. Both positions are exaggerated. The data do not justify the claim that consumer copying will kill content. At the same time, the DMCA’s effort to preserve a

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135. *Id.* at 221 n.24. This statement is further confirmation that the Court places serious weight on the First Amendment right to engage in fair use.


regime of contract and consent has a coherent ethical and economic foundation, if a debatable one. Its contours may well need adjusting.  

Of course, to the extent that a court does adopt the copying-as-Armageddon or DMCA-as-fascism approaches, the level of scrutiny probably will not make much difference. But in what I think is the more likely scenario—in which the question is trading off the statute’s legitimate anti-infringement effects with its questionable effects on fair use and use of public domain materials—the seriousness with which a court probes the factual issues could be crucial. Conventionally, courts approach the question of how hard a look to take at the facts in terms of setting the “level of scrutiny.”

Before *Eldred*, commentators debated whether copyright restrictions on speech should be considered content based and therefore subject to some kind of heightened scrutiny.  

*Eldred* makes it clear that traditional copyright restrictions are not subject to strict scrutiny, or even to a heightened form of the scrutiny applied to content-neutral regulations. What is less clear, however, is the level of scrutiny that applies when a statute bars traditionally protected practices like fair use.

One possible line of argument is that the use of circumvention technologies is so intimately connected with fair use and other protected uses that the restriction should be seen as aimed directly at protected speech. One might analogize to the Court’s view that limits on political spending are worthy of strict scrutiny because the ability to engage in political expression is so tightly connected with access to funding.  

Of course, there’s an empirical assertion here about the need to use circumvention technologies to engage in fair use that would need proof. Consider a statute that prohibited reproduction of excerpts of speech by any mechanical means such as a Xerox or word processor, even when the speech is in the public domain,
or when the copying is for a legitimate purpose that outweighs its economic impact on the original author. This seems to be a restriction on speech at least as powerful as a spending limit, and much more worthy of judicial scrutiny than the typical time, place, and manner restriction. To the extent that the level of scrutiny is just a legalistic way of asking, "How worried should we be about this statute?" there seems to be a good argument for setting the level of scrutiny fairly high.

Another line of argument would support treating the DMCA as content neutral. It is true that the DMCA is in some sense concerned with content—the idea is to promote the use of certain digital technologies to distribute content, while banning the use of countertechnologies—but the statute's basic justification is as a means of enforcing the copyright laws. Eldred makes it clear that the copyright laws, though arguably content based themselves, raise no constitutional red flags. On the other hand, Eldred strongly indicates if it does not actually hold, that doctrines like fair use are rooted in the First Amendment. Thus, even if it is considered content neutral, the DMCA burdens speech and is subject to First Amendment scrutiny.

This second line of argument would result in the application of the O'Brien test. This test first calls for courts to identify a legitimate purpose unrelated to content, to test the means to ensure that they are not unnecessarily burdensome on speech, and to determine whether ample alternative channels for speech remain open. This test has been applied with various degrees of vigor, often amounting to a free pass for the government but sometimes involving real scrutiny into the choice of legislative means.

Parsing terms like "content neutrality" is unlikely to definitively establish the level of scrutiny. Although the courts will probably announce that they are applying some specified level of scrutiny, the determining factor is likely to be the statute's potential impact on speech values. Whatever the rubric, courts should examine the DMCA with care for two reasons.

141. It is important, in this setting, to realize that the Court has not been successful in providing a crisp definition of content-based regulation. See FARBER, supra note 140, at 27–31. Thus, whether to treat the DMCA as content based (or as equivalent to a content restriction) cannot simply be decided by application of a clear-cut test.
143. For discussion, see FARBER, supra note 140, at 25–26, 54–55, 179–82.
First, if the academic commentators are to be believed, the DMCA's potential for restricting speech far exceeds the kinds of traditional content-neutral rules that the Court has reviewed (e.g., limitations on the locations of parades, the use of sidewalks for leafleting, and the like). Given their potentially pervasive impact on traditional speech rights, statutes such as the DMCA deserve closer scrutiny than a ban on leafleting outside the door of a post office. Second, even when it applies content-neutral review, the Court has done so with particular vigor when a regulation shuts off a traditional channel of communication. Given Eldred's characterization of the long-standing exceptions from copyright protection, fair use and other protected uses seem to qualify as "traditional channels" as much as front-yard lawn signs, for example. If the DMCA shuts off these traditional channels, it would seem to qualify for more vigorous review.

The standard of review question is difficult because copyright, like the DMCA, is an awkward fit with the content distinction that purportedly drives the standard of review. It does not suffer from the core vices of content-based regulation. Copyright and the DMCA protect expression indiscriminately, with no favoritism toward a particular viewpoint or subject matter. Yet, they are not exactly content neutral either. They are both deeply concerned with content, and their central purposes focus on the content of speech—encouraging more and more original content. Copyright's various exemptions also are connected with content, such as the idea/expression distinction. Rather than squeezing copyright within these classifications, Eldred seems to view it as sui generis. This is true of the DMCA as well.


145. See City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) (striking down content-neutral ban on lawn signs in residential areas because this closed off a traditional mode of communication).

146. Lemley and Volokh argue against treating copyright as a time, place, or manner restriction on similar grounds. See Lemley & Volokh, supra note 139, at 702–13.

147. Perhaps copyright infringement, like obscenity, should just be considered a traditional category of unprotected speech. Just as in the case of obscenity, however, the Court should be careful not to allow the unprotected category to expand beyond its traditional boundaries.
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In the end, it is unlikely that the fate of the DMCA will be determined by subtle arguments about levels of scrutiny. It is more likely to hinge on the strength of two other factors. The first factor is simply the strength of the empirical case against the DMCA: How much protected speech is impinged? How strong is the justification? Is the remedy unnecessarily sweeping? In *Eldred*, the majority seems not to have appreciated the negative impact of CTEA on speech. Although Lessig is probably wrong to blame himself for failing to emphasize this fact, he is right that this had some influence on the result. Whether the courts see the DMCA's broad sweep as really burdening speech, and whether they find a real justification for that broad sweep, are probably critical to the ultimate decision on its constitutionality.

The other factor that will drive the decision on the DMCA is the extent to which the Court ultimately accepts the Jeffersonian baseline. *Eldred* makes it clear that the traditional copyright limits have constitutional significance, if only to mark the limits of copyright's First Amendment "safe harbor." It is also fair to see in *Eldred*, particularly in its emphasis on fair use and the idea/expression distinction, a view that the traditionally exempted uses have important First Amendment value. *Eldred*'s discussion of these exempted uses is in the service of an argument in favor of the First Amendment acceptability of the copyright system as a whole. This suggests that the exemptions themselves are important to the

148. See Lessig, supra note 118, at 57 (2004). Lessig went on to lament that:

Defeat brings depression. They say it is a sign of health when depression gives way to anger. My anger came quickly, but it didn't cure the depression.

It was at first anger with the five conservatives. It would have been one thing for them to have explained why the principle of *Lopez* didn't apply in this case. That wouldn't have been a very convincing argument, I don't believe, having read it made by others, and having tried to make it myself.... These justices in particular have repeatedly said that the proper mode of interpreting the Constitution is "originalism".... Where was their "originalism" now? *Id.* at 63. Lessig unnecessarily blames himself:

That "grand experiment" that we call "the public domain" is over .... When I can make light of it, I think, "Honey, I shrunk the Constitution." But I can rarely make light of it. We had in our Constitution a commitment to free culture. In the case that I fathered, the Supreme Court effectively renounced that commitment. A better lawyer would have made them see differently.

*Id.*

validity of the whole system, and that a system of IP protection that lacked these protections would be suspect. If so, incursions on these rights should require exceptional justification. Hence, the Jeffersonian baseline ought to be taken seriously, and the courts should view government incursions on that baseline with real skepticism.\(^{150}\)

As this discussion indicates, I am skeptical of the utility of the Court's current framework for analyzing First Amendment issues. In particular, it is doubtful that the Court's framework will generate clear answers to issues about IP rights. Thus, current doctrine seems somewhat dysfunctional to me as an analytical construct. But the doctrine is an effort to get at an important question, which is how much we should distrust various forms of regulation bearing on speech. Thus, the problem is not that different laws warrant different levels of scrutiny, but that it is difficult to formulize the complex and sometimes elusive question of how hard a judge should look at a particular statute's justifications.

Assuming the Court does take a hard look at the DMCA, how will the statute fare? This will depend on a factual record that does not yet exist.\(^{151}\) Congress seems to have had qualms about the effects of the statute on legitimate users of digital

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\(^{150}\) In a thoughtful analysis of free speech and copyright prior to *Eldred*, Neil Netanel argued for application to copyright issues of a heightened version of *O'Brien* scrutiny, using the Supreme Court's opinions on regulation of cable television as a model. See Netanel, *supra* note 139, at 54–59, 69–85. The Supreme Court rejected that argument in *Eldred*, instead creating a safe harbor for traditional copyright doctrine. *Eldred*, 537 U.S. at 218–21. But, as we have seen, the Court did not explain what happens outside of that safe harbor. See *supra* Part IV.B. In the context of nontraditional restraints on users, Netanel's proposed test seems plausible and is not foreclosed by *Eldred*. Admittedly, *Eldred* does reject the cable television cases as models for this form of scrutiny in copyright situations. See *Eldred*, 537 U.S. at 220. But this doctrinal hook is not essential to the argument in favor of the *O'Brien* test.

\(^{151}\) For a suggestion of how the DMCA's legislative history cuts, see Netanel, *supra* note 139, at 77–81. One question that comes to mind concerns the difference between the availability of exemptions to the use prohibition and their unavailability for the distribution prohibition, which means that an exempted use may be impossible as a practical matter unless the user is in a position to create its own circumvention technology. Would it really be impractical to make circumvention technology available under careful restrictions to libraries and other possible sets of restricted users? (For example, the anticircumvention technology itself might be guarded by another layer of anticircumvention technology to which only exempted users would be given access.) Another question is whether the anticircumvention ban will really be effective against its primary target of large-scale copying, or whether its effect will be disproportionately felt by legitimate users.
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materials, providing administrative rule making by the Librarian of Congress as a remedy. In any event, if the DMCA is to survive scrutiny post-*Eldred*, there must be a showing that its extraordinary breadth is warranted by need to prevent wholesale infringement.\(^{152}\) The harsh academic criticism of the DMCA suggests that the statute may not fare well in this inquiry.\(^ {153}\) Given the Jeffersonian baseline for user rights adopted in *Eldred*,\(^ {154}\) the government bears the burden of satisfying the Court that copyright's "built-in accommodation" of free speech has not been fatally undermined.

**CONCLUSION**

Rob Merges has remarked on the crucial role that conceptual frameworks like those discussed in this Article have played in shaping IP law:

There are no natural facts to act as a brake on expansive notions of how broad a right might be, how many people and activities it might reach, or how long it might last. This is of more than passing interest. It means that what brakes and limits there are in this domain exist in our minds, or are encoded in the conceptual rules and principles that

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\(^{152}\) An alternative ground of attack would look, not to the effect of the DMCA on users, but to its effect on the dissemination of circumvention software (viewing such code as a form of speech). The Second Circuit rejected that argument in *Universal City Studios, Inc. v. Corley*, holding that the DMCA had a sufficiently strong justification for imposing a restriction at least on forms of distribution aimed to providing run-able code rather than designed to be read by other programmers. 273 F.3d 429 (2d Cir. 2001). Recall Lessig's description of software as "machines made of words." Lessig, *supra* note 26, at 1063. To the extent that the regulation covers the machinelike aspect of software, rather than its wordlike aspect, First Amendment concerns do not seem serious. The question of how the First Amendment applies to software has, however, given rise to considerable debate and cannot be fully addressed here. For further discussion, see Lee Tien, *Publishing Software as a Speech Act*, 15 BERKELEY TECH. L.J. 629 (2000).

\(^{153}\) Netanel, *supra* note 139, at 81 (viewing the DMCA as "highly vulnerable" under his test and speaking of the statute's "questionable premises" and "fatally capacious scope"); see also Netanel, *supra* note 44, at 28 ("[t]he anticircumvention provisions should not survive *Turner* scrutiny (or, for that matter, any other form of intermediate scrutiny) . . . "). But opinions about the DMCA do differ. A critical but more restrained view is found in Pamela Samuelson, *Toward a "New Deal" for Copyright in the Information Age*, 100 MICH. L. REV. 1488 (2002). The spectrum also includes some supporters of the statute. See Raymond T. Nimmer, *First Amendment Speech and the Digital Millennium Copyright Act: A Proper Marriage*, in COPYRIGHT AND FREE SPEECH—COMPARATIVE AND INTERNATIONAL ANALYSES (Johnathan Griffiths & Uma Suthersaner eds., forthcoming Feb. 2005), at ssrn.com/abstract=572886.

\(^{154}\) *Eldred*, 537 U.S. at 219.
comprise this body of law. Any change in the fundamental underpinnings of the rules thus has potentially serious implications.165

With the Internet and other digital technologies, these are not merely arcane legal issues of interest to a few industries. What is at stake is not merely a clash of viewpoints, but the legal structures that may govern much of the economy and our communal lives.

Given the potential stakes, it is not surprising that the views of scholars and other commentators about the scope of IP law and its constitutional implications are driven by more than disagreements about doctrine or empirical evidence. They implicate broad conceptions of how the economy works, how power is distributed in society, and how individuals can best flourish under contemporary conditions. These are perennial disputes, pitting those who trust institutions against those who stress individualism. Moreover, these fundamental questions seem especially acute when new territories (geographical or technological) open up. Of course, the policy issues are likely to be more nuanced than the rhetoric may suggest, but advocates have a natural tendency to invoke these core values on one side or the other. For these reasons, it is understandable that today's debate resonates so closely with one of the formative episodes in American history: the battle between Hamilton and Jefferson over the future shape of American government and society.

As we have seen, key elements of that early dispute are reflected in today's IP debate, especially in the positions taken by public intellectuals and political actors. On the one hand, we have the neo-Jeffersonians. Like Jefferson, they distrust monopolies and concentrated economic power, for fear that the economically powerful will control public life. They celebrate individualism, both as an intrinsic value and as a key to innovation and growth. Also like Jefferson, they seek to limit federal regulatory power. And like Jefferson, they are fond of celebrating the virtues of free speech and free thought. In contrast, the neo-Hamiltonians favor aggressive government action to promote economic growth. They view large institutions as essential to the contemporary economy and find the Jeffersonians' individualism romantic at best. Realists to the end, they think the best way to encourage desirable activity is not to limit its regulation, but to make it profitable.

155. Merges, supra note 42, at 2239.
Because much of the current debate over IP involves conflicting worldviews rather than isolated empirical or theoretical disagreements, it is accurate to characterize this aspect of the debate as ideological. But this should not be taken to impugn the intellectual seriousness of the debaters. The dispute between Hamilton and Jefferson was also ideological, yet the two are among the most powerful thinkers we have ever had in public life. Moreover, while the Hamiltonian and Jeffersonian perspectives represent poles of the debate, many scholars fall somewhere in the spectrum between those poles or stress different dimensions of IP issues. Thus, the debate is much more than a collision of two opposing dogmas. Nevertheless, the Jeffersonian/Hamiltonian dispute described in this Article reflects deeper disagreements about public values and social realities, and illuminates current debates over IP issues in general.

Specifically, these two viewpoints embody different ideas about the relationship between the First Amendment and IP law. Under the Jeffersonian view, much of IP law is deeply suspect because it authorizes powerful actors to control speech and innovation. By seizing part of the public domain of expression, copyright and its extensions raise fundamental First Amendment issues. Under the Hamiltonian view, however, IP law (and copyright in particular) works in tandem with the First Amendment to encourage expression and new ideas, and any conflict between them is inconsequential and tangential. So far, the Supreme Court has agreed with the Hamiltonians by finding copyright and the First Amendment to be fundamentally amicable. But it has also accepted a key aspect of the Jeffersonian framework by defining the First Amendment baseline to include rights of fair use and the idea/expression distinction. That Jeffersonian baseline may present First Amendment barriers to Hamiltonian projects such as the DMCA. Clearly, it is too early to know how this will all unfold.

In the short run, Jefferson was the clear victor over Hamilton. The Federalist Party was crushed and the Democrats reigned triumphant. In the longer run, it may be closer to the truth to say that Hamilton won. Today’s powerful federal government is Hamilton’s legacy rather than Jefferson’s, complete with the Federal Reserve System—the modern day equivalent of the Bank of the United States. Technological and economic changes vanquished Jefferson’s dream of a small America and his constitutional vision of restricted federal authority, although not his passion for individual rights. In short, he was
defeated not by Hamilton but by the Industrial Revolution. We are facing another round of fundamental technological and economic changes as we move past the industrial era. It remains to be seen whether Jefferson or Hamilton will be the victor this time around.