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Article

***297 IS THERE A RIGHT TO HAVE SOMETHING TO SAY? ONE VIEW OF THE PUBLIC DOMAIN**

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Introduction

In the standard lexicon of intellectual property law, communicative matter is divided into two parts: that which is controlled by a private "owner" and that which resides in the public domain, "free as the air to common use." [FN1] Less readily reducible to a commonplace are the *298 principles that govern how informational material--which I will refer to hereafter using the collective term "speech goods" [FN2]--should be sorted into one or the other of these categories. In particular, very little thought has been devoted to asking whether, under the American legal system, the decision is wholly discretionary that a certain bit of information, an idea, or even the concrete expression of a specific author should ultimately be "free as the air" or subject instead to private control. Might it be convincingly argued that courts and legislatures are actually required to leave some sorts of speech goods available for common use? Or, to put it differently, might some aspects of the public domain be "mandatory" and legally beyond the reach of property regimes?

This question has long been nascent in debates over the public domain, but it was thrown into high relief recently by two recent cases [FN3] that presented challenges to copyright restoration under a provision of the Uruguay Round Agreements Act ("URAA"). [FN4] Section 514 of the URAA amended the Copyright Act of 1976 by permitting copyright to be restored, under certain circumstances, to works of foreign authors or their assigns who had lost protection in the United States by failing to comply with certain technical requirements [FN5] of American law. [FN6] In *Luck's Music Library, Inc. v. *299 Ashcroft and Golan v. Ashcroft*, the plaintiffs challenged section 514 by arguing that Congress had no power under either the First Amendment (the "Free Speech and Press Clauses") [FN7] or Article I, Section 8, Clause 8 of the U.S. Constitution (the "Intellectual Property Clause") [FN8] to take works already in the public domain and place them back under an intellectual property regime.

The government moved to dismiss in both instances. [FN9] But while one court found that neither constitutional provision was violated, [FN10] the other [FN11] refused to dismiss on the ground that both claims were legally cognizable. [FN12] These cases are likely to proceed up through the appellate process and may well be the occasion for the judiciary to address directly something it has never before faced in a serious way: to wit, whether entry into the public domain is permanent.

The restoration question, however, implicates only a portion of the potential scope of a mandatory public domain. The works at issue in the restoration controversy are ones that are, by their nature, facially eligible for protection under the Intellectual Property Clause of the Constitution. The problem, for public domain purposes, arises because the attempt to give them such protection occurs after they have unambiguously lost or failed to acquire the status of intellectual property to which they were initially entitled. In other instances, questions about the nature and requirements of the public domain arise because courts or legislators want to give some form of intellectual property status to speech goods not normally thought to be eligible for such status.

Because discussions of the public domain have largely addressed the costs and benefits to creators and the economy of a rich versus a limited speech commons, little attention has been focused on whether constraints independent of the criteria already mentioned limit lawmakers' decisions on what to inject or

withdraw from the public domain. What might such constraints be, and how strong or weak a *300 case can be made that they exist? Filling that gap is the goal of this Article.

The inquiry is divided into four parts. Part I provides the context for this Article. It explains how views of the public domain have changed over time, and indicates some reasons why contemporary approaches to defending the public domain fall short in the effort to ward off the constant appetite for expanding the boundaries of intellectual property. It then suggests that problems of balancing property rights against free use might look quite different if it could be shown that some forms of speech goods simply cannot be converted to private control. At this point, the emphasis shifts to an examination of the argument that a mandatory public domain indeed exists.

Part II analyzes the Intellectual Property Clause's contribution to the hypothesis that there is a mandatory public domain and shows how it falls short. This section is not a completely fleshed-out account of all that could be said on this subject. Rather, it briefly suggests some of the clearest ways in which the Intellectual Property Clause contributes to the theory of a mandatory commons. It also indicates some current difficulties in interpreting the Clause and questions the viability of using the Clause to make the whole, or even a substantial part, of the case for strict limitations on novel forms of intellectual property.

Concern that the Intellectual Property Clause theory by itself is not up to the job of policing the line between private rights and the public domain has led many scholars in recent years to turn instead to the First Amendment of the Constitution for assistance. [FN13] Part III, the heart of this Article, similarly turns to the First Amendment. The section starts with an explanation of why, in theory, one would expect free speech doctrine to require the existence of a large, protected commons of communicative materials. It then goes on to identify and evaluate the evidence for and against this proposition before concluding that, despite some contradictions and difficulties, the free speech case is a strong one. Finally, in Part IV, I attempt to sketch the outlines of what I understand to be the mandatory portion of the public domain, and to identify preliminarily some implications it will have for the future directions of intellectual property law.

I. The Context: Changing Approaches to Analyzing and Valuing the Public Domain

To ask the question whether some speech goods must stay in the public domain is to wade into an important and much broader controversy over commodification versus free use; the controversy and the reasons for it are a necessary starting point for this Article's *301 special inquiry. Today, the public domain--its nature and its importance--is a subject that divides legislators, corporate and individual participants in creative endeavors, practicing lawyers, and intellectual property scholars in ways that, I suspect, would astonish their counterparts of even twenty-five or fifty years ago. [FN14] Historically, no pressing need existed to defend the centrality of a rich public domain or even to define its components in detail because the importance of keeping as much communicative material as possible out of private control was simply assumed. [FN15] Free use, and not *302 intellectual property status, was understood to be the preferred or natural state for speech goods. [FN16]

Aside from permitting some limited control over the words and symbols used to identify the source of consumer goods, [FN17] or an occasional recourse to notions of common law copyright, [FN18] the main way that speech goods could be kept out of the public domain, for at least a while, was through formal statutory copyright. Even under a statutory scheme, however, private rights were narrowly crafted and the monopoly conferred was only partial. The justification for this may be traced to familiar description of copyright as a "bargain" between authors and the public, [FN19] in which the author receives a limited term of protection from the copying of her expression as an incentive to produce, [FN20] while the public receives access to a new work and complete freedom to utilize its ideas and the factual content of the work. [FN21] After several years, even the formerly protected *303 expression in the work becomes part of the public domain. [FN22] The public domain could pretty accurately be defined as all published expression that copyright did not cover--in other words, it was huge.

Although the privileges enjoyed under the copyright statute have grown more expansive over time, the interest remains limited to the author's original expression, and excludes from coverage, in addition to facts and ideas, even discrete elements of the work's expression, such as individual words or phrases used by the author. Thus it can still be said that most of a copyrighted work continues to be, from the perspective of the

statute, donated to the public domain upon publication. [FN23] And even if the duration of copyright is starting to look more like "forever" than like a limited time, works nonetheless continue to lose protection in the end and become available to each of us to process, reframe, discuss, and even copy in their entirety. [FN24] As a result, no permission need be sought today to quote, republish, or *304 adapt the works of a vast array of earlier authors, from Plato to Chaucer to Shakespeare, to Newton, Dickens, Melville, or Darwin. [FN25] This state of affairs, where speech goods once communicated were free for use except as limited by copyright law, was long accepted as both just and pragmatically desirable since it promoted individual intellectual growth and provided fodder for the development of new products of the human imagination.

Times change, however, and old orthodoxies quickly morph into discredited doctrine. In intellectual property, modern technologies of communication and expanded opportunities for global trade now offer new opportunities for great private gain whenever individuals and entities can increase the kinds or scope of control they enjoy over various subsets of speech goods. Intellectual property is no longer a sleepy legal backwater, but a prime area of economic activity. That change has brought inexorable pressure to not only expand the scope of protection granted to traditional subjects of intellectual property, [FN26] but also to place new forms and aspects of speech goods within the property fold. Millions of dollars a year, for example, can be garnered by someone who holds a legal right to control information about a *305 famous person [FN27] or to grant or deny permission to reutilize all or part of the contents of a published database. [FN28] Adding to the problem, new ancillary legal regimes and new technologies give individuals tools that enable them to define their own intellectual property rights, and, increasingly, to enforce those "rights" without recourse to the courts. [FN29] *306 Thus, thinking of speech goods as property now seems more and more like the norm, and faith in the positive value of the public domain has waned. [FN30]

These developments have tended to leave thoughtful people, all believers in their own ways in the desirability of a vibrant and innovative information environment, arrayed on different sides of a deep intellectual divide. On one ledge stand the public domain skeptics, who for one reason or another do not recognize the preservation of a rich public domain as in any sense fundamental to sound intellectual property theory. One school of thought on this side of the divide holds the concept of the public domain to be a wholly rhetorical one, in reality, representing nothing more than a repository for what is left over after positive property rights have been taken into account. [FN31] Others may take a less dismissive approach, but nevertheless argue that the public domain is not something to which the public is entitled; rather, they see it wholly as an optional subsidy to the public. [FN32] The most negative among the skeptics would go so far *307 as to claim that public domain status is actually detrimental to social welfare, arguing that material, once consigned to it, typically is relegated to oblivion. [FN33]

Increasingly, law and economics scholarship has also weighed in on the anti-public domain side, arguing that information resources are more likely to be created and exploited at optimal levels under a comprehensive private control regime than under one that relies on a large public domain. [FN34] This tack, carried to its logical conclusion, *308 suggests that society would be better served if the bulk of speech goods, including factual information and ideas of a sort once assumed to be incapable of ownership, were put on the table as possible centers of private profit.

Across the chasm, defenders of the public domain awakened to the fact that they could no longer rely on shared assumptions, but now needed to effectively explicate and defend the importance of a rich information commons. [FN35] Much of the important scholarship on the subject, starting with the path-breaking work of Professors David Lange and Jessica Litman, attempts to explain why, if the public domain is significantly shrunk, it will pose a real risk to the workability of the intellectual property regime, the vibrancy of the intellectual and imaginative life of society at large, and the process of innovation itself. [FN36] Arguments in favor of a generous public domain tend to turn, as do those of its opponents, largely on pragmatic judgments about what will best promote a healthy intellectual property policy, [FN37] or on some philosophical or normative *309 understanding of the role of property rights and justifications for awarding them. [FN38]

This scholarship is enlightening, but unfortunately has not proven altogether persuasive in the public arena. In a high proportion of legislative and judicial disputes in recent years, defenders of the public

domain have tended to lose in the face of their opponents' claims that important economic benefits will flow from recognizing new or enlarged private rights in, say, formal copyright, or in the developing areas of data protection and publicity rights. [FN39]

Clearly, the experiment has not yet been devised to prove empirically who has the better side of the policy argument. I confess upfront that my sympathies and instincts align me with the defenders of a rich public domain. I am inclined to bet on an instrumental level that a broad commons will best promote innovation. [FN40]

***310** On a deeper level, however, I would also argue that the preservation of a rich public domain is normatively correct even if commodification of speech goods were actually to turn out to be the most efficient way to promote their creation and dissemination. This statement reflects a belief that the personal and social values of autonomy and participation in self governance that are supported by access to a large commons generally ought to trump efficiency where a choice cannot be avoided. The increasing enclosure of speech goods exacts costs from non-owners who want to engage in their own public or private speech. Whenever speech goods can be used only with permission, or even merely with payment, some things that might be said or written or painted or otherwise given expressive form by individuals will not be produced.

The concern over these costs is what animated my interest in whether the Constitution may impose general limits on legally sanctioned privatization. If at least some speech goods could not be removed from the public domain, the arena for further policy-based disputes over extensions of intellectual property would be circumscribed and easier to negotiate.

Such an inquiry must be prefaced by the recognition that it is far easier to find support in the Constitution for property rights in speech goods than to locate sources for a mandatory public domain. The Intellectual Property Clause of the Constitution [FN41] expressly grants power to Congress to create a time-limited [FN42] private monopoly over those speech goods that are writings original to an author. [FN43] If one considers computer programs to be communicative works, [FN44] then some forms of speech goods may even legitimately qualify for a patent. [FN45]

But beyond the categories of clearly permissible, constitutionally-based intellectual property rights lies a vast, disputed territory. Even some aspects of formal copyright (for example, as noted earlier, ***311** provisions that restore copyright to certain foreign works that have fallen into the public domain) are problematic. [FN46] And certainly, protection for speech goods by means other than formal copyright--for example, through rights of publicity, the common law tort of misappropriation, direct and indirect efforts to protect factual material compiled into databases, the expansion of trade secrecy law, [FN47] and the broadening of legal protections for trademark holders against disparagement and dilution [FN48]--go well beyond the constitutional text. All of these increase the opportunity for private parties to control who can use facts, ideas, expression and even words, as well as the conditions under which they may do so. If a constitutional basis for recognizing some form of "mandatory public domain," particularly ***312** one that reaches both federal and state activity, is plausible, its recognition would bring order to the sprawl in intellectual property rights, and stabilize the balance between incentives and access along more intelligible lines.

Important recent legal scholarship has looked to the Constitution for principles to discipline the creation of intellectual property rights. Some of it has examined the Intellectual Property Clause as the likeliest source of substantive constraints. [FN49] A few commentators broadened the exploration by turning their attention to ways in which the First Amendment alone, or interacting with the Intellectual Property Clause, provides an understanding of the limits on intellectual property. [FN50] Thus far in these various discussions, the subject of the constitutional status of the public domain has remained undeveloped.

This Article, therefore, takes up that issue directly. It does so, in a sense, by invitation of the Supreme Court, which has at various times dropped broad dicta into its opinions assuming that it would be unconstitutional to propertize some forms of speech goods such as ideas or facts. [FN51] This inquiry asks how seriously that dicta should be taken, on what grounds such dicta might rest, and what might be contained in a constitutionally-defined public domain. To put it differently, is there a right under the

Constitution to have something to say? Do individuals have some rights to further their own expressive, intellectual, and innovative goals by utilizing categories or kinds of speech goods without being obliged to seek permission from, or payment to, an "owner" of that content? [FN52]

***313** II. The Public Domain and the Intellectual Property Clause

Because the Intellectual Property Clause of the Constitution has been understood to permit some kinds of private rights in speech goods, but to deny others, [FN53] it is the logical starting place for scholars who are wrestling with the role and status of the public domain. Protection for a public domain has long been integral to traditional understandings about the meaning and purpose of copyright and patent protection. An influential line of analysis holds that intellectual property rights should extend only far enough, and no farther, than needed to assure that the public obtains greater value from the increased production of speech goods than it loses from the limits on access and free use. [FN54] Even where rights are granted, they are purposely kept narrow. The practice in patent law, for example, is to grant the inventor and her assigns the exclusive right to practice the art, but to require that the principles underlying the invention be made freely available for the perusal and enlightenment of the public. [FN55] As already noted, copyright law similarly creates ownership rights only in the author's expression, leaving the ideas and facts contained in the work in the public domain. [FN56]

***314** The reason for limiting copyright to expression alone can be found in the concern articulated by influential judges, [FN57] legislators, [FN58] and commentators [FN59] that, unless the common building blocks of learning and invention were free to all, learning and imagination would be stifled. Lord Camden, in the famous House of Lords ruling of *Donaldson v. Beckett*, [FN60] for example, penned language that was later picked up and restated, famously, by Justice Brandeis in his dissent in *Associated Press v. International News Service*. [FN61] Lord Camden wrote:

If there be any thing in the world common to all mankind, science and learning are in their nature publici juris, and they ought to be as free and general as air or water. . . . Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species? [FN62]

***315** This refrain recurred in various ways in the writings of numerous others who shaped the early law in this field. [FN63] One noted scholar points out that Enlightenment figures in both England and the continent "held unlimited literary property to be unjust because ideas belonged to everyone." [FN64] The reason for "severely limited" forms of intellectual property was the widely shared belief that ownership of basic speech goods, like ideas, was a kind of "monopoly over a body of knowledge that should be for the common good" which was detrimental to the public welfare. [FN65]

Because leading thinkers of the Enlightenment believed strongly in limitations on the kinds of speech goods in which intellectual property rights could be granted, one might reasonably have expected the Copyright and Patent Clause to explicitly contain some reasonably complete theory of the public domain. Unfortunately, the problem cannot be solved so easily. Although the "common law" of copyright is rife with statements about the public domain, ambiguities exist that create real doubt about the ability to derive a general theory of the public domain solely from the Intellectual Property Clause.

First of all, the Clause itself does not address the issue, except by providing for a limited form of protection. Nor does the legislative ***316** history of the provision indicate that the framers of the Constitution articulated a particular position on the size and scope of, or even the need for, a speech commons. [FN66] The language used in the Clause indirectly suggests some notion of bounded property rights. It limits the duration of federal patents and copyrights to something short of perpetuity, and specifies that a work must be that of an "author" to be copyrightable (that is to say, it must be work that is original), [FN67] and must be in the form of a writing (that is, in some fixed and stable form). [FN68] This language could be read as limiting the commodification of speech goods to material that meets these criteria, leaving all else in the public domain. This interpretation, however, ignores a long history of ambiguity about congressional power in this area, as well as a willingness to accept other forms of property rights in speech goods at both the federal and state levels. [FN69]

***317** As to the issue of ambiguity, two hundred years after the earliest federal copyright and patent laws, courts and scholars still do not agree whether Congress can rely on its other enumerated powers to create forms of intellectual property not permitted under the Copyright and Patent Clause. [FN70] Additionally,

the extent to which the Constitution preempts states from using their own powers to fill perceived gaps in intellectual property law is far from clear. [FN71] During the time of the framers, at least one form of state law intellectual property--trademark--was well-recognized. [FN72] Trademark has continued to be protected by the states, and eventually also by Congress. [FN73] Other state and federal protections for intangible products of the mind have been gradually added since the adoption of the Constitution, [FN74] with little to suggest that some underlying theory of the public domain, inhering in the Intellectual Property Clause, significantly limits that process.

The extent of congressional power to create new intellectual property rights outside of copyright and patent first came into question in the nineteenth century, but the resolution of the issue was far from straightforward. In the Trade-Mark Cases, the Supreme Court held that Congress could not rely on the Intellectual Property ***318** Clause to regulate trademarks. [FN75] Nevertheless, the opinion strongly suggested that, were the legislation addressed solely to interstate transactions, the Commerce Clause might supply authority for such legislation. [FN76] Subsequently, federal trademark law was enacted under the Commerce Clause power, and thus far the Supreme Court has said nothing that casts doubt on the propriety of that exercise of legislative authority. [FN77] Furthermore, the Trade-Mark Cases clearly assumed that whatever Congress could or could not do, the states could certainly protect trademarks. [FN78] Thus, although some boundaries protective of the public domain may be set by the Intellectual Property Clause, their scope and nature remain somewhat nebulous--particularly where the matter at issue falls outside the realm of patents and copyrights.

The point is demonstrated by the number of times that the Court historically has approved direct or indirect commodification of speech goods using a vehicle other than copyright or patent law. In 1918, for example, the Court recognized a limited property interest in factual material, using as its mechanism the tort of misappropriation. [FN79] In *International News Service v. Associated Press*, the Court explicitly acknowledged that statutory copyright, which the Associated Press had not acquired for its wire copy, [FN80] would have protected only the expression used to tell the stories, and not the factual material contained in the plaintiff's work. [FN81] The majority nonetheless found that if a wire service gathered the facts for its own news copy from ***319** stories prepared and distributed by a competing service, it engaged in a sanctionable unfair trade practice. [FN82] Although the decision has been much criticized in subsequent decades, it continues to be cited approvingly in other opinions. [FN83] The Court has since followed the path taken in *International News Service* and accepted as valid several other bodies of law that treat content as property or quasi-property, including trade secrecy, [FN84] sound captured on phonorecordings, [FN85] and information about celebrities. [FN86] The Justices in each of these cases did not find that states were preempted by the Constitution from recognizing novel rights, [FN87] or that these enclosures poached upon aspects of a public domain dictated by the Intellectual Property Clause.

Even when a clear opportunity arose for the Court to clarify whether the logic of the Intellectual Property Clause required some kinds of speech goods to remain in the public domain, the Justices did not follow through. The opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.* [FN88] rejected the sweat-of-the-brow theory that had been used to provide copyright coverage for the contents of factual compilations. [FN89] Several federal circuits had previously protected copyright holders against the taking of facts from their compilations to protect the value of the labor expended in gathering the material. [FN90] Facts, objected the Supreme Court, are not original works of authorship [FN91] and cannot be copyrighted--therefore, they can be "copied at will." [FN92] Unfortunately, the Court was silent on a key ***320** issue. Was the problem in *Feist* that the objective (the protection of facts) was unconstitutional, or merely that the mechanism (copyright) was wrong? In the latter case, Congress could rely on the Commerce Clause, or the states could rely on the law of misappropriation to remedy the problem. [FN93] The ambiguity in *Feist* has encouraged efforts to create new intellectual property rights--for example, it resulted in several years of effort by Congress to enact database legislation under its Commerce Clause power. [FN94]

So far, the clearest recognition by the Court that some absolute barrier against proliferating intellectual property rights may reside in the Copyright and Patent Clause can be found in the Court's recent decision, *Dastar Corp. v. Twentieth Century Fox Film Corp.* [FN95] *Dastar* involved a "reverse passing off" claim under Section 43(a) of the Lanham Act. [FN96] The defendant, *Dastar*, decided to reproduce, edit, and

reissue a set of public domain videotapes on World War II. [FN97] The set was packaged and distributed by Dastar under its own name without any mention of the originators of the television series from which they were drawn--wrongly suggesting, the claimants argued, that Dastar was the author of the work. [FN98] The Court rejected the reverse passing off claim on the ground that, as long as Dastar was the actual source of the physical goods, it did not mislead the public about their "origins" within the meaning of section 43(a). [FN99] More importantly for purposes of this Article, the Court also noted that once the term of the copyright ran out, Congress would have no ***321** alternative source of power under the Commerce Clause to require Dastar to identify the author of a public domain work. [FN100] Justice Scalia, writing for the Court, found that once a work of authorship goes into the public domain, it can be copied at will and used freely with no further obligation toward the author or prior owners of the work. [FN101] Allowing Congress to use the Lanham Act to create rights in public domain works, wholly or partially equivalent to those under copyright, he asserted, would have the impermissible effect of rendering such property interests perpetual. [FN102]

Thus, one can say with fair confidence that copyrighted expression must move into the public domain at some point. Congress cannot avoid this result by turning to its other powers to extend some or all expired copyright protections. Dastar does not, of course, answer whether there are comparable limits on Congress's power to create novel interests that do not fall under the umbrella of copyright. [FN103]

Significantly, the limits imposed by the Intellectual Property Clause on state law enclosures of the public domain are also doubtful. Thus, if the Supreme Court ruled that the limits in the Intellectual Property Clause prevent Congress from enacting a federal right of publicity statute, it would by no means be clear that if state laws supplied such rights, they would "conflict" with federal policy.

This moves us on to the foggy terrain of preemption. States may be preempted by federal statute, and thus prevented from enacting laws ***322** to control the public domain under statutory preemption. [FN104] They may also be prevented from acting under Supremacy Clause-based preemption where (1) Congress has expressly denied them that right, (2) an actual conflict arises between federal and state law, or (3) a state encroaches onto territory that is under the exclusive jurisdiction of the federal government. [FN105] Preemption analysis in the intellectual property context, however, is so confusing, and successful claims are sufficiently rare that a cautious observer would hesitate to predict that the doctrine would do much to cut off the expansion or creation of new state intellectual property law. [FN106]

In summary, the expectation that the Intellectual Property Clause will be the primary source of protection for a meaningful public domain is compelling in the abstract. [FN107] Actual legislative and judicial ***323** practices [FN108] and much scholarship, [FN109] however, suggest the need for support from other constitutional sources. For that reason, this discussion will now turn to the other possible source of a mandatory public domain, the First Amendment. It does so in the face of a lingering reluctance by courts, [FN110] as well as by many intellectual property scholars, [FN111] to recognize that the First Amendment is a pertinent source of learning about the permissible scope of intellectual property rules.

III. Can Speech Be Free Without a Public Domain?

One reason that the case for a mandatory commons under free speech has received relatively little explicit attention in intellectual property circles is, I believe, a result of an accident of history. The intellectual compartmentalization in legal scholarship leaves those primarily interested in the First Amendment largely unaware of policy ***324** debates raging in intellectual property, and many intellectual property scholars have historically thought little, or at least have not thought deeply, about the implications of the First Amendment for information policy. In the main, those who have pioneered the bridging of this gap [FN112] have focused largely on the ways that specific aspects of copyright doctrine, such as the scope of fair use, [FN113] should be shaped to take proper account of the apparently inconsistent requirement that government not regulate speech. [FN114] Others have taken a more general cut at the copyright/free speech dichotomy, [FN115] and in so doing, some have touched on the subject of the public domain. But even this discussion has proceeded at a high level of generality, dictated largely by the authors' particular theoretical understanding of the First Amendment. [FN116] This Article is not driven by a particular theory, but instead asks what material in First Amendment jurisprudence as a whole bears on whether some core body of speech goods is required to be freely available for the use of would-be speakers. [FN117] There are

many reasons to hypothesize that this *325 mandatory commons is part of what is meant by freedom of speech, and this section will begin by attempting to explain why this should be so.

A. Why the First Amendment Should Be Understood to Require a Mandatory Public Domain

It can scarcely be controversial to suggest that without the ability to use at least the basic building blocks of speech (words, ideas, hypotheses, facts, symbols with meaning), the First Amendment could guarantee a right to freedom of speech, but would not reasonably ensure that anyone could exercise it. [FN118] A number of scholars have persuasively shown that even more complex sorts of content, such as actual expression borrowed from other people's work, can be essential raw material without which some aspects of an individual's own thoughts, allegiances, and observations cannot be fully conveyed to others. [FN119] Without this raw material, communication would be limited *326 to a few primitive gestures, and would be useful for little beyond conveying our intent to satisfy our most pressing personal needs. A constitutional guarantee of free speech that promised to protect little more than our right to mumble meaningless sounds or scribble random lines on a piece of paper would be an empty concept. Speech requires content to be meaningful. This includes some ability to acquire such content and certainly the privilege of using it.

If an existing legal regime were to award ownership of all speech inputs to private parties who could charge for them, or select who can use them and how, we would not be reduced entirely to mumbles and scribbles because we could bargain our way to some measure of access to and use of content. But the tools available to any individual person for communicating would be far more circumscribed than if the speech inputs she required were free of restraints or costs. In any event, it would be difficult to characterize a scheme that centralizes control over facts and ideas, or uncopyrighted expression, in the hands of "owners" as one that promotes free speech.

Scholars argue endlessly over what theory best represents the function of the First Amendment. Some conceive of this function as one designed to protect and promote human autonomy; for others, the purpose is to facilitate participation in self-governance, or as a servant to some instrumental end. [FN120] But each of these theories has in common an assumption that some quantum of speech goods will be freely available to citizens from which to borrow, cobble together, or invent the furnishings of their minds and the content of their communications to others. [FN121] Thus, one might call a First Amendment public domain "pre-theoretical" because it is so intertwined with the possibility of speaking for any purpose that no theory of the First Amendment could be implemented without it.

An autonomy theorist would presumably be most in need of a broad public domain, a background norm that assumes unconstrained *327 use of most speech goods. Individual self-realization would be seriously hampered if people could not draw on a broad array of material, largely without constraints, [FN122] for whatever in their judgment seemed worth learning or utilizing in discourse. [FN123]

A self-governance understanding of the Free Speech Clause would be equally difficult to realize if it were forced to co-exist with a legal regime that allowed unlimited commodification of the raw materials of speech. [FN124] Although, in theory, the democratic governance position might require less content in its public domain (depending on how broadly or narrowly one conceives of what is meant by a public issue or political decision making), [FN125] discussion of public issues and development of one's capacity to engage in self-governance necessitate the use of speech goods.

Thus, however one approaches free speech, simply imagining a regime in which it is possible for many or all intellectual resources to be owned and controlled is to imagine a world where the practice of "free speech" would be shorn of most of its meaning and much of its *328 utility. Leaving aside philosophical questions about the existence and knowability of external reality, and proceeding instead from the common sense perspective of daily life, I cannot conceive of how intellectual development or human interaction would proceed if we were denied the automatic use of such inputs because what we understand, think about, and express to others is so heavily imprinted by what we observe, remember, read, and hear of from others. [FN126]

Consider, for example, an attempt in the year 2004 to discuss the situation of United States troops in Iraq

in a college history class. Then imagine that the discussion could not occur until the professor and the class first cleared rights to utilize, for example, the words and actions of Saddam Hussein or of the former American administrator of the country, L. Paul Bremer III, with the "owners" of that content. Or think about being a painter who cannot use the image of a social icon in her composition without the celebrity's permission. Or a composer who has to negotiate for permission to use the key of C major with its owner. Such a regime would not merely foster an intellectual environment that is suboptimal (after all, no one has ever claimed that constitutional rights guarantee optimal conditions for their enjoyment), but one that is horribly impoverished, and that subjugates the intellectual life of each person to the control of market ***329** actors. [FN127] Admittedly, these hypotheticals ask the reader to imagine scenarios well beyond what even the most enthusiastic advocate of greater property rights has thus far proposed, but they do illustrate, nonetheless, why freedom of speech must be predicated on freedom to utilize at least a substantial amount of content free of outside restraints. To exercise the right of free speech, one must necessarily enjoy some considerable right to have something to say.

The argument that the Constitution protects a public domain is not, however, entirely based on theory. Upon examination, one can find a refrain running through both First Amendment and copyright case law that suggests a protected commons does exist, and that it is rooted heavily, although not necessarily exclusively, in the First Amendment. On at least two occasions in its copyright decisions, the Supreme Court has made explicit reference to the existence of a constitutionally protected commons that limits what can be commodified by copyright.

The first of these was the Harper & Row decision [FN128] in 1985. The subject was raised a second time almost twenty years later in the Eldred case, to the same effect. [FN129] Harper & Row involved a dispute over a news report on the substance of an about-to-be-published autobiography of former President Gerald Ford. In addition to scooping the book's most titillating content, [FN130] the defendant in the case, the magazine *The Nation*, used about 300 actual words from the book. The magazine argued that, because of the news value of its ***330** report, it enjoyed a First Amendment defense against the publisher's claim of copyright infringement.

Justice O'Connor, writing for the majority, refused to find such a defense because, she noted, copyright doctrine was already shaped in ways that took account of the limits imposed by the Speech Clause. This is why, she wrote, copyright cannot protect facts or ideas, and that it must allow for some degree of fair use. Justice O'Connor was quite explicit about the role of the First Amendment:

The Second Circuit noted, correctly, that copyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." No author may copyright his ideas or the facts he narrates. As this Court long ago observed: "[T]he news element--the information respecting current events contained in the literary production-- is not the creation of the writer, but is a report of matters that ordinarily are publici juris; it is the history of the day." [FN131]

This passage itself referred back to a long line of similar commentary in earlier cases, all declaring a fundamental constitutional commitment to the robust and uninhibited exchange of ideas. [FN132] This was the first time, however, that the Supreme Court in a copyright decision explicitly stated that some types of speech goods cannot be subject to ownership.

Eldred, a case challenging the twenty-year extension of existing copyright terms, [FN133] reiterated the rhetoric about a public domain. This time in an opinion by Justice Ginsburg, the Court again made reference to the fact that intellectual property rights must be limited to avoid a conflict with the First Amendment. [FN134] Justice Ginsburg then added that, were Congress to ignore those limitations, the right to free speech, under which "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication," [FN135] would be violated. The opinion went on to explain that, while Congress may limit the right to use ***331** someone else's personal expression, it is a quite different case where "the government compels or burdens the communication of particular facts or ideas." [FN136] The ability to communicate facts and ideas freely, according to the Court, is "securely protect[ed]." [FN137]

Looking beyond those two decisions, various members of the Court past and present have actually made reference to speech-based protection for the public domain in nearly two dozen opinions. All seem to agree that once speech goods enter the public domain, their further use may neither be punished nor restricted in any but the most unusual circumstances. [FN138]

The Court, however, has never set out a coherent theory of the public domain, or done more than hint about why it supposes one to exist. *Eldred* and *Harper & Row* contain the most detailed discussions of the First Amendment's requirements, and they supply scarcely more than sketches in dicta. Thus, a seeker of enlightenment, like an ancient prophet, must sort through the entrails of First Amendment case law and theory for portents to help flesh out the depth of the Court's commitment to a mandatory public domain. Matters are further complicated by the fact that the signs do not always point in a single direction. Despite the implicit recognition over decades that a protected commons exists, the Court has on occasion reached conclusions that undercut that assumption. For example, the Court has tolerated the commodification of speech goods under authority other than the Intellectual Property Clause. [FN139]

***332** What follows is an attempt to evaluate the consistency of First Amendment jurisprudence with the theory of a mandatory public domain set out above. Hopefully, this examination will both support and illuminate the theory, and will also provide insights into the specific nature of the posited commons.

B. The Public Domain and the Limits of History

One might first look for evidence that the First Amendment presupposes a mandatory public domain in constitutional history. [FN140] As was true of the Intellectual Property Clause, however, this avenue provides little in the way of solid insights. To be sure, some progenitors of the First Amendment may have understood the necessity for a public domain to effectuate their vision of protection for public discourse, and ensure that information, at least about political issues, would flow unimpeded to the public. [FN141] But this was not at the top of their free speech agenda; in the context of those times, the framers were far more focused on the threat posed by government censorship to the free flow of information than they were on the risks posed by the imposition of proprietary controls over the reuse in speech of content. [FN142] Historians of the First Amendment generally agree that it was driven primarily by the reaction of the framers to Great Britain's longstanding, systematic use of seditious libel prosecutions and prior restraints to control and suppress speech critical of the actions of public officials. [FN143]

The anger generated by the government's use of these speech-inhibiting devices [FN144] in Great Britain and the American colonies cast ***333** a long shadow over the drafting of the Free Speech and Press Clauses. Most of the commentary directed to the substance of free speech protections was aimed at assuring that these devices, in particular the device of prior restraints, could not be used at the national level. [FN145] There is still debate over whether, rhetoric notwithstanding, the framers actually intended the First Amendment simply to restrict federal power in this arena and leave speech regulation to the authority of the states, or if some substantive content was also intended. [FN146] If formal content was included, the substantive view most widely accepted was that the government was disabled from restricting politically distasteful viewpoints. [FN147] A claim that the First Amendment from the outset also consciously embodied a clear underlying information policy intended to fuel the ability to speak and to engage in public or private discourse is purely speculative.

The framers were, of course, products of the Enlightenment, and undoubtedly shared assumptions similar to those expressed by other important thinkers of the era--figures like Milton, Spinoza, and Burton. All of these figures expressed to greater or lesser degrees the belief that the freedom to engage in the quest for knowledge and to develop one's understanding was basic to any concept of the free and autonomous individual. [FN148] To the extent, however, that the relationship between law and fodder for the life of the mind was an explicit subject of discourse and debate, that discussion most clearly took place in the context of copyright. [FN149] Furthermore, even the framing of the issue as a concern with the shape of a "public domain" adopts modern rather than historically traditional language.

The clearest indication I have found that American constitutional ***334** thinkers ever concerned themselves consciously about the context of freedom of speech, with regard to the issue of the acquisition

and use of content, appears in an influential treatise by Tunis Wortman. Wortman called knowledge:

[A] general fund, of which all have a right to participate: it is a capital which has the peculiar property of increasing its stores in proportion as they are used. We are entitled to pursue every justifiable method of increasing our perceptions and invigorating our faculties. We are equally entitled to communicate our information to others. [FN150]

Unfortunately, for purposes of making historically sound claims about the constitutional status of the public domain, Wortman was not a framer, and his book was published almost a decade after the First Amendment was added to the Constitution. [FN151] It, however, supports and is consistent with the idea that the authors of free speech in American law at least understood in general terms that the point of protecting speech was to allow citizens to utilize information freely.

Certainly, there is nothing to suggest that the framers, or the tenor of the times, bore hostility toward some notion that a mandatory commons was an integral part of protected speech. [FN152] It may even be fair to suggest that so widely accepted was the notion that ideas and facts should be freely utilizable that no one supposed it necessary to provide for it explicitly. [FN153]

C. Teasing a Foundation for Public Domain Theory Out of Free Speech Doctrine

Since history is at best opaque, one must turn elsewhere for evidence to help decide how seriously to take the dicta on the public domain in *Harper & Row* and *Eldred*. Several lines of cases (not all of them dealing directly with free speech) suggest themselves as sources, and when read together, fall into a pattern highly suggestive of a First Amendment-based mandatory public domain. [FN154] The most *335 illuminating of these strands are the cases dealing with libel and privacy, although contributions also come from the law on trade secrets and commercial speech. Some scholars have also directed attention to an area of First Amendment jurisprudence commonly called the "right to know" in support of protecting the public domain; although some learning can be gleaned from this area, it turns out on reconsideration to contribute only in a limited way. [FN155] But because of this earlier work, the right to know will be the first body of doctrine examined.

1. The Right to Know

In 1996, Professor Patterson and Judge Birch published an article in which they argued, in pertinent part, that the Constitution guarantees the public at large a right to access and use public domain materials embodied in copyrighted expression. [FN156] Their interpretation grew from an understanding of the interplay between the Intellectual Property Clause and the Free Speech Clause. [FN157] On the free speech side, the authors argued that a "right to learn" meant that materials in the public domain must be kept freely accessible. They drew precedent for this conclusion from a body of case law better known in the First Amendment literature as the "right to know." [FN158] A few years *336 later, Professor Benkler picked up a different strand of right to know theory--public access to the means of communication--to argue that the government must protect, rather than permit erosion of, the public domain. [FN159]

The problem with relying on this body of law to establish the existence of a protected public domain is that the "right" in question is difficult to define. Courts asked to decide a case under this right have approached the issue with great tentativeness. The right to know has two aspects. On the one hand, the theory suggests that someone (here, the government) has a correlative duty to disclose information; on the other, the theory would permit the government to curtail the voices of some to enhance the voices of others who might not otherwise be heard. Because both aspects raise hordes of troubling issues, the theory continues to occupy a position in First Amendment doctrine that can most generously be termed marginal, [FN160] and is utilized only in rare instances.

*337 Patterson and Birch rely, on the free speech side, largely on *Board of Education v. Pico*. [FN161] Although the case contains language that supports the belief that a right exists to access and use uncopyrighted content, *Pico* is nonetheless a thin reed on which to hang an argument about protecting the public domain. The case challenged the removal of "disapproved" books from a school library by a local board of education. [FN162] Although the plaintiffs "won" in the sense that a bare majority of the Court

found that summary judgment for the school board had been improperly granted, in other regards, Pico is a less than a ringing endorsement of the right to know, and more of an object lesson in why expanding protection by this route is unlikely. Only four members of the majority clearly adopted the view that removal of books from a library by public authorities for purposes of censorship is a First Amendment violation. [FN163] And each of those four struggled with a problem: how they could prevent the removal of books for purposes of censorship without announcing a principle that would require school boards to abandon all subjective preferences when making the decision to acquire books (a result the Justices clearly thought went too far and was poor policy besides). [FN164] The decision by the plurality, therefore, that some kind of "access to ideas" is protected by the First Amendment, [FN165] is too hedged with limitations to infer from Pico any strong right to be informed or to "learn."

Related areas of legal development reinforce the doubtfulness that "the right to know" will assist in developing a general theory of the public domain. For example, the First Amendment protection for informing oneself might be strengthened were the Court to recognize a constitutional right to education. But when the opportunity to do so *338 was presented in *San Antonio Independent School District v. Rodriguez*, [FN166] it was declined. Although the Court occasionally discusses academic freedom as something that the First Amendment protects, evidence that academic freedom covers the means to acquire the information needed for "learning" or knowing is sparse to nonexistent. [FN167]

I am also doubtful that much assistance can be gleaned from some notion, also labeled a right to know, that the government is permitted to manage the means of communication so as to maximize the diversity of voices and views in the marketplace of ideas. [FN168] This, too, is an interest that has been articulated more often than it has been applied. Although scholars have argued for decades that the *339 government has an affirmative responsibility to use its powers to increase speech diversity, [FN169] prior to the decision in *Turner Broadcasting System, Inc. v. FCC*, [FN170] the government's authority to do so consistent with free speech principles had been recognized only in relation to a publicly-owned resource--the airwaves. [FN171] And even there, the Supreme Court was reluctant to allow affirmative steps to diversify speakers out of concern for the other speech values--to wit, the right of the broadcaster to exercise his editorial judgment free from restraint--that were implicated. [FN172]

Because *Turner Broadcasting* was a case involving cable rather than access to the public airwaves, it arguably opened the door to greater freedom for government to "manage" communications opportunities. But the relevance of the case to protection of the public domain is not necessarily clear. [FN173] For one thing, cable is an area where the government role in licensing has always been central, and rules that apply to that medium may well not be ones from which to derive general principles. Furthermore, recognition that the government has power to preserve a rich marketplace of ideas is not the same as a requirement that it do so. Presently, nothing in this line of cases evinces an acceptance of the idea of affirmative obligations to intervene on behalf of free speech. [FN174] Hence, the posited existence of a mandatory public domain would seem to receive no support from this source, even though, rhetorically, its endorsement of the idea that speech presupposes "knowing" or "learning" or observing continues to have theoretical power. [FN175] It is difficult to disagree logically with *340 Justice Brennan's claim in *Pico* that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." [FN176]

There are, however, a few circumscribed areas where a right to know, and a concomitant duty to disclose, clearly can be seen to make solid contributions to a mandatory public domain. These are situations where the material at issue relates to certain core government actions and proceedings, and where commodification of the information involved would interfere with public knowledge about these activities.

First, the Constitution itself requires that some information affirmatively be given to the public, and to remain available without restrictions on its subsequent use. Article I of the Constitution, for example, provides that the Senate and House of Representatives "shall keep a Journal of its Proceedings, and from time to time publish the same." [FN177] This does not, of course, demand that everything Congress does must be entirely transparent and in the mandatory public domain. The framers left Congress considerable discretion to conduct business in private without obliging it to report fully on its activities to the public. [FN178] The Constitution, for example, allows Congress to decide what things, "in their Judgment require

Secrecy," and allows, if more than four-fifths of the members desire it, the identities of those who vote for and against legislation to be concealed from the public. [FN179]

The President is also required in Article II to "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." [FN180] Like the Congressional Record, the State of the Union address has traditionally been available to the public and may be required to be so, although in point of fact, that requirement is not explicit in the text of the Constitution. [FN181] Due *341 process is generally understood to require that legislation and judicial decisions must be available to the public free of restrictions on their reuse. [FN182]

Finally, the Sixth Amendment provides for public criminal trials, [FN183] although the Supreme Court has made clear that, because this right was intended to protect defendants rather than to provide information to the public, the defendant can waive it. [FN184] However, after deciding in *Gannett Co. v. DePasquale* [FN185] that the public and the press did not share defendants' Sixth Amendment right to public criminal trials, the Supreme Court faced a rash of court closings virtually for the first time in American history. It responded in 1980 by finding an affirmative right of the public and the press to attend criminal trials in the First Amendment. [FN186] One could imagine other situations with plausible claims of a right of access to government information, but in reality the practical problems created by extending an affirmative claim of this sort have made it doubtful that the Court will ever reach beyond the courthouse in making the government reveal its operations to the public. [FN187]

In summary, the "right to know" accounts for only a very limited piece of the mandatory public domain, and is unlikely to do more because it is limited to information controlled by government sources. It will do little to help retain access to and use of such other essential *342 elements of discourse and learning, such as factual information about the private sector, ideas, events that occur in public settings, life experiences, or uncopyrighted expressive works. For this reason, other areas of First Amendment doctrine necessarily must be relied upon if freedom to use these sorts of speech goods is to be secured. The Article now turns, therefore, in other directions.

2. Public Discourse Theory as a Basis for Inferring the Existence of a Mandatory Public Domain

The constitutional privileges that have attached to defamatory falsehoods since the early 1960s have been explained by the Supreme Court as necessary to ensure the full and free discussion of matters of public concern that the Constitution envisions. Professor Robert Post has traced back to the 1930s and 1940s the Court's understanding of protection of public discourse as a core of the purpose and meaning of the Free Speech Clause. [FN188] But *New York Times Co. v. Sullivan* [FN189] brought this understanding of the First Amendment to the fore, articulating in the process not only the Free Speech and Press Clauses' role in fostering "uninhibited, robust, and wide-open" debate [FN190] on public issues, but the need to protect the use of one's choice of content to fuel that discourse. [FN191] To that end, *Sullivan* and its successors went so far as to find defamatory falsehoods, ordinarily not a form of speech sheltered by the First Amendment, to be privileged in order to minimize the risk that speakers would be inhibited from engaging in otherwise legitimate exchanges of ideas and positions. [FN192]

In elaborating the *Sullivan* privileges, the Court was not inventing a new theory about content. Rather, it was ratifying a position that had already become firmly embedded in the common law of libel. State courts had long-established privileges, such as the fair comment rule in defamation and newsworthiness in privacy law, to draw a protective cordon around content. [FN193] That such privileges had constitutional standing was first acknowledged in *Sullivan*. [FN194]

The privacy cases provide the clearest evidence that the freedom to draw on information for the substance of one's communications is inextricably linked to the exercise of speech rights. [FN195] In all *343 jurisdictions that adopted the tort of invasion of privacy, the ability to recover was limited to cases where the information at issue was not deemed to be newsworthy. [FN196] So powerful was the privilege covering newsworthy information and so broad was the definition given to the term, that suits challenging accurate disclosures of legitimately obtained information, however embarrassing or harmful to the plaintiff, were almost never successful. [FN197] It made no difference to the *344 outcome whether the

complaining party was a public figure, a public official, or simply a private person. [FN198] As a general matter, information of public interest was information that was of interest to the public, not what was in some absolute sense "important."

In its own series of decisions dealing with privacy interests, the Supreme Court was reluctant to impose limits on the use of information once defendants became aware of it through legitimate means. In fact, the Court several times expressed serious doubt that the First Amendment would ever permit the use of accurate information to be sanctioned. [FN199] Some understanding of the thinking behind this position can be gleaned from a famous passage by Justice Brennan in *Time, Inc. v. Hill*, [FN200] a false light invasion of privacy case. [FN201] Writing for the majority, he explained that:

Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." [FN202]

The Court has applied the "once learned, free to use" principle to several kinds of content, including the identity of rape victims, the name of a juvenile defender, and information about a judge accused of misconduct. [FN203]

Admittedly, in most of these cases, the information in question came from public records or was disclosed by public officials or during public proceedings. One way, therefore, to understand the *345 construction of the mandatory public domain is to think of it as donating to public use only that information that the government must disclose, or opts to disclose, [FN204] in unrestricted form. [FN205] The recent decision in *Bartnicki v. Vopper* [FN206] demonstrates, however, that this conception of the public domain is far too limited. The mandatory public domain must also be understood as extending to information that is wholly private in its origins. [FN207]

*346 The dispute in *Bartnicki* involved the application of federal and state wiretap laws to republish information derived from eavesdropping on cellular telephone calls. The parties said to be in violation of the laws were not those who intercepted the calls, but rather members of the press who had received, and reported on, tapes of the conversations. According to the statutes in question, it was illegal to use material from intercepted calls as long as the user "kn[ew] or ha[d] reason to know that the information was obtained" by illicit means. [FN208]

The conversation captured on tape in *Bartnicki* was between two teachers' union representatives during a heated labor dispute with the local school board. [FN209] The person who made the recording was never identified because he or she had sent the tape to the press anonymously. [FN210] The conversation contained threatening language (although how serious the threats were is debatable) directed toward board officials. [FN211] After the conversation was reported in local newspapers and played on local broadcasts, the union representatives sued the press for violation of the statutes, seeking actual, statutory and punitive damages, as well as attorneys' fees and costs. [FN212]

The Supreme Court ruled for the defendants on the ground that mere knowledge that the recordings in question were illegal did not make their receipt and republication wrongful. [FN213] In the absence of wrongdoing at the acquisition stage, publication of "truthful *347 information of public concern" [FN214] could not be sanctioned. Although the majority made plain that the privacy interests protected by the statute were substantial, this was not enough to render constitutional the attempt to regulate the use of information by innocent third parties once they had learned it. [FN215] "[P]rivacy concerns," Justice Stevens wrote, "give way when balanced against the interest in publishing matters of public importance." [FN216] Perhaps another way to make the point would be to say that noncontractual limitations on the use of information will not survive unless they can pass the exacting standards of strict scrutiny.

After reading Chief Justice Rehnquist's dissent, it becomes clear that both the majority and the dissent in *Bartnicki* acknowledged a First Amendment protection for the public domain. The dissenters [FN217] expressly agreed with the majority that once information has been legitimately acquired, [FN218] only a

state interest of the highest level of importance can justify restricting its free reuse. [FN219] They disagreed with *348 the majority only on whether the information in question in this case had actually entered the public domain, not on the consequences if it had. [FN220] To the dissenters, the taint of the illegal acquisition by the source carried over to the third parties who chose to publish the information knowing that the taping was illicit. Under these circumstances, Chief Justice Rehnquist wrote that the information did not move into the public domain because it failed the requirement that it be legally obtained. [FN221]

For the purposes of this Article, the history of legal efforts to regulate information used in the interests of personal privacy is interesting in other ways as well. The underlying justification given for the legal right to prevent disclosure of embarrassing personal information is essentially that individuals have something like a property right in the facts of their lives. Indeed, Samuel Warren and Louis Brandeis, whose famous law review article is agreed to have jump-started the modern tort of invasion of privacy, [FN222] relied heavily on common law copyright principles and cases as the source of their claimed privacy right. [FN223] Thus, privacy tort law has more than a passing relevance to the legitimacy of generating new forms of intellectual property rights. [FN224]

Interestingly, from the birth of the common law right of privacy, courts recognized that there is a downside to granting individuals control over how others can use information about them. It significantly strips others of the wherewithal to form their own ideas, utilize their own observations, and communicate about these things *349 with friends, colleagues, and fellow citizens. [FN225] The fear of this unconstitutional consequence is why broad newsworthiness rules have cabined the tort almost to the point of annihilation. [FN226] This strongly suggests that the ability to use speech goods is a necessary element of what the First Amendment protects, and that, as a result, it is very risky to allow individuals to "own" or control use of their life stories.

Relying on case law designed to promote public discourse to protect the public domain will, of course, have greater appeal for those theorists who believe that the First Amendment is limited to promoting democratic participation and decision making [FN227] than it will for those to whom the promotion of autonomy and self-realization is the preferred understanding of the Free Speech Clause. [FN228] The *350 content necessary to feed public discourse would seem to be a more limited class of materials than that which would be demanded by an autonomy rationale. Autonomy theory would require a right to use whatever legitimately-acquired information the individual chooses to draw upon for self-actualization, regardless of its public or private nature. Limiting protection to content on matters of public concern might seem seriously underinclusive to autonomy theorists.

There are two reasons to suppose, however, that the support marshaled here for a mandatory public domain would be more inclusive than it appears at first sight. For one thing, courts have been reluctant in all but a few instances to apply their own normative standards to the question of what is and is not of "legitimate" public concern. The term, therefore, as a practical matter, has largely come to mean material that is of possible interest to some subgroup for some reason. [FN229]

The commercial speech line of cases is instructive in this regard. Information about products and services is likely in most cases to have only a tenuous connection with matters of public concern if that term is narrowly confined to issues relating to governance. The primary reason frequently repeated by the Supreme Court, however, for bringing such speech under the umbrella of the First Amendment is the public interest in allowing individuals to access and use such content. [FN230] Thus, while a public interest-based privilege might not, on the margins, be adequate to realize the autonomy ideal fully (failing, as it might, to extend to materials that only one single individual or a *351 very small group is interested in exploring or communicating), [FN231] it would certainly accommodate most of what individuals, including small groups of them, want to talk about. Nor is it inconsistent with the future recognition of a more open-ended right to utilize content freely.

Second, it is actually impossible to tell in advance whether some particular item of content will or will not be used in discourse on matters of public issues. Thus, any rule that permits public or private entities to ration the use of published or publicly accessible information has the potential to restrict such discussions.

Therefore, even though uses may be sanctionable for the harm they cause in particular instances, any legal assignment of prior property or quasi-property rights in a category of specific, publicly known speech goods should fail constitutional muster. This is because, a fortiori, per se restrictions on the use of speech goods could lead to shrinkage in public discourse. [FN232]

3. The Law Protecting Secrets and Refusing to Protect the "Not Secret"

The case law discussed thus far all revolves around information about individuals and business or nonprofit institutions and organizations. It is not a very big stretch to conclude that if granting private rights to control the dissemination of "private" information about individuals interferes impermissibly with discussion about matters of public concern, so too would granting private rights to control the use of other kinds of facts or other information about events or subjects that are similarly essential. Although the latter type of information does not involve the lives of other people, it is also necessary if the rest of us are to be able to explore elements of our shared experience or make choices about the kind of society in which we live. Support for a broader concept of the public domain, incorporating much more than personal information, is now emerging from other sources, including the law governing the protection of secrets.

The law of trade secrets, a branch of intellectual property law, protects business entities against the use or revelation of secret proprietary information by entities who either have a duty not to disclose it or who obtain the secret information by illicit means. [FN233] *352 This information may include such diverse matters as customer lists, formulas or manufacturing methods, [FN234] and it is designed to prevent unfair trade practices by competitors. [FN235] Once the information at issue is no longer actually secret, however, its further use and dissemination generally cannot be punished. [FN236] This distinction in the treatment of what is "known" and "not known" runs along similar lines of reasoning to those used in the case law on personal privacy. There, too, courts generally allow free reuse of information gleaned from public occasions or in public places, [FN237] while severely restricting use of what is learned by spying on people in places where they have gone to withdraw from public view.

Although trade secrecy protection has not traditionally been viewed as having a First Amendment aspect, a careful reading of the trade secrets cases, especially recent ones, suggests that the inability to protect speech goods once they cease to be secret rests, as is true in the privacy case law, not merely on common law principles, but on constitutional ones as well.

Attempts to apply provisions in the Restatement (Third) of Unfair Competition and the Uniform Trade Secrets Act that deal with the liability of "tippees" has brought to the fore the free speech issues embedded in trade secrecy. [FN238] These are individuals who, having learned the secret from an intermediary, go on to further disseminate *353 the proprietary information. Historically, liability for disclosure or use of a trade secret was limited to those individuals who directly violated some duty not to use or disclose it, [FN239] or to parties who engaged in illicit acts to acquire information that the proprietor had taken appropriate measures to keep secret. [FN240] Courts sometimes came across cases, however, where business rivals acquired what they knew were a competitor's trade secrets from, say, a former employee who was not entitled to reveal them. In this situation, it was sometimes thought to be just and proper to extend the duty of confidentiality to the business rivals on the ground that it was unfair for them to benefit commercially from knowing use of someone else's proprietary information. [FN241] This principle was embodied both in the Uniform Trade Secrets Act and the Third Restatement, each of which took the position that a third person could also not disclose or otherwise use a trade secret when that party knew or had reason to know that the information in question was either improperly obtained or revealed. [FN242] Because the language was not explicitly limited to competitive situations, it was still broad enough on its face to apply to people who learned secrets but had reasons other than gaining a competitive advantage to use or further disseminate them.

*354 Whatever one may think about a rule that limits knowing use by business competitors of a rival's secret information, courts have begun to see the serious free speech questions posed by the application of the rule to non-competing third-party recipients. A number of them have grappled with publication of alleged trade secrets by the press in situations where the reporter knew or had reason to know that the information was supposed to be a trade secret, and they have hesitated to enjoin or sanction such

revelations on the ground that it would violate freedom of speech. [FN243] A federal district court, for example, refused to enjoin the publisher of blueovalnews.com, a website that focuses on the Ford Motor Company, from publishing trade secrets learned through leaks from a Ford employee, [FN244] relying on the First Amendment. [FN245]

At least two other jurisdictions have wrestled specifically with the application of the provisions of the Uniform Act to tippers who were not competitors. In *DVD Copy Control Ass'n v. Bunner*, a California intermediate appellate court held that, where an individual was under no contractual or fiduciary obligation to protect trade secrets, the defendant's First Amendment interest in publishing overrode the proprietary interest of the plaintiff in preventing revelation of its trade secrets. [FN246] In that case, an individual posted up information on how to *355 remove the encryption used by the movie industry to protect digital video disks ("DVDs") against copyists. [FN247]

The ruling was reversed by the California Supreme Court, which upheld the preliminary injunction against re-publication of the information. [FN248] The majority took pains to distinguish *Bartnicki*, which it clearly recognized as cutting against injunctive relief. [FN249] The opinion took comfort from the fact that the Supreme Court "expressly declined to extend *Bartnicki* to 'disclosures of trade secrets or domestic gossip or other information of purely private concern.'" [FN250] This reassurance was somewhat misplaced, however, because the *Bartnicki* Court did not expressly decline for substantive reasons, but rather because it was following the traditional prudential rule of not reaching a question until compelled to do so. [FN251] The *Bunner* Court argued that publication of the code in question did not raise weighty First Amendment issues because the publication by *Bunner* was not designed to address a matter of public concern. [FN252] This conclusion was odd since the face-off between techies and the movie industry over DVD encryption (which rendered them unplayable on equipment using the Linux operating system) had frequently been on the front pages of newspapers across the country. [FN253] In short, although the majority reached its preferred outcome, it clearly did not find its results easy to explain in the face of existing free speech precedent. [FN254]

In contrast, the Oregon Supreme Court a few years earlier concluded that the equivalent to the First Amendment in its state constitution [FN255] protected the right of a newsletter to publish alleged *356 trade secrets of Adidas. [FN256] The Court found that the trade secrecy law in question was "directed at a 'specific subject of communication, excluding some speech based on the content of the message'" and that "it, therefore, 'limits the substance of a subject of communication.'" [FN257]

Notwithstanding *Bunner*, a growing number of cases in trade secrecy law are beginning to follow lines similar to those suggested by *Bartnicki*, and in the process provide further support for a claim that the First Amendment requires some mandatory speech commons. Information that is either "published" in the sense of being accessible to anyone who looks for it, or that has in a legitimate way been discovered by a would-be speaker appears to be freely reusable as a constitutional right. Once known, [FN258] information becomes embedded more or less permanently in the free speech commons. While I do not claim that it is never possible to sanction the use of information, such instances would be exceptional; the default rule seems to be that, once factual or other content is in the commons, further restrictions on its use cannot be imposed.

*357 D. Three Problems for a Constitutional Theory of the Public Domain

The assertion that the First Amendment creates a mandatory public domain must meet three challenges. First, it must be reconciled with a small, but significant, body of case law that allows certain intellectual property interests other than copyright to be created in material that should be permanently embedded in the public domain. These include decisions that permit private rights in subject matter ranging from sound recordings to current news.

The second problem derives from the manner in which the Rehnquist Court analyzes speech cases. The Court has repeatedly said that, where the government is pursuing an objective other than speech regulation, and proceeds in a "content-neutral" way, it enjoys considerable latitude to restrict speech. [FN259] Cases adopting this more lenient approach to speech regulation could be read as a tacit rejection of a claim that

one function of the First Amendment is to preserve access to and use of content.

Finally, any claims about a constitutionally mandated public domain must make clear, and be able to defend, their underlying concept of "freedom" in this context. To be precise, even if the Constitution requires that access to publicly disclosed content be "free" in the sense that no one can be required to ask permission to use it, does it also require the content to be "free" in the economic sense? One could have a public domain that allows anyone to draw at will from the speech goods it contains if she so wishes, but requires that she must pay a toll for that usage. This would be a regime of de facto compulsory licenses, which, although they do not allow an "owner" to restrict use, do require potential users to pay it.

1. The "Property Trumps Free Speech" Case Law Problem

In *Harper & Row*, the Supreme Court made broad assertions about the existence of a speech commons, [FN260] but, in doing so, it neither reconciled nor repudiated a series of earlier decisions that seem to be *358 at odds with the claim that such communicative raw materials as facts and ideas must be freely available to all.

The most famous of these, *International News Service v. Associated Press*, [FN261] recognized a property-like interest in the laborious gathering of factual information from the World War I battlefields. When a rival of Associated Press ("AP"), the International News Service ("INS"), took factual data from publicly accessible AP wires and used that information to file stories for its own subscribers, the Court classified the behavior as an unfair trade practice and upheld a preliminary injunction against continuation of the practice. [FN262] Although the Court clearly appreciated that it was on delicate ground--it admitted that the news of the day was, as it put it, "ordinarily . . . publici juris" [FN263]--it nevertheless adopted the position that where the user was also a competitor, a quasi-property right could be invoked to stop the use in question.

The decision in *International News Service* could be disposed of on the ground that it predates the beginning of the era in which the Supreme Court started to elaborate modern First Amendment doctrine. That explanation would dispose of *International News Service* as valid precedent, but it is not entirely convincing. The Court has continued to rely on the *International News Service* decision from time to time, including it in another case that involved the dissemination of news. The Justices unanimously reached out in *Carpenter v. United States*, [FN264] an insider trading case, to rule, based on *International News Service*, that the raw information gathered by a Wall Street Journal reporter for use in his column could be deemed the "property" of his employer. [FN265] Thus, when the reporter shared the *359 information with friends prior to its publication, he was guilty of misappropriating valuable property. [FN266]

In at least two other instances, material one might have expected to fall squarely into the First Amendment common, based on the earlier discussion, was treated as intellectual property. In these cases, unlike *International News Service* and *Carpenter*, explicit First Amendment challenges were raised and disposed of by the Justices. In *Zacchini v. Scripps-Howard Broadcasting Co.*, [FN267] for example, the Court concluded that a right of publicity action could be brought, consistent with the First Amendment, against a television station. The broadcaster had aired film footage, taken out-of-doors at a fair, of a "human cannonball" being shot through the air. As it did in *International News Service*, the Court again held that "news" legitimately observed and recorded by reporters was subject to control of a private owner and could not be used without permission. The case was unusual on its facts because what was "taken" was the performer's entire fifteen-second act, rather than, as in the classic publicity rights case, an aspect of *Zacchini's* persona, such as his name or a picture of his face. [FN268] The case was also striking because, again unlike the typical publicity case, the use at issue was not for advertising purposes--the most widely agreed-upon violation of publicity rights [FN269]--but for news reporting.

A second decision that runs contrary to the posited existence of a mandatory public domain is *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*. [FN270] Here, the Court upheld a federal law giving the United States Olympic Committee (USOC) the exclusive right to use the word "Olympic" in relation to a sporting event. The statute in question gave USOC ownership of the word even as against sporting events whose use of it did not give rise to consumer confusion. The law was challenged

on constitutional grounds by the organizers of what was then known as the Gay Olympics. Their claim was that vesting such extensive control over a *360 descriptive word in the hands of a single entity was a free speech violation. The Court responded rather blandly that barring the defendants from using the word "Olympics" was not unconstitutional because it was merely an "incidental" effect of a law intended to effectuate a valid state purpose: rewarding those who create value by an expenditure of time, money, and effort with a property right. [FN271]

Although these cases are few in number, and caged in by limiting language, they nonetheless provide support for the contrary claim that freedom of speech is quite compatible with awards of private rights over who can use "their" speech goods and how. There are, however, other ways of thinking about these cases that might reduce their challenge to the thesis laid out in this Article.

The first is to argue that the whole in this area is greater than the sum of its parts--that this tiny number of cases simply represents the occasional doctrinal wrong turn, and is too insignificant to outweigh the evidence in favor of a mandatory public domain. Another way to understand these cases is to say that they are relevant only to special instances where a particularized and substantial harm of the sort that the state has a serious interest in preventing has been identified. It is true that the Court saw some of these fact patterns as posing high risks of market failure. That is because the defendant's activities were interpreted as undercutting the plaintiff's financial rewards to such an extent that he or she might well be deterred from continuing to engage in a socially desirable (usually expressive) activity. [FN272]

This argument was made express in *Zacchini*, where the Court argued that performers and producers of live events would go out of business if they could not prevent appropriation of most, if not all, of their revenue stream by those who paid no part of the expenses of putting on the production. If broadcasters were permitted to show Mr. *Zacchini*'s entire performance without paying him, or if television cameras could transmit sporting events without permission so that the public could enjoy the event without buying tickets, communicative activities and entertainment would diminish in number. The concern about potential destruction of markets might also explain why, in *361 *International News Service*, the Court conceded complete freedom to members of the general public to reuse the facts in AP's news articles but limited INS's ability to do so until AP was able to secure at least some minimal level of returns from its effort. [FN273]

On the other hand, it must be said that this justification for regulating speech does not seem to rise to the level of significance that the Court has historically required as a precondition for either enjoining or punishing other kinds of speech. [FN274] Private economic injury is not generally recognized as a compelling reason to regulate speech. Nor does the market failure rationale do much to explain the result in the *Gay Olympics* case. Thus, it is not, I freely admit, wholly and entirely satisfying.

2. The Public Concern Theory and the Categorical Approach to Free Speech Analysis

Another important problem for the argument that the First Amendment requires a mandatory public domain lies in the analytic strategy the Court, particularly over the last decade, has used when it decides free speech questions. The model currently in favor seems on its face not to take content seriously as an independent speech value. [FN275] Instead, the Court has chosen, rather formalistically, to *362 classify government regulations of speech into a set of a priori categories. Once the restriction has been classified as to type, fixed rules of decision can then be applied that seem largely to disregard the nature of what is being said, or the general effect of a restriction on speech activities. While the scope of this article does not permit detailed discussion of this analytical approach, a brief description will quickly reveal its relevance to public domain theory. [FN276]

Simply put, the Court has developed graduated levels of constitutional scrutiny for regulations that impinge on speech, closely mimicking those used to decide equal protection cases. [FN277] Content-based regulations are severely scrutinized (and rarely survive the process), particularly if they favor or disfavor speech based on the point of view being expressed. [FN278] The analytical status of a second kind of content-based discrimination, one which targets speech based on its subject matter, is less clear. It is difficult to predict accurately whether such instances of regulation will be subject to strict or intermediate

scrutiny because the line between laws that restrict content, and ones that are content-neutral, turns out to be quite uncertain. [FN279]

Regulation of speech that the Court classifies as content-neutral or that, although content-based, is intended to further "an important or substantial governmental interest . . . unrelated to the suppression of free expression," [FN280] is subjected to a form of intermediate scrutiny *363 comparable to the quite flexible standard applied in the commercial speech cases. [FN281] This means that, although the substantiality of the government objective and the fit between that objective and the means chosen to achieve it will be considered, the importance of the content of the speech to the individual or to discourse on matters of public concern will not. [FN282] The latter of the two classes of speech regulations subjected to intermediate scrutiny is the more troubling because it can, in theory, lead to an entire area of content being placed off limits as long as the purpose of doing so is to achieve a "legitimate" end other than pure and simple suppression of speech. [FN283]

Intermediate scrutiny of speech regulation was originally introduced to deal with cases involving the regulation of behavior that carried with it communicative overtones. [FN284] If the restriction addressed some non-speech consequence of the behavior, then it was likely to pass muster. Subsequently, this approach was extended to cover regulation of "adult" entertainment on the grounds that the government purpose in regulating purveyors of pornography was not *364 a desire to restrict protected speech, but rather an effort to combat its "secondary effects." [FN285]

The third analytic category is reserved for laws of general applicability (that is, laws that do not, on their face, address speech at all, even when, as applied, they may severely restrict it). Such laws are tested under a minimalistic rational basis test, [FN286] and in contrast to those in the strict scrutiny category, rarely fail to be upheld.

The shift to tiered First Amendment analysis is problematic in a number of regards, but it is potentially fatal to a public domain theory that relies heavily on the claim that content itself, and the ability to use it, is an independent value protected by the Free Speech Clause. Certainly, much of the scholarship exploring the interface between intellectual property and the First Amendment, as well as some recent judicial opinions, struggles to answer questions about ownership of intangibles by wrestling to fit their conclusions within this form of analysis. [FN287] The implications are, by and large, discouraging. By following the three-tiered approach, for example, one might feel compelled to conclude that, if a content-neutral regulation "reasonably" furthers a "significant" state interest, such as protection of personal privacy or the provision of economic incentives to encourage production of speech goods, the regulation (and the intellectual property right it creates) is constitutional. This approach would, of course, render irrelevant any independent consideration of *365 the value of the content in question, either to those who wish to use it in their own speech, or to those who wish to hear it.

Interestingly, however, recent evidence suggests that the three-tiered approach to speech regulation may not so clearly refute the analysis suggested by this Article. Bartnicki [FN288] is a sign that the First Amendment interest in access to the raw material of speech continues to be highly significant to a majority of the Court.

The case was certainly one where the odds were high that, under the three-tiered approach, the rule in question would be upheld. A ban on the republication of the contents of intercepted telephone calls is subject matter-neutral, and was designed not for the purpose of limiting speech, but rather to serve the state's legitimate interest in protecting personal privacy. But the case was not analyzed that way; indeed, the opinion did not even address the question of the "appropriate" level of scrutiny. [FN289] Instead, the majority seemed tacitly to apply strict scrutiny, following an old, familiar line of reasoning: Justice Stevens simply asserted that publication of "truthful information of public concern" was fully protected, as long as the defendants did nothing illegal in acquiring the tape. [FN290] "[P]rivacy concerns," he wrote, "give way when balanced against the interest in publishing matters of public importance." [FN291]

Clearly, Bartnicki goes far toward reinvigorating the argument that the First Amendment foundation for a mandatory public domain remains sound. But it is not the only evidence that content retains affirmative

importance in the eyes of the Court, notwithstanding the use of three-tiered scrutiny. The recent history of commercial speech cases is also quite suggestive.

In 1986, the Court agreed that Puerto Rico's decision to prohibit advertising of its casinos to its own citizens was a legitimate regulation *366 of commercial speech, despite the fact that it was an attempt to censor discussion of one particular kind of truthful content. [FN292] The Court clearly was unconvinced that the content was especially valuable, and seemed at the time untroubled by the attempt to control access of an audience to it. A decade later, however, the Court repudiated that decision and embarked on a course of commercial speech analysis that seems explicitly to recognize the independent significance of content as a free speech value. Starting with *Rubin v. Coors Brewing Co.*, [FN293] the Court has reiterated the importance of freedom to communicate accurate content, and the crucial role such content plays, both in individual decision making and as a foundation for discourse on matters of public concern. [FN294]

When these pieces of evidence are put together, it seems plausible that, despite some twists in the path, the case for a mandatory public domain that rests on the importance of content to the First Amendment remains viable. Thus, unless illegitimate means of acquisition are at issue, or the law of copyrights and patents can properly be invoked, interferences with the reutilization of kinds of content are likely to be invalid, even if the Court in other situations continues to uphold interferences with speech that occur in pursuit of other regulatory goals.

3. The Compulsory License as a Way to Privatize Speech While Respecting First Amendment Values

One of the most interesting and difficult questions to answer in thinking about the public domain, its nature, and its First Amendment status is whether or not to draw a distinction between freedom to use and a right to use for free. [FN295] This distinction is now attracting the *367 attention of scholars engaged in defining various meanings of the term "public domain." [FN296] But the question was presaged long ago by the Supreme Court in *Zacchini*. [FN297] In the course of deciding the Human Cannonball's right to sue a news broadcaster for televising an entire performance of his act, the majority commented in passing that it saw a distinction between his claim to be paid for his performance and a claim--not present in that instance--of a right to an injunction. [FN298] The latter would have troubled the Court in a way that the former did not.

To understand this distinction, one might say that the First Amendment is offended by restrictions on the right to use content, but not by requirements to pay for it. Does this mean that even if a mandatory public domain does exist, the First Amendment still allows the speech goods to be subjected to some form of compulsory license? Statutory compulsory licenses have been used in copyright, for example, to provide composers with payment for use of their music while depriving them of control over who uses it. In the context of a property regime, compulsory licenses are generally thought of as a device that increases access to works while respecting the economic interests of authors in being paid.

The idea of a metered public domain, however, is intuitively uncomfortable, and I suspect quite alien to the understanding that animates the work of most scholars in the field. [FN299] This statement does *368 not quarrel with the idea that there may be legitimate reasons to expect people to pay for access to works in the public domain. First of all, individuals can always agree to pay for the right to reuse something, even if, absent the agreement, the Constitution would give them unrestricted rights to use it. Contractual arrangements that allow compilers of information to be paid for their work are not inherently suspect.

Also, the costs associated with the packaging of speech goods may legitimately be recovered by the packager. Here, of course, the charge is not for the content but its embodiment on paper. The fact, for example, that *Moby Dick* is in the public domain does not mean that anyone who wishes to do so can simply pick up the physical object in which it is embodied and walk off with it for free. Similarly, one who provides a theater to show films may charge for access, and a would-be patron cannot obtain a free seat simply because the movie in question is now in the public domain.

Nevertheless, the intuition that a compulsory fee violates the First Amendment is distinguishable and defensible. We recognize, for example, that the price tags that unavoidably attach to accessing speech

goods (including the cost of school tuition, the funding of libraries and so on) have an underside. They contribute to inevitable wealth-based informational disparities among members of society. Access conditioned on ability to pay can lead to distortions that offend our norms of individual equality, and that impede the possibility of fully realizing individual potential. Disparities in exposure to speech goods can also lead to inefficient results for the overall society. Education, learning, and the production of new work are among the benefits of exposure to a wealth of sources of information. Thus, free access and free use both produce positive social externalities. When, however, individuals can neither shift the costs of access onto others nor defray it themselves, knowledge and creativity spill-overs for society are diminished. For these reasons, wealthier and more democratic countries devote large amounts of their public resources to equalize the intellectual playing field by funding public education and stocking public libraries.

Any compulsory fee that attaches to the use of content, once legitimately acquired, could be plausibly conceived of as a "burden" in *369 much the same way it would be a "burden" to require private permission for the use. This is so given the importance of learning, thinking and sharing ideas to social welfare and our understanding of the value of free speech. Because of the exceptional circumstances of the case, Zacchini may have posed enough of a risk of market failure that the burden imposed on the broadcaster was warranted. [FN300] The broadcaster was required to help subsidize Zacchini's costs as a quid pro quo for the use of his act. [FN301] It is difficult to imagine, however, that the First Amendment would generally be indifferent to property or quasi-property rights that routinely allow private parties to subject information to a wealth burden. To do so would mean that anyone writing about or depicting Zacchini and his act could be required to pay for the right to disseminate information about the act, even if they do not broadcast it in its entirety. This outcome is inconsistent both with the goals of promoting individual autonomy and protecting the full and free discussion of matters of public concern. It would, in effect, permit the law to "prefer" the speech activities of the rich over the poor, and promote self-censorship to boot.

Perhaps the most thoughtful observation on this issue was made by Professor Edwin Baker in a recent article. Although the context was different, the point is sound in this setting as well. Baker wrote: "[S]peech freedom is a liberty--not a market--right. Freedom of speech gives a person a right to say what she wants. It does not give the person a right to charge a price for the opportunity to hear or receive her speech." [FN302] Thus, a compulsory license attached to the reutilization of legally obtained content might pit a policy preference (rewarding private owners) against a constitutional right to speak. Such a right to payment can be sustained over the constitutional right to speak, if at all, only on the rarest of occasions and only to the extent necessary to prevent serious harm. It cannot be sustained as a generally acceptable burden on speech rights.

Having said this, I freely admit that the subject is one where the existing doctrine is of little help. It deserves much greater thought and discussion than I and others have thus far given it. The relationship between speech and payment is the most troubling aspect of public domain theory and also the part that is least well-developed, in a field of real competitors.

After considering all three of the possible impediments to a First Amendment right to use content--I hope fairly--I recognize that the affirmative case for a mandatory public domain is not perfect. But it is nonetheless strong. The negatives, on balance, do not seem powerful enough to warrant betting against taking the Harper & Row *370 language that some information must stay in the public domain other than with complete seriousness. [FN303] Both the logic behind free speech and the Court's commitment to the protection of public discourse suggest that this is the appropriate conclusion.

IV. What Does the Mandatory Public Domain Contain?

Having concluded that, on balance, the case for the existence of a mandatory public domain is plausible, the final issue to address is what sorts of things the public domain I posit would contain. [FN304] It is impossible, without making this Article into a book, to do full justice to this question. Rather, what follows is an attempt to sketch the outlines of the public domain's contents and to note some of the issues that the mandatory public domain theory, if valid, raises for the future.

To frame the examination, I will start with the following prediction. First, whatever the mandatory public

domain holds, there is a baseline presumption that its contents can be used without permission and without charge. Second, very little will end up in the public domain as a result of an affirmative requirement that it be put there. Only a very limited amount of information must be contributed to the public, and everything in that limited category comes from government sources such as criminal trials and reports of Congressional proceedings.

For the most part, however, information that becomes part of the mandatory public domain does so by routes that are not themselves "mandatory." Disclosures do not have to be made. Manuscripts need not be shared. Secrets can be kept. But once the content is no longer held under conditions of "seclusion," it becomes part of the "public domain" and at that point is available to be used by any third party who learns of it through legally acceptable means. [FN305] Normally, *371 therefore, information will become "public" and freely available for reuse as a result of some volitional (although not necessarily voluntary) [FN306] act by the source. [FN307] This category of speech goods will include material inserted into public records or otherwise released by the government. It will also include private sector content drawn from events, conversations, and activities that occur in a sufficiently public manner that others can experience them without committing crimes or trespasses. Factual data and ideas can also enter the public domain once they have been disclosed to the public in some way, and cease to be closely held as "secrets."

Once speech goods are publicly available, [FN308] those who "know" them are privileged, absent contractual obligations to the contrary or protection from copyright or patent law, to utilize and recommunicate them unencumbered by any proprietary restrictions. Thus, names in a telephone directory, or information in an encyclopedia, once published, can be said to "belong" to anyone who buys, borrows or browses through these works. Also included among the kinds of material that will be in the mandatory part of the public domain are such fundamental building blocks of speech such as: words used in their denotative and descriptive sense (although prevention of consumer confusion can allow reasonable levels of protection for use as trademarks), [FN309] factual material, and the sorts of things that *372 individuals can pick up with their own sensory apparatus without spying or illicit prying (for example, the appearance of another human being, or of the physical elements on a public street). The mandatory public domain also contains all expression whose copyright term has run out, [FN310] and original expression that, for one reason or another, failed to acquire, or lost, statutory copyright by some failure to comply with the applicable law. [FN311]

What is "mandatory" about this public domain, in sum, is that what goes into it must stay there. The facts about the physical composition of water, for example, cannot be freely usable today, but available only by license from a private or public entity tomorrow. One may be allowed to extract money from would-be users as a precondition for the release of the information. Once, however, speech goods are released in ways that give the public actual or constructive awareness of them, they must remain public goods, except to the extent that they violate copyright or patent law, or cause some cognizable harm that the government is entitled to prevent or redress. This one-way ratchet means that even some aspects of current copyright law itself may be unconstitutional. For example, restoration of copyright for foreign works that had previously fallen into the public domain is suspect, both because the provisions that do this may violate the limited times provision of the Intellectual Property Clause, as well as First Amendment norms.

For restrictions on the use of content in the public domain to be legitimate, the justification for doing so should be a government interest of a very high order, and the harm a highly particularized and plausible one. National security needs may mean that one cannot disclose the location of a particular troop carrier today, but not that one may never do so. In short, where the use of legitimately obtained, constitutionally protected content is involved, the kind of scrutiny the *373 Court applied in *Bartnicki* [FN312] is the one that should be applied to restrictions on reuse. Nameless though that standard was in the case, it looked very much like old-fashioned strict scrutiny. Assuming that regimes designed to prevent market failure or business-destroying unfair competition could, and sometimes should, pass such a test, they would need to be narrowly crafted and directed toward plausible, rather than highly speculative, threats.

Because the Court has long treated speech that is both false and harmful as outside the ambit of the Free Speech Clause, the public domain theory articulated here would seem entirely consistent with traditional functions of trademark, that is, to prevent harm to companies and consumers from misleading uses of

words and symbols. On the other hand, it is likely to require severe paring back of the current law on dilution. These are but a few examples of how the recognition of a public domain necessary for meaningful speech rights to survive might play out in revising and refining our ideas of what intellectual property law can and cannot achieve.

Some will find the theory here an insufficiently radical view of the public domain because, although it captures much of our common sense intuition about how the free availability of speech goods intersects with our ability to communicate, it does not necessarily guarantee us a "perfect" public domain from their policy perspective. Others may find it radical because of the idea that there is an absolute limit on what can be subjected to intellectual property regimes. As the scope and role of the mandatory public domain is further fleshed out over time, most claims that publicity rights have been violated, or that noncompetitors have wrongfully disseminated legitimately obtained trade secrets will likely fall by the wayside. Trademark rights will be limited to prevention of consumer confusion and false designations of origin. The permissible scope of database legislation will be greatly restricted, if not altogether eliminated. Expression that has either failed to acquire, or has run out of, copyright protection would necessarily become a public resource. In short, this theory sharply defines the outer edges of possibility for intellectual property and limits the scope of decisions that can rest purely on public policy determinations.

Conclusion

The public domain has customarily been spoken of in the legal literature as an important value, and one that, at least in theory, has been recognized as essential both to theories of innovation and to constitutional principles of free speech. Unfortunately or not, we have passed the time when abstract testimonials to intellectual productivity and freedom to communicate are sufficient unto *374 themselves as a means of protecting the public domain. If the public domain is indeed central, then it must at least be anchored by mainstream constitutional jurisprudence for us to be certain that it can resist erosion and replacement by private markets.

The Intellectual Property Clause, I posit, is likely to offer part, but only part, of that anchorage. The most certain contribution of the Intellectual Property Clause to a mandatory public domain is the limited time provision that insists that all federally-protected works eventually become fully and freely available. Other contributions remain more questionable.

This Article, therefore, explores a second, rich source of potential protection for the public domain, derived from the First Amendment. While the claim that the First Amendment provides for a mandatory commons is also not entirely free of problems, the evidence, on balance, is that the Justices, whatever their overall persuasions on speech issues, have consistently shared a belief that freedom of speech incorporates some form of mandatory public domain. Although no case has ever ruled directly that the public domain is required by the First Amendment, this is not fatal to the claim. Professor Vincent Blasi once wrote, while discussing the likelihood that the First Amendment incorporates some affirmative rights to information, that "any central norm of the first amendment relating to the right to know would derive largely from long-held operating assumptions rather than from historically significant resolution of hard-fought disputes." [FN313] Indeed, that was ultimately how the public's right to attend criminal trials was derived.

It is not radical to claim, therefore, that long-standing assumptions about the centrality of a rich public domain to free speech will also ultimately lead to formal recognition of the principle. That the assumptions are long-standing can be seen both from the historical background of intellectual property and free speech law, and from a century's worth of elaboration of the newsworthiness standard in common law privacy tort cases. In particular, *Bartnicki* [FN314] has gone far to give new life to the argument that First Amendment jurisprudence explicitly values content for its own sake. Thus, the tools needed to effectuate the assurances in *Harper & Row* [FN315] about the public domain remain close at hand. The alternative--a society that values free speech and learning, but permits most of the valuable raw materials of speech to be privately owned in the interests of efficiency, or because information originators want more incentives, or because they "deserve" them-- leads us in a direction that is deeply inconsistent with the values embodied in free speech. Contemplating the costs *375 imposed by the lack of a coherent theory of the mandatory public domain is reason enough to get serious about developing one.

[FN1]. Samuel Tilden Professor of Law, New York University School of Law. I give special thanks to Professor Marci Hamilton whose skepticism about claims that information "wants to be free" prompted me to think harder about the whole issue. This in turn led to a consideration of the public domain--what might be in it and the extent to which, if at all, it could be understood as being required, at least in part, as a constitutional matter. Ultimately, I ended up believing that perhaps information, or at least some of it, does indeed "want to be free."

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[FN1]. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

The public domain, as I use the term in this paper, is one consisting of communicative material. All of the public domain is free for anyone to use without prior permission and, I would argue, without charge, but some of what is in the public domain could be made subject to an intellectual property regime by legislative or judicial choice. For example, in earlier versions of the copyright laws, Congress did not choose to cover everything that was constitutionally eligible. Some forms of "writings" were initially omitted and not added until later versions of the statute were passed. "Writings" eligible but not protected by statute were in the public domain, although there was no necessity for them to be there. See *infra* notes 5, 18, 24. Other materials, however, as this Article will attempt to show, are of a sort not subject to commodification and reside in what I will refer to hereafter as the "mandatory" public domain.

The reader should be aware, however, that no standard definition of the public domain exists. Some scholars would include some "owned" material in the public domain, such as work that can be freely used under copyright's fair use doctrine. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354, 361-62 (1999) [hereinafter Benkler, *Free as the Air*]. Recent papers discuss a variety of possible meanings for the term "public domain." See, e.g., James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, *Law & Contemp. Probs.*, Winter/Spring 2003, at 33, 58-62 [hereinafter Boyle, *The Second Enclosure Movement*]; see also Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, *Law & Contemp. Probs.*, Winter/Spring 2003, at 111, 114-28.

[FN2]. This term is intended to capture a range of inputs from external sources--the bits and pieces that make up the raw material of speech--that, when assembled in an individual's mind, become the fodder for his or her own knowledge base as well as that on which he or she draws to express him or herself to others. Sometimes things, such as inventions, may also be referred to as "in the public domain" in the sense that they can be replicated by anyone without a license, but the term "public domain," as used in this Article, applies only to speech goods. This Article will not address the public domain as it relates to tangibles, as distinguished from information.

[FN3]. *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2004); *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004).

[FN4]. Pub. L. No. 103-465, sec. 514, § 104A, 108 Stat. 4809, 4976 (1994) (codified as amended at 17 U.S.C. § 104A (2000)).

[FN5]. Prior to joining the Berne Convention for the Protection of Literary and Artistic Works in 1988, the United States imposed a number of requirements for perfecting and retaining copyrights that other

countries did not. For example, publishing in the United States without a proper copyright notice, or failing to file a notice of renewal before the end of the first twenty-eight years of protection (for works first published before 1978), meant that a work never attained--or prematurely lost--copyright protection. 17 U.S.C. § 104A(h)(6)(B). The 1909 Act permitted copyright to endure for up to fifty-six years, if renewal occurred in a timely fashion. Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080.

[FN6]. The amendment applied to works protected under the laws of countries adhering to the Berne Convention for the Protection of Literary and Artistic Works, other intellectual property treaties, or belonging to the World Trade Organization. 17 U.S.C. § 104A(h)(1), (3).

[FN7]. U.S. Const. amend. I.

[FN8]. U.S. Const. art. I, § 8, cl. 8 (giving Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). This clause is also referred to as the "Copyright and Patent Clause."

[FN9]. *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 108 (D.D.C. 2004); *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1216 (D. Colo. 2004).

[FN10]. *Luck's Music Library, Inc.*, 321 F. Supp. 2d at 117-19.

[FN11]. *Golan*, 310 F. Supp. 2d at 1218-20.

[FN12]. The Colorado court was somewhat more dubious about the strength of a third claim that copyright restoration violated substantive due process, but also refused to dismiss it. *Id.* at 1220-21.

[FN13]. See *infra* notes 112-16 and accompanying text.

[FN14]. A glance back at writings of well known scholars in the field of intellectual property shows a reasonably consistent pattern of support for a rich public domain. A typical example of this point of view can be found in this paragraph from the writings of Ralph Brown:

Emphasis on the protected domain leads to neglect of the public domain. There are masses of writings and discoveries that are open to the public--for good reasons.... It is not only ideas that circulate in the public domain without paying toll. All sorts of literary and artistic products are likewise open; and this helps to satisfy another vital interest: the national policy pressing toward competition as the best way our economy knows of satisfying wants efficiently and therefore cheaply.

Ralph S. Brown, Jr., *Unification: A Cheerful Requiem for Common Law Copyright*, 24 *UCLA L. Rev.* 1070, 1093 (1977); see also Benjamin Kaplan, *An Unhurried View Of Copyright* 112, 115, 125 (1967) [hereinafter Kaplan, *An Unhurried View*] (expressing a preference for copyright legislation that puts as much as possible into the public domain at the earliest feasible time); Zechariah Chafee, Jr., *Reflections on the Law of Copyright* (pt. 2), 45 *Colum. L. Rev.* 719, 721-22, 730 (1945) (discussing his preference for and the advantages of public domain status for works of authorship at earliest possible time); Benjamin Kaplan, *Revision of the Copyright Law*, 52 *Law Libr. J.* 3, 7 (1959) [hereinafter Kaplan, *Copyright Law*]; cf. *Graham v. John Deere Co.*, 383 U.S. 1, 5-10 (1966) (laying out the reasons why the granting of patents should be the exception and why most innovations should move immediately into the public domain).

[FN15]. Several of the judges involved in deciding the eighteenth-century litigation in Britain involving the existence and duration of common law copyright expressed real doubt, for example, that any property right could be found, not merely in the author's ideas, but also in his expression of them, absent a statutory copyright. See, e.g., *Millar v. Taylor*, 98 *Eng. Rep.* 201, 234 (K.B. 1769) (Yates, J., dissenting); *Proceedings in the Lords on the Question of Literary Property*, 17 *Parl. Hist. Eng.* 953, 972, 997 (1774) (remarks of Baron Eyre and Lord Camden regarding *Donaldson v. Beckett*, 1 *Eng. Rep.* 837 (H.L. 1774)). For discussions of this history, see Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, *Law & Contemp. Probs.*, Winter/Spring 2003, at 75; Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 *Wm. & Mary L. Rev.* 665 (1992) [hereinafter Zimmerman, *Information as Speech*].

Even in the nineteenth century, objections to the idea of copyright continued to be expressed. See Catherine Seville, *Literary Copyright Reform in Early Victorian England* 24, 30 (1999) (reporting doubts expressed by members of Parliament, including Thomas Wakley, Henry Warburton, and Joseph Hume, about the defensibility of copyright generally). In the debates over an extension of the term of copyrights, several members of Parliament favored sharply limited terms for statutory copyright out of concern over the negative effects of monopolies and out of a desire to promote public education. *Id.* at 46-48. A speech on the negative impact of lengthy monopolies by author Thomas Babington Macaulay is often credited with the initial defeat of what later became the Copyright Act of 1842 in Britain. *Id.* at 64-66.

[FN16]. See Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 *Cal. L. Rev.* 2187, 2239-40 (2000) [hereinafter Merges, *Solicitude*]. Professor Seville, for example, points out that a proposal to lengthen the term of British copyright in the nineteenth century led to vigorous protests. Seville, *supra* note 15, at 21-22. Many argued that increasing the term of the property right in expression was unacceptable because it would have potential deleterious effects on public education. *Id.* at 21-22, 105-09.

[FN17]. Trademarks, although not mentioned in the Constitution's Intellectual Property Clause, were a well-recognized form of intellectual property at the time of the adoption of the Constitution. Trademarks were protected insofar as they identified the source of goods, thereby allowing producers to enjoy the goodwill they built up in relation to their businesses and preventing consumer deception. For a discussion of the history of trademarks and their origins in medieval guilds, see Edward S. Rogers, *The Lanham Act and the Social Function of Trade-Marks*, 14 *Law & Contemp. Probs.* 173, 173 (1949).

[FN18]. Common law copyright was used in the United States largely to protect unpublished writings at a time when statutory copyright was available only upon publication. See, e.g., Copyright Act of 1909, ch. 320, § 9, 35 Stat. 1075, 1077-78 ("[A]ny person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act...."). For a discussion of the development of common law copyright, see Zimmerman, *Information as Speech*, *supra* note 15, at 692-98. When the 1976 Copyright Act moved the attachment of copyright back to the point of fixation in tangible form, 17 U.S.C. § 102(a) (2000) (stating that copyright subsists in works "fixed in any tangible medium of expression"), Congress replaced common law protection for unpublished works with a statutory, limited term of copyright, 17 U.S.C. § 303.

[FN19]. The most recent use of this language was in the Supreme Court's last copyright case, *Eldred v. Ashcroft*, 537 U.S. 186, 214-16, 231 n.7 (2003).

[FN20]. The notion that copyright is limited to the author's own expression and not to the underlying content of the work is central to copyright. For classic statements of this principle, see *Baker v. Selden*, 101 U.S. 99, 103 (1879) (copyright covers the book but not the content expressed therein) and *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (discussing at length the dividing line between protected expression and unprotected ideas).

[FN21]. Some courts did give copyright protection to the contents of factual compilations using a "sweat of the brow" theory. See, e.g., *Leon v. Pac. Tel. & Tel. Co.*, 91 F.2d 484 (9th Cir. 1937); *Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co.*, 281 F. 83 (2d Cir. 1922). See generally Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 *Colum. L. Rev.* 1865 (1990). This practice, which was never universally accepted among the lower courts, was thoroughly discredited by the U.S. Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

[FN22]. The writings of Thomas Jefferson (who drafted the 1793 Patent Act and helped administer the patent system as Secretary of State) make clear that he saw inventions and writings as things that became a public good as soon as they were communicated to others. *Graham v. John Deere Co.*, 383 U.S. 1, 7- 10 (1966).

Jefferson rejected the notion that an individual had any natural right to own ideas and argued that positive law alone was what created property rights in mental product--if, and only if, it was beneficial to society to do so. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 *The Writings of Thomas*

Jefferson 180-81 (H.A. Washington ed., 1859) (cited in *Graham*, 383 U.S. at 8 n.2). Jefferson was a strong supporter of the limited term provision of the Intellectual Property Clause, even going so far as to express his preference for a maximum term of protection to be set out in the Constitution itself. *Graham*, 383 U.S. at 8.

[FN23]. Similarly, patent law donates the information about an invention to the public up front. A patent application must disclose the nature of the invention in detail, and although the public cannot practice the art during the period of the patent, it can use the information disclosed in a variety of other ways. See 35 U.S.C. §§ 111-112 (2000).

[FN24]. This was not always so. First, through monopolies granted to printers, and subsequently through those granted to the members of the Stationers Company, rights could be obtained in old and new works alike. See *Seville*, supra note 15, at 3-4. Monopolies in the publication, for example, of the Book of Psalms or of the works of Shakespeare could be, and were, asserted and protected. See *Donaldson v. Beckett*, 1 Eng. Rep. 837, 842 (H.L. 1774). This state of affairs continued until the passage of the Statute of Anne, when copyrights in older works were phased out. 8 Ann., c. 19 (1710) (Eng.); see also infra note 25. The booksellers were not discouraged by the statutory limit imposed on their claimed rights, however, and attempted to assert that common law rights in the works under their control kicked back in after the statutory period of protection lapsed. *Donaldson*, 1 Eng. Rep. at 846-47. This argument was initially successful, *Millar v. Taylor*, 98 Eng. Rep. 201, 262 (K.B. 1769), but ultimately, the House of Lords concluded that common law rights did not continue to survive after the term of statutory copyright lapsed, *Donaldson*, 1 Eng. Rep. at 846-47. A similar conclusion was reached in the United States. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). This meant that older works became part of the public domain. For a comprehensive and fascinating history of these developments, see generally Lyman Ray Patterson, *Copyright in Historical Perspective* (1968) and *Rose*, supra note 15.

[FN25]. At the outset, as a transition measure, even ancient works in print could be protected by statutory copyright for a brief period of time under both English and American law. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124; Statute of Anne, 8 Ann., c. 19 (1710) (Eng.) (giving 21 years of protection to "the author of any book or books already printed,... or the bookseller or booksellers, printer or printers, or other person or persons, who hath or have purchased or acquired the copy or copies of any book or books, in order to print or reprint the same"); *Eldred v. Ashcroft*, 537 U.S. 186, 194 (2003) (noting that the initial U.S. copyright statute protected already published works). Once the English and American laws were in place, however, copyrights would then issue only for newly published works. The Statute of Anne specified that "the author of any book or books... that shall hereafter be composed... shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same." 8 Ann., c.19 (Eng.). The first American copyright statute also made clear that, going forward, only newly published works could receive protection. See Act of May 31, 1790, 1 Stat. at 124.

[FN26]. For example, the Copyright Act of 1976 extended copyright terms from twenty-eight years with a possible twenty-eight year renewal to the life of the author plus fifty years. Pub. L. No. 94-553, sec. 101, § 302(a), 90 Stat. 2541, 2572 (codified as amended at 17 U.S.C. § 302(a) (2000)). The term was extended again recently for an additional period of twenty years by the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (1998) (amending 17 U.S.C. § 302). Various other expansionary changes in copyright were made following adherence in 1989 to the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works, July 14, 1967, art. 7, 828 U.N.T.S. 221, 235; see, e.g., 17 U.S.C. § 104A (providing for the restoration of copyrights for foreign works formerly in the public domain in the United States); 17 U.S.C. § 106A (providing moral rights protections for visual artists). Another example of expanded protection can be found in the Federal Trademark Dilution Act of 1995. Pub. L. No. 104- 98, § 3(a), 109 Stat. 985, 985 (1996) (codified as amended at 15 U.S.C. § 1125(c) (2000)) (adding injunctive relief as a remedy for the dilution of a trademark); cf. *Merges, Solicitude*, supra note 16, at 2235-39.

[FN27]. The right of publicity, a property interest that allows the owner to exercise exclusive rights over the commercial use of identifying information about an individual, was first created in the 1950s by Judge

Jerome Frank. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953). It has subsequently been widely adopted. See, e.g., Restatement (Third) of Unfair Competition § 46 (1995); J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1.1(A)(1) (1999). The right of publicity can be a source of considerable revenue. It has been reported that golf star Tiger Woods earns \$50 to \$60 million a year from exploiting his publicity rights. See Dave Anderson, *Big Money, a Broken Bat and a Wonder Named Woods*, N.Y. Times, Dec. 31, 2000, § 8, at 1; Grainger David, *Tiger Woods*, Fortune, Apr. 30, 2001, at 25; Bob Garfield, 2000: The Year in Review; People, Advertising Age, Dec. 18, 2000, at 38. Retired basketball player Michael Jordan and rap artist Sean (P. Diddy) Combs are other examples of sports stars and entertainers who make tens of millions of dollars each year from exploiting the value of their names and images. Polly Devaney, *Celebrities Vie for a Part of the Own-Brand Market*, Marketing Wk. (London), July 19, 2001, at 28, available at LEXIS, News library, MKGWK file (regarding Combs' successful efforts to exploit his fame as a way to market clothing); Associated Press, *Jordan Wants Out of Endorsements*, Columbian (Vancouver, Wash.), Mar. 23, 2000, at C4, available at LEXIS, News library, COLMBN file (estimating Jordan's endorsement income for 1997 at forty million dollars); Guy Trebay, *Fashion Statement: Hip-Hop on Runway*, N.Y. Times, Feb. 9, 2002, at A1 (describing the success of Combs' clothing label).

[FN28]. Congress, for example, has been debating for several years now the possibility of passing a database protection statute that, although it does not quite create a property right in information, comes very close to doing so. For discussions of various drafts of this legislation, see Paul Bender, *The Constitutionality of Proposed Federal Database Protection Legislation*, 28 U. Dayton L. Rev. 143 (2003); Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 Berkeley Tech. L.J. 535, 541-52 (2000) [hereinafter Benkler, *Constitutional Bounds*]; Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. Cin. L. Rev. 151 (1997) [hereinafter Ginsburg, *Sui Generis Protection*]. For a recent argument that facts should be protected under copyright rather than by sui generis legislation, see Michael Steven Green, *Copyrighting Facts*, 78 Ind. L. J. 919 (2003). States similarly have gotten into the business of protecting nontraditional material. For example, many states recognize the right of publicity, which is an ownership interest in the commercial exploitation of an individual's personal identifying characteristics. See supra note 27.

[FN29]. One indirect way to create and maintain intellectual property rights is to give private individuals legal tools for circulating speech goods that permit them, when they circulate speech goods, to set their own terms for how purchasers can access and use the materials. This can occur through the statutory or judicial validation of non-negotiated shrink-wrap contracts. See, e.g., *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (upholding a contract term prohibiting commercial reuse of facts from a computerized compilation). The Uniform Computer Information Transaction Act ("UCITA"), approved by the Commissioners on Uniform State Laws in 1999, covers such contracts. Uniform Computer Information Transaction Act, at http://www.law.upenn.edu/bll/ulc/ucita/ucita_99.htm (last visited Aug. 25, 2004). UCITA has been adopted in Virginia and Maryland. A Few Facts About the... Uniform Computer Information Transactions Act, at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucita.asp (Aug. 1, 2003). Although the draft act will remain on the books, the State Commissioners decided at their annual meeting in 2003 to no longer push for state passage because UCITA continued to generate a high degree of controversy. See *UCITA Standby Committee Is Discharged*, at <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=56> (last visited Aug. 25, 2004). The Digital Millennium Copyright Act ("DMCA") also provides legal artillery to help protect copyrighted works. See Pub. L. No. 105-304, ch. 12, 112 Stat. 2860, 2863 (1998) (codified as amended at 17 U.S.C. §§ 1201-1205 (2000)). The DMCA prohibits the distribution of tools of any kind that would allow users to circumvent technological self-help devices that control access to or use of copyrighted works. See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (publishing DeCSS code, which can be used to de-encrypt movies in DVD format, violates the DMCA), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

[FN30]. As one prominent scholar has pointed out, reliance on the weight of tradition or on history is no longer enough to win an argument over whether to protect the public domain. Peter A. Jaszi, *Goodbye to All That--A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public*

Interest in Copyright Law, 29 Vand. J. Transnat'l L. 595, 596 (1996). Jaszi goes on to say:

My aim is to suggest that in today's new discursive climate, those who care about the survival of the public domain must begin to find new, and newly compelling, vocabularies with which to articulate their concerns. Unless they do so, they risk the consequences of discovering that familiar constitutionally-grounded arguments for limitations on proprietary rights will become irrelevant in tomorrow's intellectual property policy debates.

Id.

[FN31]. See Edward Samuels, *The Public Domain in Copyright Law*, 41 J. Copyright Soc'y USA 137, 137 (1993). Professor Samuels was among the earliest to express skepticism about the public domain as either a coherent concept or a foundational element of intellectual property law.

[FN32]. Robert Merges is among those who conceive of the public domain as a subsidy to users. He suggests that redistribution of the subsidy from users to owners is not problematic if, in the judgment of lawmakers, public policy objectives are better served by doing so. Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-line Commerce*, 12 Berkeley Tech. L.J. 115, 134-35 (1997).

[FN33]. In *Eldred v. Reno*, for example, Judge Ginsburg of the D.C. Circuit Court of Appeals, in the course of concluding that the recent twenty-year extension of the copyright term for existing works does "promote Progress," suggested that it was romantic nonsense to believe that works are better off in the public domain. 239 F.3d 372, 379 (D.C. Cir. 2001), *aff'd sub nom. Eldred v. Ashcroft*, 537 U.S. 186 (2003). When copyright ends, Judge Ginsburg wrote, works that are no longer private property are likely to "disappear--not enter the public domain but disappear." Id. Keeping them under statutory protection makes them more accessible to the public. Id.

[FN34]. See Douglas G. Baird, *Does Bogart Still Get Scale? Rights of Publicity in the Digital Age*, 4 Green Bag 2d 357 (2001) [hereinafter Baird, *Does Bogart Still Get Scale?*]. See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325 (1989). In his paper, Baird contrasts his views on the public domain with those of the preeminent copyright scholar, Benjamin Kaplan, as follows:

Kaplan believed that there would always be a frontier that marks the boundary between privately owned intellectual property and the open wilderness that is the public domain. While we want to protect creators, we need a large public domain as well.

Many follow Kaplan and believe that preserving the public domain is a principal goal of intellectual property law. In this paper, however, I ask whether this intuition still makes sense. Perhaps the principal problem is no longer one of preserving the public domain but understanding how the law of intellectual property should function in a world in which our cultural icons and symbols are increasingly privately owned. To a very large extent, Kaplan's frontier may no longer exist.

Baird, *Does Bogart Still Get Scale?*, *supra*, at 357. He uses Mickey Mouse, who narrowly avoided public domain status by virtue of an extension of the term of copyright in 1998, as one illustration:

It is not necessarily a bad thing that Disney still owns rights to Mickey Mouse. It gives Disney an incentive to preserve this icon. Without intellectual property protection, there would be nothing to stop cheap reproductions and the dilution and tarnishing that comes with it. Without intellectual property protection, there would be nothing to stop the use of Mickey for any and all purposes. Our world is not necessarily a better place if anyone can show Mickey Mouse shooting heroin, as indeed someone has tried.

Id. at 363.

Professor Samuels has taken something of the same approach, arguing that no one can assert with assurance that a rich public domain serves the public interest better than private ownership would. See Samuels, *supra* note 31, at 160-61. A rather different form of public domain skepticism appears in the scholarship of Professor R. Polk Wagner. He argues that enclosure is a good way to promote innovation and that enlarging the public domain would be less effective in spurring creativity. Wagner also assumes, however, that what he terms "spillovers"--the informational content revealed from inventions and contained in copyrighted works--will escape enclosure and will be added to the public domain. R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 Colum. L. Rev. 995, 1005-08 (2003). My own motivation for writing this article is that I am worried about increasing

numbers of efforts to enclose those spillovers. While I agree with Professor Wagner that information is difficult to enclose fully, significant interference is something to worry about, and, should it occur, would undercut his argument to a greater or lesser degree.

[FN35].

Defenders of the public domain are numerous. See, e.g., Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain (Part I)*, 18 *Colum.-VLA J.L. & Arts* 1 (1994); Benkler, *Free as the Air*, *supra* note 1; Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, *Law & Contemp. Probs.*, Winter/Spring 2003, at 173 [hereinafter Benkler, *Through the Looking Glass*]; James Boyle, *A Theory of Law and Information: Copyrights, Spleens, Blackmail, and Insider Trading*, 80 *Cal. L. Rev.* 1415 (1992); Boyle, *The Second Enclosure Movement*, *supra* note 1, at 33; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *Yale L.J.* 1533, 1556-57 (1993); David Lange, *Recognizing the Public Domain*, *Law & Contemp. Probs.*, Autumn 1981, at 147 [hereinafter Lange, *Recognizing*]; David Lange, *Reimagining the Public Domain*, *Law & Contemp. Probs.*, Winter/Spring 2003, at 463; Jessica Litman, *The Public Domain*, 39 *Emory L.J.* 965 (1990); L. Ray Patterson & Judge Stanley F. Birch, Jr., *Copyright and Free Speech Rights*, 4 *J. Intell. Prop. L.* 1 (1996); see also L. Ray Patterson & Stanley W. Lindberg, *The Nature of Copyright: A Law of Users' Rights* 50 (1991) (arguing for the centrality of the public domain to copyright).

[FN36]. See *supra* note 35. Yochai Benkler, for example, argues persuasively that allowing copyright owners too broad control over their current product will reduce the amount of fresh and innovative cultural production in the future because the cheaper option will be for owners to recycle existing characters, properties, and ideas. Benkler, *Free as the Air*, *supra* note 1, at 397-98.

[FN37]. Litman argues that because we all use so many of the same resources to create new works, the concept of a public domain is needed to prevent material not original to a particular author from being walled off for her private control by intellectual property rules. Litman, *supra* note 35, at 1010-22. As Litman puts it, the purpose of copyright is to nurture authorship, not authors, and the public domain is essential in achieving that goal. *Id.* at 969. Some argue that efficient levels of future innovation will not be achieved if creators are unduly burdened by cumbersome permission or payment obligations.

Professor Benkler argues in favor of a rich public domain using the Constitution as part of the basis of his case. Benkler, *Free as the Air*, *supra* note 1, at 358. He also emphasizes the policy benefits, such as the encouragement of more diverse, new works of authorship. See *id.* at 408. He argues, in particular, that impecunious individuals and small organizations would find it more difficult, absent a rich public domain, to afford access to the preexisting information products they need as inputs for their own creations if those inputs were not in the public domain. See *id.* at 408-12; see also Kaplan, *An Unhurried View*, *supra* note 14, at 24 (discussing the fact that at many times in history, the ability to imitate past works was more highly valued and deemed more worthwhile than innovativeness).

[FN38]. Professor Wendy Gordon supplies a rich exegesis of the natural law theories of John Locke to explain the significance in intellectual property of a rich public domain. Gordon argues that, under Lockean notions of property, private rights are justified only if "enough and as good" is left in the commons for others, and if granting the property right also can be shown to increase the total social welfare. For these two conditions to be satisfied, Gordon says, much of the stuff from which intellectual products are constructed must remain free for everyone to use. Gordon, *supra* note 35, at 1540-60. For a discussion of Locke's role in framing ideas about intellectual property, see Zimmerman, *Information as Speech*, *supra* note 15, at 676-77.

[FN39]. Two counter-examples where pro-public domain advocates may have helped stem the intellectual property tidal wave include discouraging widespread adoption of UCITA, see *supra* note 29, and in staving off passage of database protection legislation in the United States, despite ongoing pressure for Congress to copy the European model. See Council Directive 96/9/EC of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20; J.H. Reichman & Paul F. Uhlir, *A Contractually Reconstructed Research Commons for Scientific Data in a Highly Protectionist Intellectual Property Environment*, *Law & Contemp. Probs.*, Winter/Spring 2003, at 315, 329 (remarking on the divide between U.S. and European attitudes to a

public domain for data); see also *supra* note 28. For a discussion of the European approach, see Jane C. Ginsburg, *US Initiatives to Protect Works of Low Authorship*, in *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* 55 (Rochelle Cooper Dreyfuss et al. eds., 2001).

[FN40]. At one level, belief in the benefits of a broad public domain rests simply on observation. A *de minimis* property regime (limited to some fairly basic, time-bound prohibition against literal copying) and an ample public domain is the type of legal regime that was in place for generations in the United States, and it has demonstrated itself compatible with a high level of social and intellectual welfare. Little empirical evidence exists that ever-higher levels of intellectual property protection will improve on those results. This point has been made with regard to database protection. The European Union has adopted a stringent intellectual property regime protecting databases, ostensibly to get a foothold in a market that has been dominated by a country--the United States--where collected data receives little in the way of meaningful protection from the law. Reichman & Uhler, *supra* note 39, at 355.

[FN41]. U.S. Const. art. I, § 8, cl. 8. The Intellectual Property Clause specifies that "exclusive Right[s]" shall only be granted for "limited Times." *Id.*

[FN42]. The meaning of a limited time itself is deeply imbued with discretionary elements. For example, the Supreme Court recently concluded that Congress had not gone beyond a limited time when it extended the term of copyright by an additional twenty years for old and new works alike. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

[FN43]. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346-47 (1999).

[FN44]. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (finding computer programs to be a form of expression); *Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000) (same).

[FN45]. See generally Dan L. Burk, *Patenting Speech*, 79 *Tex. L. Rev.* 99 (2000).

[FN46]. Compare *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2004), with *Golan v. Ashcroft*, 310 F. Supp. 2d 1215 (D. Colo. 2004) (disagreeing over whether constitutional challenges to restoration of copyrights are sufficiently meritorious to withstand motions to dismiss). Also, definitions of patentable or copyrightable subject matter have sufficient malleability to permit certain materials to shift into intellectual property even though such materials might, using a different definition, be deemed exempt from either patent or copyright. One such example is copyright's often tenuous line between the unprotectable idea and protectable expression, which often results in considerable disagreement about what can and cannot be protected. Compare, e.g., *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236 (3d Cir. 1986) ("The purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of the expression of the idea." (emphasis omitted)), with *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) (applying a far more stringent abstraction and filtration approach to separate ideas and other unprotectable elements from the program's expression). See generally Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 *Emory L.J.* 393 (1989).

[FN47]. See, e.g., *Uniform Trade Secrets Act*, § 1(2)(ii)(B)-(C) (1985) (making illegal the disclosure of trade secrets by third parties who are aware that their source was not entitled to reveal the information), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/utsa85.htm> (last visited Aug. 25, 2004). The constitutionality of this provision, adopted by California in its civil code, was recently litigated. *Cal. Civ. Code* § 3426.1(b)(2)(B)-(C) (West 1997); see *DVD Copy Control Ass'n v. Bunner*, 75 P.3d 1 (2003); *infra* notes 246-54 and accompanying text.

[FN48]. The Federal Trademark Dilution Act makes actionable any use that "causes dilution of the distinctive quality of [a famous] mark." 15 U.S.C. § 1125(c)(1) (2000). Dilution is a cause of action that covers situations where the capacity of the mark to identify and distinguish goods is lessened, even though the use in question does not mislead or deceive as to the origins of a good or service. *Moseley v. V Secret*

Catalogue, Inc., 537 U.S. 418, 421 (2003). Thus, hypothetically, a humorous word play on a famous name--for example, Abercrombie's Finch for a bird seed purveyor--could be held to dilute the mark (in this case of Abercrombie and Fitch) by playing off of it, even if no consumer would be misled into believing that both stores sold clothes, or bird food, or indeed had any relationship to one another. As the United States Supreme Court noted in a recent decision, this is a form of legal protection (which had been offered prior to the federal act by some states) that does not proceed either from earlier common law or from any interest in protecting consumers. *Id.* at 429. The Court somewhat limited the reach of the dilution provisions by interpreting the statute to require at least circumstantial evidence of actual harm to the senior mark. *Id.* at 434.

[FN49]. See, e.g., Julie E. Cohen, Copyright and the Jurisprudence of Self-Help, 13 Berkeley Tech. L.J. 1089, 1131-32 (1998); Gordon, *supra* note 35; J.H. Reichman & Jonathan A. Franklin, Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information, 147 U. Pa. L. Rev. 875 (1999); Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised, 14 Berkeley Tech. L.J. 519 (1999).

[FN50]. See, e.g., William W. Van Alstyne, Reconciling What the First Amendment Forbids with What the Copyright Clause Permits: A Summary Explanation and Review, *Law & Contemp. Probs.*, Winter/Spring 2003, at 225; C. Edwin Baker, First Amendment Limits on Copyright, 55 Vand. L. Rev. 891 (2002) [hereinafter Baker, First Amendment]; Benkler, Through the Looking Glass, *supra* note 35; Michael Birnhack, The Copyright Law and Free Speech Affair: Making-up and Breaking-up, 43 IDEA 233 (2003); Michael D. Birnhack, Copyright Law and Free Speech After *Eldred v. Ashcroft*, 76 S. Cal. L. Rev. 1275 (2003); Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 Duke L.J. 147 (1998); Neil Weinstock Netanel, Locating Copyright Within the First Amendment Skein, 54 Stan. L. Rev. 1 (2001); Patterson & Birch, *supra* note 35, at 1; Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1 (2002); Yen, *supra* note 46.

[FN51]. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (stressing that copyright does not protect facts); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-57 (1985) (same).

[FN52]. The Article, however, borrows its baseline assumption from the preceding free speech/copyright scholarship. Its premise is that unless the commodification of speech goods occurs under a valid exercise of the Copyright and Patent Clause power, an intellectual property regime can be valid only if it survives scrutiny under the standards of the Free Speech Clause. See *supra* note 50.

[FN53]. See *supra* notes 17-23, 41-45 and accompanying text.

[FN54]. See Thomas Babington, Lord Macaulay, A Speech Delivered in the House of Commons on the 5th of February, 1841, in *Speeches by Lord Macaulay with his Minute on Indian Education* 156, 162 (G.M. Young ed., 1935) [hereinafter Macaulay, Speech on the 5th of February, 1841]. Macaulay felt that "monopoly [was] an evil" and argued that "[f]or the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good." *Id.*; see also Kaplan, Copyright Law, *supra* note 14, at 7 (expressing doubt that very long terms for all copyrighted works could be justified). Justice Breyer examined the economic advantages of providing copyright protection for books. Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs, 84 Harv. L. Rev. 281 (1970). He determined that copyright protection, at least for more than a very short period, did not provide book publishers with any substantial amount of additional economic advantage, whereas abolishing copyright protection for books would provide a measurable benefit in the form of reduction in costs to consumers. *Id.* at 291-323.

[FN55]. See 35 U.S.C. § 154(d) (2000); see also 3 Donald S. Chisum, Chisum on Patents § 7.01 (2003). The first patent statute passed by Congress required "a specification in writing, containing a description, accompanied with drafts or models, and explanations and models." Act of Apr. 10, 1790, ch. 7, § 2, 1 Stat. 109, 110. The requirement was explained in *Evans v. Eaton*, both as helping the public guard against "unintentional infringement" by disclosing the nature of the protected invention, and as enabling "an artist to make the improvement, by a reference to some known and certain authority, to be found among the

records of the office of the Secretary of State, after the patent has run out." 20 U.S. (7 Wheat.) 356, 367 (1822).

[FN56]. See 17 U.S.C. § 102(b) (2000). The statute makes clear that copyright protection cannot extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery." *Id.* This language did not appear in the Copyright Act prior to the 1976 iteration of the statute, but it reflects a long line of earlier precedent. See *Baker v. Selden*, 101 U.S. 99 (1879); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930); *Fendler v. Morosco*, 171 N.E. 56 (N.Y. 1930).

[FN57]. See *infra* notes 60-63 and accompanying text.

[FN58]. See generally Macaulay, Speech on the 5th of February, 1841, *supra* note 54, at 156-73 (speaking in response to a proposed bill that would extend the term of copyright). In the debate over the extension of the copyright term that ultimately was passed as part of the Copyright Act of 1842, several other legislators joined Macaulay in his concern about the effects of too expansive rights. See Seville, *supra* note 15, at 44-46. For example, according to Seville, Thomas Wakley "presented two petitions from the president and council of... [the British Medical Association], expressing anxiety that an extended term would deny the public access to cheap publications, particularly scientific ones." *Id.* at 44.

[FN59]. In a letter to Edward Clarke, John Locke in particular protested the claim of property rights in old works by members of the Stationers' Company. Letter from John Locke to Edward Clarke (Jan. 2, 1693), in *The Correspondence of John Locke and Edward Clarke* 366-68 (Benjamin Rand ed., 1927). "[W]hat right," he wrote, "can anyone pretend to have to the writings of one who lived a thousand years ago." *Id.* at 367.

The Marquis de Condorcet, forefather of French copyright law, at one time reportedly preferred government subsidies to living authors and opposed the idea of privatizing intellectual property. Calvin D. Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)*, 9 *Ind. Int'l & Comp. L. Rev.* 423, 430-31 (1999).

[FN60]. Proceedings in the Lords on the Question of Literary Property, 17 *Parl. Hist. Eng.* 953, 992-1001 (1774) (remarks of Lord Camden regarding *Donaldson v. Beckett*, 1 *Eng. Rep.* 837 (H.L. 1774)). As already noted, *Donaldson* held that copyright was purely a creature of statute and that no common law property rights in expression survived the expiration of the statutory term of protection. See *supra* note 24.

[FN61]. 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("The general rule of law is, that the noblest of human productions--knowledge, truths ascertained, conceptions, and ideas--become, after voluntary communication to others, free as the air to common use.").

[FN62]. 17 *Parl. Hist. Eng.* at 999 (opinion of Lord Camden). Examples of similar statements are scattered throughout copyright jurisprudence and scholarship. Lord Mansfield, grappling with the problem of just what aspects of maps and charts were copyrightable, cautioned that courts "must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be... deprived of improvements, nor the progress of the arts be retarded." *Sayre v. Moore* (1785), quoted in *Cary v. Longman*, 102 *Eng. Rep.* 139, 140 n.(b) (K.B. 1801). On this side of the Atlantic, Justice Story in his great work *Equity Jurisprudence* makes a distinction in literary works between that which "belongs to the exclusive labors of a single mind," and those things that are "common sources of the materials of the knowledge, used by all." 2 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 940 (8th ed. 1861). The clear implication is that only the first can become intellectual property. See also *Millar v. Taylor*, 98 *Eng. Rep.* 201, 249- 50 (K.B. 1769) (opinion of Yates, J.) (stating that if copyright were made perpetual, it would cut against the important social objective of encouraging learning). The majority of judges in *Millar* disagreed with Yates, and ruled that the common law could be used to create "permanent" copyrights. *Id.* at 258-62. This position was rejected ultimately by the House of Lords in *Donaldson*. 1 *Eng. Rep.* 837, 846-47.

[FN63]. For a history of the development of the concept of the public domain, see Rose, *supra* note 15. Rose points out that public domain discourse in the eighteenth century was very undeveloped. *Id.* at 86-87.

In the United States, in the early part of the twentieth century, the Supreme Court agreed that, even if a work were copyrighted, its content "ordinarily [is] *publici juris*." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); see also *Stowe v. Thomas*, 23 F. Cas. 201, 208 (E.D. Pa. 1853) (No. 13,514) ("By the publication of [her] book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. [Uncle Tom and Topsy are as much *publici juris* as Don Quixote and Sancho Panza].... All that now remains is the copyright of her book; the exclusive right to print, reprint and vend it...."). In a recent article on the public domain, scholar Mark Rose argues that the public domain discourse in the eighteenth century was very underdeveloped. See Rose, *supra* note 15, at 86-87.

[FN64]. Roger Chartier, *The Order of Books: Readers, Authors, and Libraries in Europe Between the Fourteenth and Eighteenth Centuries* 35-36 (Lydia G. Cochrane trans., Stanford Univ. Press 1994).

[FN65]. *Id.* at 36.

[FN66]. It is generally agreed that the direct legislative history of the Intellectual Property Clause provides little insight into the intent of the drafters, other than to indicate a desire to provide uniformity among the states. See, e.g., Oscar Cargill & Patrick A. Moran, *Copyright Duration v. The Constitution*, 17 *Wayne L. Rev.* 917, 920 (1971) (mentioning the lack of records, but noting a desire for uniformity); Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 *Geo. L.J.* 109, 114 (1929) (noting that no minutes refer to the Clause or any debate in the Constitutional Convention); *The Federalist* No. 43 (James Madison) (noting the desire for national uniformity and stating that the public good is served by the benefit of patents and copyrights to authors and inventors). L. Ray Patterson, in his writings on the history of the Intellectual Property Clause, says that the Clause traces back directly to the Statute of Anne and was intended to serve the same purposes, including the protection of the public domain. L. Ray Patterson, *Understanding the Copyright Clause*, 47 *J. Copyright Soc'y USA* 365, 374-75 (2000) [hereinafter Patterson, *Understanding*]; see also L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay*, 52 *Emory L.J.* 909 (2003). Patterson arrives at this conclusion in part based on inferences from the language of the Statute of Anne, Patterson, *Understanding*, *supra*, and in part based on the final decision in *Donaldson v. Beckett*, which refused to continue common law copyright protection for works once statutory copyright ended. *Id.* at 382. This decision was handed down by the House of Lords in 1774, thirteen years before the drafting of the Intellectual Property Clause. *Id.*

[FN67]. U.S. Const. art. I, § 8, cl. 8; see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991) ("The originality requirement articulated in the Trade-Mark Cases and *Burrow-Giles* remains the touchstone of copyright protection today. It is the very 'premise of copyright law.'" (citation omitted)). Originality, in the copyright context, means both that the work must have originated with the author (rather than being copied by her from somewhere else) and that it display some modest level of novelty. *Id.* at 340 ("The constitutional requirement necessitates independent creation plus a modicum of creativity.").

[FN68]. U.S. Const. art. I, § 8, cl. 8.

[FN69]. The Supreme Court in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165-67 (1989), lists a series of presumptively valid forms of intellectual property created by state law and apparently wholly compatible in its view of the Constitution. As Professor Jaszi points out, the argument for restricting intellectual property because of constitutional limits on congressional power falters when faced with the reality that states, under existing precedent, have vast power to create new rights. See Jaszi, *supra* note 30, at 604-06. "[I]f, as a constitutional matter, one tolerates state law protection for unfixed sound recordings, it would seem perverse to rule out the creation of a federal scheme with the same effect." *Id.* at 604-05.

[FN70]. See *infra* notes 75-104 and accompanying text. But see *Eldred v. Ashcroft*, 537 U.S. 186, 234 (2003) (Stevens, J., dissenting) (arguing that Congress may not use its powers to create copyright interests that do not comply with the limited time provisions of the "Copyright/Patent Clause").

[FN71]. Compare *Goldstein v. California*, 412 U.S. 546, 570 (1973) (holding that a state is entitled to

protect sound recordings where Congress, in its exercise of its copyright powers, has declined to do so), with *Bonito Boats*, 489 U.S. 141 and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964) (holding that when something is unprotected by copyright or patent, a state may not prohibit others from copying it).

[FN72]. See *The Trade-Mark Cases*, 100 U.S. 82, 92 (1879); see also William H. Browne, *A Treatise on the Law of Trade-Marks* 1-14 (2d ed. 1885); *supra* note 17. The Supreme Court noted in 1879 that:

The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States.... This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage.

The Trade-Mark Cases, 100 U.S. at 92.

[FN73]. See *infra* note 78 and accompanying text.

[FN74]. To give some examples, common law copyright has been held under certain circumstances to be capable of protecting conversations and oral presentations, *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250 (N.Y. 1968), and to the use of confidential information, *Prince Albert v. Strange*, 64 Eng. Rep. 293, 302 (V.C. 1849). Cf. *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918) (recognizing a theory of misappropriation to protect facts in a news story). For a discussion of these developments, see Zimmerman, *Information as Speech*, *supra* note 15, at 696-712. Another example is the creation of publicity rights. See *supra* note 27.

[FN75]. *Trade-Mark Cases*, 100 U.S. at 93-94.

[FN76]. *Id.* at 95. The Court found that the trademark statute in question was not limited to interstate commerce, but left open the question of whether it would properly fall under the commerce power of Congress if it were so limited. *Id.*

[FN77]. Following the decision in the *Trade-Mark Cases*, *id.*, several revised iterations of federal trademark legislation were enacted by Congress. The statute in effect today, commonly known as the Lanham Act, was passed in 1946 and became effective the following year. *Lanham Trade-Mark Act of 1946*, Pub. L. No. 489, ch. 540, 60 Stat. 427 (codified as amended in scattered sections of 15 U.S.C.); Roger E. Schechter & John R. Thomas, *Intellectual Property: The Law of Copyrights, Patents and Trademarks* 544-46 (2003).

[FN78]. The Court noted that recognition of trademarks had a long history at common law and in the statutes of some states.

As the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection, the power of Congress to legislate on the subject, to establish the conditions on which these rights shall be enjoyed and exercised, the period of their duration, and the legal remedies for their enforcement, if such power exist at all, must be found in the Constitution of the United States, which is the source of all the powers that Congress can lawfully exercise.

100 U.S. at 93.

[FN79]. *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

[FN80]. *Id.* at 233.

[FN81]. The Court noted that this point was conceded by *International News Service*. *Id.* It is discussed at greater length by Justice Brandeis in his dissent. *Id.* at 254-55 (Brandeis, J., dissenting).

[FN82]. *Id.* at 242-45.

[FN83]. See, e.g., *Carpenter v. United States*, 484 U.S. 19, 26 (1987) (recognizing that the Wall Street Journal has a property right in raw information gathered by its reporters); *Goldstein v. California*, 412 U.S. 546, 571 (1973) (holding that a state is entitled to protect sound recordings where Congress, in its exercise of its copyright powers, declined to do so).

[FN84]. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

[FN85]. *Goldstein v. California*, 412 U.S. 546 (1973).

[FN86]. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1976).

[FN87]. Occasionally, the Court would strike down a state intellectual property law on preemption grounds because it conflicted with the federal scheme for protecting copyrights and patents. There have not been many such cases, however, and even fewer successful ones. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (holding that a state law prohibiting plug mold copies of unpatented boat hull designs was preempted); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (holding that a state may not protect the design of a pole lamp that is not entitled to a patent); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (holding that state law cannot forbid the copying of a useful object unprotected by patent law). But see *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (holding that patent law does not preempt state trade secrets protection); *Goldstein*, 412 U.S. 546 (holding that a state may protect a writing, or in this case, a sound recording, when federal copyright law declines to do so).

[FN88]. 499 U.S. 340 (1991).

[FN89]. *Id.*

[FN90]. *Id.* at 352-54.

[FN91]. *Id.* at 347-48.

[FN92]. *Id.* at 350.

[FN93]. The lack of clarity is surprising, since Justice O'Connor, who wrote the opinion for Feist, had previously penned dicta in *Harper & Row* suggesting that there was an absolute prohibition against commodifying facts. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985). Somewhat similar ambiguity can be found elsewhere. For example, in *Graham v. John Deere Co.*, Justice Clark, writing for the Court, said: "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." 383 U.S. 1, 6 (1966). As in Feist, whether or not such a result could be reached by other means is not specified.

[FN94]. See supra note 28. Professor Jaszi has criticized Feist on similar grounds as I do in this Article. After making the best case for reading Feist as a bar on using congressional power to give intellectual property protection to facts, he then cautions:

The difficulty with the preceding conclusion... is that the Supreme Court does not say, or at least does not say very emphatically, that the demarcation of the public domain is what is at stake in Feist. To claim that it is, unfortunately, represents a mere interpretation of the decision, no matter how plausible or attractive it may be. Given the emphasis placed on the importance of enriching the public domain in traditional copyright policy discourse, one might have expected more from the Court in Feist than it actually delivered.

Jaszi, supra note 30, at 605-06.

[FN95]. 539 U.S. 23 (2003).

[FN96]. *Id.* at 27 n.1.

[FN97]. *Id.* at 26-27.

[FN98]. *Id.* at 31.

[FN99]. *Id.* at 38.

[FN100]. *Id.* at 33. Rights under the Lanham Act and trademark rights generally are not time-limited in the same way as copyrights. A trademark, for example, survives as long as it continues to be used. Schechter & Thomas, *supra* note 77, at 757.

The suit also alleged that Dastar had infringed a subsisting copyright in the book on which the original television series was itself based. See *Dastar*, 539 U.S. at 28 n.2. This part of the case was not raised in the petition for certiorari, and was not decided by the Court. *Id.* It was, however, alluded to in the opinion. *Id.* at 34-35.

[FN101]. *Dastar*, 539 U.S. at 34-35.

[FN102]. *Id.* The only other case to consider a claim to perpetual copyright is *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). That case, however, did not turn on the demands of the public domain, but rather on the fact that neither the state of Pennsylvania nor the federal copyright statute recognized the possibility of a perpetual common law copyright in a published writing. *Id.* at 657-58.

[FN103]. For example, something not fixed in tangible form may be uncopyrightable because it does not qualify as a "writing" for purposes of the Intellectual Property Clause. The question would then be whether a statute could be drafted under the commerce power to protect, say, a famous person's extemporaneous remarks or an actor's improvisation. *Harper & Row* suggests that there are other limits on what can be considered intellectual property, but it is unclear whether those limits are attributable to the Intellectual Property Clause itself. See *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 555 (1985). The Court discussed copyright doctrines that avoid conflicts with freedom of speech. *Id.* at 555-56. Although the opinion is not altogether clear on the issue, the more persuasive reading seems to be that these accommodations are demanded by the First Amendment rather than by the Intellectual Property Clause. See *id.*; see also *Eldred v. Ashcroft*, 537 U.S. 186, 217-24 (2003). Thus, *Harper & Row* and *Eldred* are discussed in the next section of this Article dealing with the Freedom of Speech and Press Clauses. See *infra* notes 128-37 and accompanying text.

[FN104]. See 17 U.S.C. § 301 (2000) (preemption provision of the Copyright Act of 1976).

[FN105]. For examples of successful preemption cases, see *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3rd Cir. 1999); *U.S. ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453 (4th Cir. 1997); *Maljack Productions, Inc. v. Good Times Home Video Corp.*, 81 F.3d 881 (9th Cir. 1996); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 674-79 (7th Cir. 1986).

[FN106]. See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (preempting state protection of unpatented designs); *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) (same); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (same). But see *Goldstein v. California*, 412 U.S. 546 (1973) (allowing state to protect expression unprotected by Congress under copyright law). A number of scholars have argued that preemption should be more vigorously used to limit incursions into the public domain by states. See *Lange, Recognizing*, *supra* note 35, at 173-74 (urging preemption to be used "readily, not grudgingly"); *David Shipley, Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 *Cornell L. Rev.* 673 (1981) (arguing that publicity rights should be considered preempted). Courts have generally shown little enthusiasm for such an approach. Normally, if a state right is deemed to protect some "extra element" not the subject of copyright, courts will refuse to apply preemption. See, e.g., *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Mark A. Lemley, The Law and Economics of Internet Norms*, 73 *Chi.-Kent L. Rev.* 1257 (1998) (finding it unlikely that courts would apply preemption to contract law because it supplies the necessary extra element). When courts do find common law intellectual property rights preempted, usually the right conflicts with interests conveyed by statutory copyright. See, e.g., *NBA v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (finding partial

preemption of state misappropriation law because it was applied to facts acquired from copyrighted, publicly telecast basketball games); *Baltimore Orioles*, 805 F.2d 663 (preempting the publicity right claims of players where assertion of that right would interfere with a copyright owner's ability to broadcast a copyrighted recording of the games). But see *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (finding no preemption of a right of publicity claim, and suggesting that preemption would play a role only if Midler wanted exclusive rights to the song in question as part of her claim); *Wendt v. Host Int'l, Inc.*, 50 F.3d 18 (9th Cir. 1995) (unpublished table decision) (refusing to find preemption in a publicity rights case because of an extra element in a case where the claim arguably conflicted with rights of copyright owners).

[FN107]. See, e.g., Benkler, *Constitutional Bounds*, supra note 28 at 538, 541-52; Rochelle Cooper Dreyfuss, *A Wiseguy's Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 *Sup. Ct. Rev.* 195, 230; Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 *U. Ill. L. Rev.* 1119; Malla Pollack, *The Owned Public Domain: The Constitutional Right Not to Be Excluded--Or the Supreme Court Chose the Right Breakfast Cereal in Kellogg v. National Biscuit Co.*, 22 *Hastings Comm. & Ent. L.J.* 265 (2000). In their very interesting and thoughtful article, Professor Patterson and Judge Birch also argue that the Copyright Clause itself protects access to the public domain, as well as some level of access to copyrighted works. Patterson & Birch, supra note 35.

[FN108]. See, e.g., *Federal Trademark Dilution Act of 1995*, Pub. L. No. 104-98, sec. 3, 109 Stat. 985, 985 (codified as amended at 15 U.S.C. § 1125(c) (2000)); *Semiconductor Chip Protection Act of 1984*, Pub. L. No. 98- 620, sec. 302, §§ 901-914, 98 Stat. 3335, 3347-56 (codified as amended at 17 U.S.C. §§ 901-914). For judicial opinions on the topic, see cases cited in supra note 103.

[FN109]. Professor Jane Ginsburg has argued both that Congress can expand intellectual property protection under the Copyright and Patent Clause by exercising its discretion to redefine the "limiting" terms in the Clause, and that it can also use the Commerce Clause power to offer protections to "conduct different from that at issue in patent and copyright laws." Jane C. Ginsburg, *No "Sweat" ? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 *Colum. L. Rev.* 338, 367-84 (1992) [hereinafter Ginsburg, *No "Sweat" ?*]; see also Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 *Cath. U. L. Rev.* 365 (1989) (expressing concern that Supreme Court decisions in *Carpenter v. United States*, 484 U.S. 19 (1987), and *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), appeared to open the way to treating factual information as property). For arguments that the Supreme Court has also left considerable scope to the states to create new intellectual property rights, see Ginsburg, *No "Sweat" ?*, supra, at 353-67; Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutory Impulse*, 78 *Va. L. Rev.* 149, 154 (1992); Jaszi, supra note 30, at 602-05.

[FN110]. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-60 (1985); *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001), aff'd sub. nom. *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1179-82 (5th Cir. 1980). But see *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

[FN111]. For examples of articles on intellectual property rights in databases that make little mention of possible First Amendment impediments, see Bender, supra note 28; Ginsburg, *Sui Generis Protection*, supra note 28; J.H. Reichman and Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 *Vand. L. Rev.* 51 (1997). But see Green, supra note 28.

[FN112]. See, e.g., Baker, *First Amendment*, supra note 50; Benkler, *Constitutional Bounds*, supra note 28; Benkler, *Free as the Air*, supra note 1; Benkler, *Through the Looking Glass*, supra note 35; Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 *Cal. L. Rev.* 283 (1979); Paul Goldstein, *Copyright and the First Amendment*, 70 *Colum. L. Rev.* 983 (1970); Netanel, supra note 50; Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 *UCLA L. Rev.* 1180 (1970); Patterson & Birch, supra note 35; Rubinfeld, supra note 50; Zimmerman, *Information as Speech*, supra note 15.

[FN113]. See, e.g., Gary L. Francione, *Facing The Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. Pa. L. Rev. 519 (1986); David E. Shipley, *Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises*, 1986 BYU L. Rev. 983.

[FN114]. See, e.g., Denicola, *supra* note 112; Goldstein, *supra* note 112; Nimmer, *supra* note 112.

[FN115]. See, e.g., Baker, *First Amendment*, *supra* note 50; Netanel, *supra* note 50; Rubinfeld, *supra* note 50; Van Alstyne, *supra* note 50.

[FN116]. For an argument based on a view of the First Amendment as a protection of human autonomy, see Baker, *First Amendment*, *supra* note 50, at 897-99 and Benkler, *Constitutional Bounds*, *supra* note 28, at 561-62. For an argument proceeding from an interpretation of the First Amendment as a way to ensure that citizens can participate in democratic self-governance, see *id.* at 558-61.

[FN117]. Benkler's most recent article on the First Amendment and intellectual property, Benkler, *Through the Looking Glass*, *supra* note 35, refers to the public domain in its title, but does not take the approach used here. Rather, the article works back from the autonomy and civil democratic participation perspectives to make a case that the term extension in Eldred; the provisions in the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-1205 (2000), that prohibit discussion of code-breaking; and the proposed protection of databases all pose free speech problems. This Article does not discuss the public domain as an intellectual construct, nor does it attempt to suggest any of its discernible contours. Patterson and Birch, too, do not directly address the existence of a mandatory public domain, although they do make an argument that free speech presupposes access to, and the ability to use, information. Patterson & Birch, *supra* note 35, at 6, 10, 20. They ground this argument in a First Amendment "right to know."

Part of the problem is that the concentration on the right to print and speak, rather than to read and hear, gives the impression that copyright is consistent with, and indeed implements, the right of free speech. This view is sound, but too limited, for it ignores what is the essence of free speech rights--the right to know--if it is to be meaningful. This follows from the fact that to censor is to control what one can know, that is, to control access, to information, knowledge and learning, which is precisely what the First Amendment protects against.

Id. at 20. A discussion of the right to know theory as a possible basis for a mandatory public domain can be found in Part III.C.1, *infra*.

[FN118]. A few well-recognized exceptions to the general rule, in addition to copyright, should be acknowledged. For example, we might be restrained from communicating content that poses an immediate and imminent danger to public safety. See *Near v. Minn. ex rel. Olson*, 283 U.S. 697 (1931). Also, under some circumstances, it is permissible to enter into an enforceable agreement to keep information secret. This is the basis of trade secrecy law. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). Secrecy agreements have also been upheld to protect national security information and personal information. See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Snepp v. United States*, 444 U.S. 507 (1980).

[FN119]. See, e.g., Baker, *First Amendment*, *supra* note 50, at 899-900; Benkler, *Free as the Air*, *supra* note 1, at 362-63. This argument found its way into a major copyright decision in the Second Circuit. In *New Era Publications International, ApS v. Carol Publishing Group*, the court wrote:

[E]ven passages used for their expression are intended to convey the author's perception of Hubbard's hypocrisy and pomposity, qualities that may best (or only) be revealed through direct quotation. The book "is not merely the product of 'the facile use of the scissors.'" [W]hile a few of these [quotations] may arguably come close to the line separating critical study from appropriation, most do not. Indeed, even this borderline use appears to serve the author's purpose by juxtaposing the grandiose expression of the quotations with the banal (to the author) material contained in the body of the chapter.

904 F.2d 152, 156 (2d Cir. 1990) (citations omitted). But see *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 423-24 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987). In the district court case, Judge Pierre Leval argued that direct quotes from unpublished works could constitute fair use if they served the second author's expressive needs. *Id.* at 423-24.

[FN120]. One possibility is that the Free Speech Clause facilitates the formation of shared values in the

community. Paul D. Carrington, *Our Imperial First Amendment*, 34 U. Rich. L. Rev. 1167, 1177-79 (2001); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 580 (1991); see also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 26-32 (1998).

[FN121]. Compare C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. Pa. L. Rev. 646 (1982) (arguing that the Free Speech Clause primarily protects the rights of autonomous individuals in self-expression), with Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971) (arguing that free speech protection was designed to protect the political process and covers only speech that deals explicitly with political issues), and Martin H. Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591 (1982) (arguing that the First Amendment was primarily designed to foster a marketplace of ideas so that individuals would have access to the intellectual tools that could give them control over their destinies).

[FN122]. As will be discussed in a later section, some constraints are compatible even with an autonomy-driven First Amendment. Even the most adamant defender of the autonomy hypothesis will usually concede that the individual's decision to communicate using material that is not publicly known could be restricted on those rare occasions where a profoundly important interest of the larger society demanded it. See cases cited in note 118, *supra*; see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (interest in secrecy to protect national security may be strong enough on some occasions to warrant a prior restraint); *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979) (same). Whether similar reasoning should ever justify limiting the use of material not held in secret and learned of from publicly available sources is at least a question. In *Progressive*, the material sought to be restrained was drawn entirely from such publicly available sources as encyclopedias. *Id.* at 993.

[FN123]. Edwin Baker, who takes a strong pro-autonomy view of the Free Speech Clause, argues in a recent article on free speech and copyright that individual speakers have a First Amendment right to use even copyrighted expression at will for noncommercial purposes. Baker, *First Amendment*, *supra* note 50, at 900-04. This is an interesting argument in light of the number of disputes in recent years that involve copying by individuals for their private use. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994).

[FN124]. As Yochai Benkler has pointed out, property rights in speech goods conflict with the goal of enabling democratic self-governance, not only because "they affect... how much information is exchanged in our public conversations, but more importantly who gets to say what to whom, and who decides these questions." Benkler, *Constitutional Bounds*, *supra* note 28, at 561. He also notes: "For a community to be democratically self-governing its members must have access to information, this information must not be too tightly controlled by one group or another, and constituents must be able to express their views as well as receive information." *Id.* at 559.

[FN125]. Compare the broad definition used by Alexander Meiklejohn with the very narrow one used by Bork. Compare Alexander Meiklejohn, *Political Freedom* 117 (1960) [hereinafter Meiklejohn, *Political Freedom*], and Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245, 255-57 [hereinafter Meiklejohn, *First Amendment*], with Bork, *supra* note 121, at 20, 26.

[FN126]. The relationship between human development and intellectual inputs (including those in the form of speech goods) has long been recognized. The actual development of the brain seems to be affected by the richness or poverty of a person's experience, including interactions with other people as well as with objects. Children, who have been deprived of normal inputs by being reared in extreme isolation, or in the wild, in most cases do not develop normal communication skills or normal affect, despite efforts to teach and interact with them when they are rescued. Numerous case reports of so-called feral children, or children isolated in dungeons and the like at an early age, are reasonably consistent on these points. The Reverend J.A.L. Singh, for example, studied two children raised by wolves. Douglas Keith Candland, *Feral Children and Clever Animals: Reflections on Human Nature* 53-68 (1993). Bishop H. Pakenham-Walsh,

who visited the wolf-children, reported of one of them:

When I saw Kamala she could speak, quite clearly and distinctly, about thirty words; when told to say what a certain object was, she would name it, but she never used her words in a spontaneous way. She would never, for instance, ask for anything she wanted by naming it, but would quietly wait till Mrs. Singh asked her, one by one, whether it was so and so she wanted, and when the right thing was named she would nod.

Id. at 67 (quoting Pakenham-Walsh's description of Kamala from J.A.L. Singh & R.M. Zingg, *Wolf-children and Feral Man* xxvi-xxvii (1939)). Pakenham-Walsh notes that Kamala gradually learned more words, but did not develop curiosity or a sense of humor, nor did she show much else in the way of emotional growth. Id. at 67-68. Numerous similar stories are told, and, in many, no language development at all occurred. See Floyd E. Bloom & Arlyne Lazerson, *Brain, Mind, and Behavior* 266-67 (2d ed. 1988) (recounting the story of Genie, a child reared from 20 months to 13 years of age in isolation in a small room, harnessed to a potty chair); Jean-Marc-Gaspard Itard, *The Wild Boy of Aveyron* 3 (George & Muriel Humphrey trans., 1962) (recounting the story of a child who lived alone in the woods in France until he was 12 or 13 years of age); see also Candland, *supra* (discussing studies of children who spent their early years without human contact).

[FN127]. Whether a compulsory licensing scheme, under which permission is automatic upon payment of a fee, would be inconsistent with the First Amendment will be discussed at length later in this piece. See *infra* Part III.D.3.

[FN128]. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). Other, earlier decisions also recognized the existence of a public domain. In *Baker v. Selden*, for example, the Court wrote extensively about what is and is not in the public domain. The Court stated that if an author publishes a book without getting a patent on the art contained in it (and patents, of course, are available only for a limited subset of things that are useful), then the art will be deemed to have been given to the public. 101 U.S. 99, 103-04 (1879). The Court explicated further by saying:

The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, or to the diagrams which he employs to explain them, so as to prevent an engineer from using them whenever occasion requires. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.

Id. at 103.

[FN129]. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

[FN130]. The autobiography contained former President Ford's first explanation to the public of his decision to pardon Richard Nixon after he stepped down from the presidency in the wake of the Watergate scandal. Much of this information apparently had also been provided by President Ford to a congressional committee, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 205 (2d Cir. 1983), but obviously what he would choose to say about these events in his autobiography was not public knowledge until *The Nation* published its story.

[FN131]. *Harper & Row*, 471 U.S. at 556 (citations omitted). Interestingly, however, Justice O'Connor also wrote the Court's opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.*, and never mentioned any First Amendment limitations when actually asked about the appropriateness of a copyright in facts. 499 U.S. 340 (1991).

[FN132]. *Harper & Row*, 471 U.S. at 556; see, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). For a later example using similar language, see *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

[FN133]. The statute in question, the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), (d), 112 Stat. 2827, 2827-28 (amending 17 U.S.C. §§ 302, 304 (2000)), extended both new and existing copyrights. The specific challenge in *Eldred*, however, was to the extension of existing copyrights.

537 U.S. at 193.

[FN134]. Eldred, 537 U.S. at 219-20.

[FN135]. Id. at 219.

[FN136]. Id. at 221.

[FN137]. Id. Patterson and Birch place a somewhat different interpretation on this line of reasoning. They argue that the First Amendment and the Intellectual Property Clause have a common origin and share a common goal of promoting speech. Patterson & Birch, *supra* note 35. This conclusion is supported by Justice O'Connor's statement in Harper & Row that copyright is the "engine of free expression." 471 U.S. at 558.

[FN138]. In addition to Eldred and Harper & Row, which have already been discussed, the protected status of material in the public domain is alluded to in the majority opinions of several Supreme Court First Amendment cases. See *Smith v. Doe*, 538 U.S. 84, 100-01 (2003); *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (cannot restrict use of information individual already possesses); *Fla. Star v. B.J.F.*, 491 U.S. 524, 538 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 840 (1978); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 602-03 (1978); *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308, 311-12 (1977) (*per curiam*); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). In addition, comments to the same effect appear in numerous concurring or dissenting opinions by Justices from across the entire ideological spectrum. See *Bartnicki v. Vopper*, 532 U.S. 514, 548 (2001) (Rehnquist, C.J., dissenting); *L.A. Police Dep't*, 528 U.S. at 43 (Ginsburg, J., concurring); *Landmark Communications, Inc.*, 435 U.S. at 849 (Stewart, J., concurring) (finding that once information is in the hands of the press, republication cannot be punished or restrained absent "overwhelming" need); *Nixon*, 435 U.S. at 615-16 (Stevens, J., dissenting); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 595-96 (1976) (Brennan, J., concurring); *Gravel v. United States*, 408 U.S. 606, 646 (1972) (Douglas, J., dissenting); *Time, Inc. v. Hill*, 385 U.S. 374, 401 (1967) (Douglas, J., concurring); *Rosenblatt v. Baer*, 383 U.S. 75, 89 (1966) (Douglas, J., concurring).

[FN139]. See *supra* notes 78-80 and accompanying text.

[FN140]. On numerous occasions, the Supreme Court has turned to historical understandings of the First Amendment as an interpretative aid. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (discussing James Madison's belief that the right of free public discussion of public officials was "a fundamental principle of the American form of government"); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358-70 (1995) (Ginsburg, J., concurring); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 583-86 (1983); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 (1980).

[FN141]. James Madison, for example, once wrote: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 *Writings of James Madison* 103 (Galliard Hunt ed., 1910).

[FN142]. This early history is discussed at greater length in Zimmerman, *Information as Speech*, *supra* note 15, at 677-85.

[FN143]. In fact, copyright in Great Britain (prior to its first statutory incarnation) was in its earliest iteration a central part of a censorship scheme. In return for allowing books to be vetted and licensed by the Crown, the Stationers Company was allowed to control who could print and sell them. Kaplan, *An Unhurried View*, *supra* note 14, at 3-4. Benjamin Kaplan has famously written that copyright was excreted from the "interstices" of censorship. Id.

[FN144]. A "seditious" libel was a statement tending to cast the Crown, government officials, or even the established Church and its representatives, into disrepute. The first law in England against disparagement of figures in positions of state authority dates back to 1275 A.D. See Leonard W. Levy, *Emergence of a Free Press* 6 (Oxford Univ. Press 1985).

[FN145]. See generally *id.* Ironically, of course, Congress did in fact pass a law punishing sedition early in the history of the republic. The Alien and Sedition Acts are discussed at length in Sullivan, 376 U.S. at 274-77.

[FN146]. The history surrounding the First Amendment does not provide clear answers to this debate, leaving commentators to speculate on the actual intentions of the framers. See Levy, *supra* note 144, at 264-79; see also William T. Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression*, 84 *Colum. L. Rev.* 91, 117-21 (1984).

[FN147]. This history is reflected in modern case law. Any regulation of speech based on disapproval of the content of the speech occupies a particularly disfavored position. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959); *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

[FN148]. Zimmerman, *Information as Speech*, *supra* note 15, at 779-80.

[FN149]. For example, in *Donaldson v. Beckett*, Lord Camden insisted that science and learning ought to be "free and general as air or water," and added, "Why did we enter into society at all, but to enlighten one another's minds, and improve our faculties, for the common welfare of the species?" 17 *Parl. Hist. Eng.* 953, 999 (1774). For other examples, see Zimmerman, *Information as Speech*, *supra* note 15, at 681-84.

[FN150]. Tunis Wortman, *A Treatise Concerning Political Enquiry and the Liberty of the Press* 140-41 (DaCapo Press 1970) (1800).

[FN151]. *Id.*

[FN152]. Some might argue that the existence of the Intellectual Property Clause indicates that the drafters of the First Amendment were aware, and approved of, property rights in content. But that argument does not comport with the narrowness of copyright at the time of the Bill of Rights. Courts protected only published expression, and only against direct piracy. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001); L. Ray Patterson, *Understanding*, *supra* note 66, at 383. As noted earlier in this Article, the strong tradition in copyright was that ideas, knowledge--in short, the content--in a work belonged to the public, not the author. See text accompanying *supra* notes 15-16.

[FN153]. I have discussed this history extensively elsewhere. See generally Zimmerman, *Information as Speech*, *supra* note 15.

[FN154]. See *infra* Part III.C.3., notes 225, 237 and accompanying text.

[FN155]. See *infra* Part. III.C.1.

[FN156]. The authors write that "the First Amendment protects the right to learn (by reading the published works) in case the copyright owner wishes to deny access to the work." Patterson & Birch, *supra* note 35, at 2. They are concerned with the ways modern technologies can be used to block the use of copyrighted works, and, by extension, the public domain materials they contain. *Id.* at 5-6. The article does not, however, attempt to define the public domain or explain why certain things, such as facts, belong in it. It also makes a case for a constitutional access right to protected expression itself under some circumstances. *Id.* at 9.

[FN157]. The right to use content arises, they say, from the fact that "the copyright clause protects the right to teach (by publishing original works of authorship) and the First Amendment protects the right to learn

(by reading the published works) in case the copyright owner wishes to deny access to the work." *Id.* at 2. Although copyright does give authors incentives to "teach" by publishing new works, and in doing so, supports the communication of information and ideas, the language of the Clause says only that Congress "may" provide protections for original works of authorship. I do not think this soft form of authority supplies a basis for any strong claim of a "right" to publish or to teach. To the extent that either a right to teach or a right to learn are a necessary underpinning for protection of the public domain under Patterson and Birch's approach, it seems that both would more logically arise from the First Amendment.

[FN158]. The First Amendment case relied on by the authors is *Board of Education v. Pico*, 457 U.S. 853 (1982), commonly classified as a right to know case. The right to know has been discussed in the work of many scholars. See, e.g., Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 *Colum. L. Rev.* 449, 489-93 (1985) (arguing that "a right of potential speakers 'to know,' that is to have access to noteworthy information and events, would seem a natural complement to the right to speak"); Patterson & Birch, *supra* note 35; Genevra Kay Loveland, *Comment, Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 *Tex. L. Rev.* 1440, 1463-64 (1975) (noting that "the fundamental premise of Republican libertarian theory that grew out of opposition to the Alien and Sedition Act of 1798 was that '[s]ociety is possessed of the absolute right to investigate every subject which relates to its interests'"); Eric G. Olsen, *Note, The Right to Know in First Amendment Analysis*, 57 *Tex. L. Rev.* 505 (1979) (laying out evidence for a First Amendment right to know); Note, *The Rights of the Public and the Press to Gather Information*, 87 *Harv. L. Rev.* 1505, 1505 (1974) ("Meaningful democratic decisionmaking and the public's ability realistically to perceive and respond to the world require the widespread availability of information of general interest."). Although Daniel Farber does not talk about content in terms of a "right to know," he has argued that the First Amendment can be understood as a means to promote the creation and dissemination of an optimal level of information, free from the distortions in private markets that may lead to an undersupply of an essential public good. Farber, *supra* note 120. But see Robert Post, *Recuperating First Amendment Doctrine*, 47 *Stan. L. Rev.* 1249, 1252-54 (1995) (suggesting that information does not receive protection *per se* from the First Amendment). Post distinguishes navigational charts, which, he argues, are unprotected content because they are intended to generate reliance rather than discussion, from art, which, because it is intended to generate discussion and controversy, is, he claims, protected. *Id.*; see also Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 *Cal. L. Rev.* 482, 487-88 (1980) (expressing the view that the right to know "may be better read as a recognition that... freedom from governmental regulation of content facilitates the dissemination of information to the public and supports the press in its role of providing information," but "does not guarantee a flow of information to the public nor... assure that the press will be able to obtain information").

[FN159]. Benkler, *Through the Looking Glass*, *supra* note 35.

[FN160]. Arguments of this type have been made in a number of press cases, where courts have been urged, typically without success, to find that the First Amendment protects not only speech, but the process of gathering and developing the content of the speech. While it is generally agreed that reporters cannot use some methods, such as breaking and entering or stealing, the claim has been made that the law may not unnecessarily burden the process of newsgathering where it does not involve palpably illegal methods. For example, it has been urged that novel applications of tort law to impede newsgathering should be deemed to violate the First Amendment. See generally Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 *Wm. & Mary Bill Rts. J.* 1145 (1996); Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 *U. Rich. L. Rev.* 1185 (2000) [hereinafter, Zimmerman, *I Spy*]. Others have argued that the government may not place limits on access to sources or on the methods for recording news events without compelling justification. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (holding that the news media has no constitutional right of access to a county jail); *Pell v. Procunier*, 417 U.S. 817 (1974) (upholding prison regulation that prohibited media representatives from selecting a particular prison inmate for an interview); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974) (same); *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977) (press may observe but not film an execution); *CBS, Inc. v. Lieberman*, 439 F. Supp. 862 (N.D. Ill. 1976) (barring use of television cameras to record a public administrative hearing). Although the Supreme Court has agreed in theory that newsgathering deserves some protection, it has yet to find a case in which to grant

any.

[FN161]. 457 U.S. 853 (1982); see *Patterson & Birch*, supra note 35.

[FN162]. *Pico*, 457 U.S. at 856-60.

[FN163]. Justice White, the fifth vote, preferred to withhold judgment on the speech issue unless required to do so after a full trial. *Id.* at 883- 84. Justice White characterized the issue in the case as a difficult one in a largely uncharted field. *Id.* at 884.

[FN164]. *Id.* at 869-72 (Brennan, J., plurality opinion); *id.* at 880- 82 (Blackmun, J., concurring).

[FN165]. See, e.g., *id.* at 880-81 (Blackmun, J., concurring).

[FN166]. 411 U.S. 1 (1973). The Court wrote that "[e]ducation... is not among the rights afforded explicit protection under our Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 35.

[FN167]. See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182, 197-98 (1990), in which the Court denied that academic freedom protected anything other than the freedom to speak. The specific issue in the case, however, was not the acquisition of learning, but whether a university's internal tenure review files were protected on a theory of academic freedom. The argument was that protection for such material was a condition precedent to the enjoyment of academic freedom by members of the academic community. The Court disagreed, ruling that the school was obligated to turn over the records to the EEOC on a simple showing of relevancy. *Id.* at 194. Closer to the issues under discussion in this article is *In re American Tobacco Co.*, 880 F.2d 1520, 1528-29 (2d Cir. 1989), in which a federal appellate court expressed grave doubts that any privilege existed under the First Amendment to protect a non-party scholar from subpoenas that would interfere with his research. For a fuller discussion of the issue of academic freedom as a protection for information gathering, see Diane Leenheer Zimmerman, *Scientific Speech in the 1990s*, 2 N.Y.U. Envtl. L.J. 254, 262-66 (1993).

Similar arguments by the press for First Amendment protection of information gathering activities have met with little success in the Supreme Court. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (permitting law enforcement officers to search a newsroom for pictures that would help identify lawbreakers); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (holding that news reporters could be required to reveal their sources to a grand jury without violating the First Amendment even if doing so impeded the ability to gather news). Lower courts have been divided over whether the First Amendment provides at least some partial privilege for news reporters who are asked to turn over their notes, photographs, testimony or video footage during criminal trials or civil litigation. For examples of courts that have recognized a partial privilege to protect sources and journalistic materials, see *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). But see, e.g., *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998) (holding that news reporters do not have a qualified privilege not to disclose non-confidential information in criminal cases); *In re Shain*, 978 F.2d 850 (4th Cir. 1992) (finding that a reporter, who interviewed a member of the state legislature charged with accepting bribes, did not have a qualified privilege under the First Amendment against being forced to testify about information learned in the interview); *United States v. King*, 194 F.R.D. 569, 584-85 (E.D. Va. 2000) (holding that the First Amendment did not privilege a news reporter or news station to refuse to produce the unedited version of an interview with a government witness in a criminal case).

[FN168].

Reliance on this line of cases is made in *Benkler, Free as the Air*, supra note 1, at 364-77.

[FN169]. See, e.g., Jerome A. Barron, *Access to the Press--A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967) (advocating for a right of access to ensure that the widest diversity of voices will be heard).

[FN170]. 520 U.S. 180 (1997) (upholding requirement that cable companies carry local broadcast television channels).

[FN171]. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (finding constitutional a government requirement that the subject of a personal attack on a broadcast be given air time to respond). But see *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (finding that a right of reply statute as applied to a newspaper is an unconstitutional interference with editorial discretion).

[FN172]. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973) (holding that broadcasters, as journalists, are entitled to discretion about what to put on the air, and cannot be required to accept editorial advertising).

[FN173]. *Turner Broadcasting*, 520 U.S. at 180.

[FN174]. Even where the government owns or controls the speech good or the facility for speech activities, affirmative duties have not been recognized. For example, in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), the Court concluded that a state-owned public television station was under no affirmative obligation to open a political debate among Congressional candidates to everyone who was in the race.

[FN175]. According to Professor Rabban, one important figure in American history who saw a direct link between freedom of speech, press, assembly, and religion and a "right to education" was John Dewey. Dewey believed that education was an essential component in constructing a democratic society in which citizens were able to participate meaningfully. See generally David M. Rabban, *Free Speech in Progressive Social Thought*, 74 *Tex. L. Rev.* 951 (1996).

[FN176]. *Bd. of Ed. v. Pico*, 457 U.S. 853, 867 (1982).

[FN177]. U.S. Const. art. I, § 5, cl. 3.

[FN178]. *BeVier*, supra note 158.

History is both as elusive and as suggestive on the "right to know" question as it is on all of the questions of contemporary relevance which the framers did not specifically address. Not having had to confront the argument that the Constitution in principle guaranteed citizens access to the internal workings of the government, the framers cannot be said either to have accepted or rejected the proposition in terms clear enough unalterably to confine today's choices. Historical practice suggests, however, that the framers did not think it illegitimate to conduct important governmental affairs in confidence.

Id. at 500-01 (footnotes omitted).

[FN179]. U.S. Const. art. I, § 4, cl. 3.

[FN180]. *Id.* art. II, § 3.

[FN181]. The same might be said for census data, which must be collected under U.S. Constitution, Article I, Section 2, Clause 3, and has traditionally been made public, although no such explicit requirement is found in the governing document.

[FN182]. This issue has come up, indirectly, in copyright cases, where private parties have claimed exclusive rights to publish statutes or court opinions. Copyright in these has generally been rejected. See, e.g., 17 U.S.C. § 105 (2000) (copyright unavailable for any work of the United States government); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834) (stating in dictum that state judicial opinions are not copyrightable). Often the reason given for why such material cannot be copyrighted is that the public has a right of unrestricted access to the laws, judicial and statutory, that govern them. See, e.g., *Bldg. Officials & Code Adm'rs v. Code Tech., Inc.*, 628 F.2d 730, 734-35 (1st Cir. 1980) (citing due process considerations); *Harrison Co. v. Code Revision Comm'n*, 260 S.E.2d 30, 34 (Ga. 1979) ("[A] state's laws are public records open to inspection, digesting and compiling by anyone."); *State v. Mitchell*, 74 P.2d 417, 424 (Mont. 1937)

(noting that anyone is free to publish law that is binding on all citizens).

[FN183]. U.S. Const. amend. VI.

[FN184]. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

[FN185]. *Id.*

[FN186]. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) was the first case to recognize an affirmative First Amendment right to information. See also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

[FN187]. Professor Vincent Blasi has said of these developments in the First Amendment right to know:

There is no shortage of rhetoric in the first amendment tradition extolling the right to know, but only recently has that rhetoric ripened into judicial doctrine. The Court has granted journalists a constitutional right of access to various trial proceedings and a highly contingent right to investigate certain prison conditions, but those rights have been extended cautiously and with great attention to limiting principles.

Blasi, *supra* note 158, at 489 (footnotes omitted).

[FN188]. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 601, 629-31 (1990) [hereinafter Post, *The Constitutional Concept*].

[FN189]. 376 U.S. 254 (1964).

[FN190]. *Id.* at 270.

[FN191]. *Id.* at 271-72.

[FN192]. See, e.g., *id.* at 279 & n.19.

[FN193]. See *id.* at 273-74, 292 n. 30.

[FN194]. The actual malice rule adopted in *Sullivan* was drawn from the common law fair comment rules. See *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942), cited in *Sullivan*, 376 U.S. at 272.

[FN195]. See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (finding that the identification of a rape victim is protected speech); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (publishing the name of a juvenile defendant is protected speech); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (identifying a judge subject to disciplinary proceedings is protected speech); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (holding that unless knowingly false, an incorrect version of a story about individuals taken hostage is protected speech). For other cases discussing the importance of freedom to use content bearing on matters of public concern, see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (finding that a tort claim for intentional infliction of emotional distress cannot be used to stifle speech on a matter of public concern) and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (discussing the public concern standard, but declining to apply it to privilege a violation of plaintiff's right of publicity).

[FN196]. The one exception was the sub-branch of the tort dealing with intrusions into seclusion. Restatement (Second) of Torts § 652B (1977). Here, the gravamen of the wrong was not the communication of information, but the way the information was obtained. Since the information was acquired as a result of an unlawful act, any use of it could be sanctioned. See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (wearing a tape recorder and carrying a hidden camera into a private home was a wrongful intrusion); *Sanders v. Am. Broad. Cos.*, 978 P.2d 67 (Cal. 1999) (secretly recording activities in a workplace not open to the general public is a wrongful intrusion). The point that information-gathering, rather than dissemination, is central to this tort is clear since public dissemination is

not necessary for a cause of action to arise. Some of the best known intrusion cases did not involve any republication of the information gathered by the tortfeasor. See, e.g., *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964) (finding a landlord liable for hiding a microphone under a tenant's bed); see also *Fowler v. S. Bell Tel. & Tel. Co.*, 343 F.2d 150 (5th Cir. 1965) (finding a cause of action for invasion of privacy even where there was no further dissemination of improperly gathered material).

[FN197]. State common law continued to hold out the possibility that some disclosures might be so offensive and so unjustifiable that they could be punished. The Restatement (Second) of Torts, for example, said that the right to disseminate personal information about others could be limited if "the publicity... becomes a morbid and sensational prying into private lives for its own sake." Restatement (Second) of Torts § 652D cmt. h (1977). This exception was rarely applied, however. See, e.g., *Commonwealth v. Wiseman*, 249 N.E.2d 610 (Mass. 1969) (issuing an injunction to protect privacy where a documentary film showed inmates of a state institution, while naked, being force-fed, and in the process of dying). No case decided by the United States Supreme Court was found to reach a level of sufficient offensiveness to justify governmental regulation. The major limitation on the right of free dissemination was contractual; an individual who had undertaken to protect them could, for example, be sanctioned for disclosing trade secrets or government security information. See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (upholding secrecy agreement signed by former employee of the Central Intelligence Agency who published a book without submitting it for requisite review). Even here, once others not bound by trade secrecy or security agreements learned the relevant information, they were free to use and share it. Although it has recognized the possibility that a prior restraint could be issued to protect national security or human life, *Near v. Minn. ex rel Olson*, 283 U.S. 697 (1931), the Supreme Court has thus far rejected all attempts to impose one. See, e.g., *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (refusing to uphold injunction against press coverage of preliminary hearing); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publication of Pentagon Papers).

[FN198]. See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 *Cornell L. Rev.* 291, 344-47 (1983).

[FN199]. See, e.g., *Fla. Star*, 491 U.S. at 533; *Cox Broad. Corp.*, 420 U.S. at 496.

[FN200]. 385 U.S. at 388.

[FN201]. False light invasion of privacy occurs when defendant publishes inaccurate information about a plaintiff that, while not necessarily libelous, is "highly offensive to a reasonable" person. Restatement (Second) of Torts § 652B (1977). For a discussion of this tort, see Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 *N.Y.U. L. Rev.* 364 (1989).

[FN202]. *Time Inc.*, 385 U.S. at 388 (citing *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)). Similar language appears in numerous other cases. See, e.g., *Fla. Star*, 491 U.S. at 533 (disclosure of identity of rape victim); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104-05 (1979) (publishing the name of juvenile defendant); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842 (1978) (identifying a state judge whose alleged conduct triggered a state inquiry); *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308, 311 (1977) (publishing the name and photograph of a juvenile defendant); *Cox Broad. Corp.*, 420 U.S. at 489 (identifying a rape victim).

[FN203]. See cases cited in *supra* note 202.

[FN204]. The disclosures may be inadvertent, *Fla. Star*, 491 U.S. at 536, or may occur through a leak, *Landmark Communications*, 435 U.S. at 832, but once the information has "escaped," the Court has refused to allow the government to re-enclose it. Some lower court cases have attempted to distinguish this precedent and find that information released by mistake can sometimes be re-enclosed. See, e.g., *Pub. Citizen Research Group v. FDA*, 953 F. Supp. 400 (D.D.C. 1996) (holding that where government inadvertently discloses a trade secret of a private party, it can prevent further distribution of the material).

[FN205]. The Supreme Court has allowed the government to grant access selectively under some

circumstances. See, e.g., *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (finding that the government may establish criteria for who can obtain access to certain government records); cf. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (establishing that even though the contents were publicly revealed, the press was not entitled to physical copies of presidential tapes). However, those who receive such access and are not bound by a prior promise not to disclose what they learn, appear to be free thereafter to communicate the information without further restrictions. See *L.A. Police Dep't*, 528 U.S. at 40. In some limited circumstances, however, the context within which one can utilize information in the public domain can be regulated. Time, place, and manner restrictions might limit the communication of public domain material through loudspeakers. See *Grayned v. City of Rockford*, 408 U.S. 104, 115-16 (1972). At times, the state might be able to prevent a speaker from conveying information to someone who does not wish to receive it. See *id.* The Supreme Court has made it clear, however, that it is skeptical about listener interests as a justification for limiting what speakers can communicate. For example, in *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court struck down a municipal statute that made it unlawful for "any person distributing handbills, circulars or other advertisements" to ring the doorbell or summon the residents of the house for the purpose of receiving the handbills. *Id.* at 142. The Court found that while trespassing was a serious problem, communities could not create anti-trespassing laws without considering "the constitutional rights of those desiring to distribute literature and those desiring to receive it." *Id.* at 149. The Court also stated that the freedom to distribute information was "vital to the preservation of a free society" and must be protected. *Id.* at 146-47; see also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127-28 (1989) (striking down a Federal Communications Commission regulation banning indecent telephone messages as unnecessarily broad because the caller to a dial-in service would be a willing listener to the message).

[FN206]. 532 U.S. 514 (2001). For another recent case suggesting that content is part of what the First Amendment protects, see *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

[FN207]. *Bartnicki*, of course, is not the only case of its kind. In several earlier Supreme Court cases turning on a public concern rationale, the information at issue was also generated by and from private sources. The facts on which the play in *Time, Inc. v. Hill* was based had been widely reported in the media, and much of the information undoubtedly came from interviews with members of the public or on-site observation. 385 U.S. 374, 393 (1967). In *Landmark Communications*, the information about the judge whose conduct was a source of inquiry was not alleged to have come through any official government channel. 435 U.S. at 831-32. Similarly, *Hustler Magazine, Inc. v. Fallwell* did not involve information stemming from government sources. 485 U.S. 46, 48 (1988). The common law privacy cases also recognized a privilege to use privately generated information. See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975) (noting that information about a surfer came from interviews with the subject and acquaintances). Although many of the Supreme Court's defamation cases have involved government officials or government proceedings, the source of the information reported was often private. See, e.g., *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (discussing a situation where a senatorial candidate was characterized by the defendant as a "former small-time bootlegger"); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 135 (1967) (noting that the football coach was accused of "fixing" a football game). This principle is widely recognized in state and lower federal court precedent as well. See, e.g., *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) (permitting *Business Week* to publish information obtained from a sealed document that was given to it by a private attorney and noting that the Constitution would be violated if government were to prevent a "news organization from publishing information in its possession on a matter of public concern"); *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745 (E.D. Mich. 1999) (holding that recipient of trade secrets who owes no duty to the owner is free to publish the information).

[FN208]. *Bartnicki*, 532 U.S. at 520 (citing 18 U.S.C. § 2511(1)(c) (2000)).

[FN209]. *Id.* at 518.

[FN210]. *Id.* at 519.

[FN211]. *Id.*

[FN212]. *Id.* at 519-20.

[FN213]. *Id.* at 517-18. Illegality in this case was held to mean something other than violating positive law. Communicating the contents of intercepted telephone calls was protected speech as long as the communicators did not instigate or participate in the interception, but simply received the "fruits" of someone else's illegal act after the fact. *Id.* at 525.

[FN214]. *Id.* at 534. The majority set aside for purposes of this case the broader issue of whether application of the statute would be permissible if what had been disclosed was "trade secrets or domestic gossip or other information of purely private concern." *Id.* at 533.

[FN215]. *Id.* at 529-30.

[FN216]. *Id.* at 534. A concurrence by Justice Breyer, joined by Justice O'Connor, takes a narrower position than that which appears in Justice Stevens's opinion. *Id.* at 535 (Breyer, J., concurring). Breyer and O'Connor, for example, stress what they call the unusual circumstances of the case, including the fact that the plaintiffs were "limited public figures," and that the content of the taped telephone call was unusually important. *Id.* at 539 (Breyer, J., concurring). According to Justice Breyer, the calls involved "threats to public safety," a description that may strike readers of the opinion as somewhat surprising. *Id.* In the course of discussing how to get negotiations back on track between the teachers and the school board, one union representative said to the other:

"If they're not gonna move for three percent, we're gonna have to go to their, their homes.... To blow off their front porches, we'll have to do some work on some of those guys. (PAUSES). Really, uh, really and truthfully because this is, you know, this is bad news."

Id. at 518-19. In prior cases, the Court has tended to treat language such as this as "rhetorical hyperbole," absent substantial reason to believe that the speaker was being literal. See, e.g., *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974) (characterizing strike-breaking workers as traitors to their country and persons of poor character is metaphoric, not literal, use of language); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970) (characterizing a plaintiff's behavior as "blackmail" is rhetorical hyperbole). The concurrence is somewhat puzzling, because both Justices also signed on to the Stevens opinion.

[FN217]. The dissent was written by Chief Justice Rehnquist and joined by Justices Scalia and Thomas. *Bartnicki*, 532 U.S. at 541.

[FN218]. Excluded from discussion here are situations involving trade secrets or voluntary confidentiality agreements. Both may bar individuals under some circumstances from using or disseminating specified speech goods. See *infra* Part III.C.3.

[FN219]. *Bartnicki*, 532 U.S. at 545 (Rehnquist, C.J., dissenting) (citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)). In fact, the dissent makes reference at least three times to the effect of having information in the public domain in the course of the opinion. *Id.* (Rehnquist, C.J., dissenting).

[FN220]. *Id.* at 545, 554-55 (Rehnquist, C.J., dissenting).

[FN221]. See *id.* at 548 (Rehnquist, C.J., dissenting).

[FN222]. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890).

[FN223]. The only reason the authors departed from the property theory, it seems, is that they believed treating privacy as a property right demeaned its importance as an aspect of human dignity. *Id.* at 205. A history of the origins of privacy in the doctrine of common law copyright is laid out in Zimmerman, *Information as Speech*, *supra* note 15, at 692-703.

[FN224]. Indeed, after a half century of development of the privacy interest, a new branch reached into traditional intellectual property territory. Judge Jerome Frank, in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), decided, at least, that the interest of celebrities in the

control of personal information about themselves was not in privacy, but in money. Hence, he recognized a new property interest now widely known and accepted as the right of publicity. *Id.* at 868. For discussions of the right of publicity, see Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 *Vand. L. Rev.* 1199, 1203-15 (1986); Roberta Rosenthal Kwall, *Fame*, 73 *Ind. L.J.* 1 (1997); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *Cal. L. Rev.* 127, 147-78 (1993); J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 *Colum.-VLA J.L. & Arts* 129 (1995); and Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 *DePaul-LCA J. Art & Ent. L.* 35 (1998) [hereinafter Zimmerman, *Right of Publicity*].

[FN225]. Privacy cases illustrate this beautifully. In many of them, the information that one individual wants to use involves the lives of others, but also relates directly to how the speaker perceives her own life and experience. If the individual cannot use the information she has internalized from observing and interacting with other people, she will be unable to speak adequately about her own life. See, e.g., *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993) (describing a situation where interviewee discloses details of her marriage to author who subsequently uses them in his book, and the interviewee's former husband objects to publication on grounds that his wife's revelations about her life with him invade his privacy); *Hall v. Post*, 372 S.E.2d 711, 712-13 (N.C. 1988) (recounting how one person's revelation of information in the course of searching for her daughter was said by the daughter and her adoptive parent to invade their privacy). On a more abstract and sophisticated plane, one author has written:

Each of our minds knows it is alone in a universe it creates; yet in our attempts to communicate, among ourselves and other species, we reveal a struggle to know other minds, to overcome the isolation of our own mind.... [What distinguishes] human beings from other beings... is the quest to understand the minds of others. It is a human belief that, through language, we can both transfer the contents of our mind to another and come to experience the contents of the minds of others.

Candland, *supra* note 126, at 355.

[FN226]. Zimmerman, *Information as Speech*, *supra* note 15, at 713-14.

[FN227]. For adherents of the view that the First Amendment is intended to promote democratic values, the conception of "public concern" varies considerably. For some, the speech commons might be limited to matters expressly political in nature. See, e.g., Bork, *supra* note 121, at 20 ("Constitutional protection should be accorded only to speech that is explicitly political."). For others, meaningful participation in self-governance requires access to a much wider variety of materials, many not at all explicitly political. Meiklejohn, after initially endorsing a narrower definition of political speech in his book *Political Freedom*, ultimately modified his position in response to criticism that the First Amendment, conceived of as he suggested, would omit protection for novels, plays, works of science and philosophy, and much else of great value to the society. See Meiklejohn, *Political Freedom*, *supra* note 125, at 24-28, 55-57, 79-80; see also Zechariah Chafee, Jr., *Book Review*, 62 *Harv. L. Rev.* 891, 899-900 (1949) (reviewing Alexander Meiklejohn, *Free Speech: And Its Relation to Self-Government* (1948)). Upon reconsideration, Meiklejohn said that such nonpolitical works would indeed qualify for protection under his theory because they were sources from which "the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express." Meiklejohn, *First Amendment*, *supra* note 125, at 256.

[FN228]. See, e.g., C. Edwin Baker, *Human Liberty and Freedom of Speech* (1989); David Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 *U. Pa. L. Rev.* 45 (1974); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *Phil. & Pub. Aff.* 204 (1972).

[FN229]. For an interesting discussion of the inability of courts to impose a limiting definition on what may constitute "matters of public concern," see *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 78-81 (1971) (Marshall, J., dissenting). Justice Marshall noted that the use of a public interest standard had essentially destroyed attempts to create a common law right of privacy because virtually everything published met the standard. *Id.* at 80; see also *Post*, *The Constitutional Concept*, *supra* note 188, at 681-82 (because all speech is potentially relevant to democratic discourse, it all logically ought to be classified as being of public concern). Subsequently, the Court backed away from privileging negligent defamation in all cases of

public concern, opting instead for a graduated privilege that turned on the status of the plaintiff (was she a public or a private figure?). See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 331-32, 351-52 (1974). In a tiny handful of subsequent cases, the Court did rule that some speech was purely private, and therefore unprivileged as a First Amendment matter. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (punitive damages can be assessed for defamatory speech that is not on a matter of public concern without a requirement that actual malice be shown); *Connick v. Meyers*, 461 U.S. 138 (1983) (First Amendment rights of employee not violated because the speech that led to dismissal did not touch on a matter of public concern). Whether the Court would be as willing to exercise its discretion in deciding whether speech is public or private outside the special circumstances of these two cases (where a defamatory falsehood is the speech at issue, or where the issue is the decision to discipline an employee for disruptive actions) is a question that remains open.

[FN230]. See *infra* note 237.

[FN231]. See *supra* note 37.

[FN232]. This point will be developed and supported later in the Article. See *infra* Part III.D.

[FN233]. See generally Restatement (Third) of Unfair Competition §§ 39-40 (1995) and accompanying commentary. Illicit means included "theft, wiretapping, or even aerial reconnaissance." *Kewanee Oil v. Bicron Corp.*, 416 U.S. 470, 475-76 (1974). Legitimate means included reverse engineering, independent invention or "accidental disclosure." *Id.*

[FN234]. See Restatement (Third) of Unfair Competition § 39 cmt. d (1995).

[FN235]. This principle is illustrated by *Omnitech International, Inc. v. Clorox Co.*, 11 F.3d 1316 (5th Cir. 1994). The Court in *Omnitech* said that for a trade secret to be treated as "appropriated," the defendant must have gotten some sort of unfair advantage over the plaintiff. *Id.* at 1325. Merely getting smarter as a result of learning a trade secret is not enough to create liability. *Id.*

[FN236]. *Kewanee*, 416 U.S. at 475; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984).

[FN237]. Events on public streets, for example, are not deemed to be private. See, e.g., *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991) (supporting the proposition that things visible on public streets do not give rise to actions for invasion of privacy); *Swerdlick v. Koch*, 721 A.2d 849, 857-58 (R.I. 1998) (same); *Cox v. Hatch*, 761 P.2d 556, 564 (Utah 1988) (same). Also, courts have generally refused to treat as "private" matters exposed to more limited groups--for example, to friends at a party. See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975) (finding that plaintiff's bizarre behavior, exhibited at parties, was not "private" and could be reported). But see *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998) (suggesting that it is a question of fact for the jury whether an accident scene was public or private); *Rafferty v. Hartford Courant Co.*, 416 A.2d 1215 (Conn. Super. Ct. 1980) (holding that events occurring at a divorce party could be private). The line between what is secret and what is public is obviously not entirely bright-line, and from time to time is a matter that must be litigated.

[FN238]. The Uniform Act was first promulgated in 1979 by the State Commissioners on Uniform State Laws. Uniform Trade Secrets Act (1985), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/utsa85.htm> (last visited Aug. 25, 2004). It has subsequently been adopted in whole or with some modifications in forty-four states and the District of Columbia. A Few Facts About the... Uniform Trade Secrets Act, at http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-utsa.asp (last visited Aug. 25, 2004).

[FN239]. See *Kewanee*, 416 U.S. at 475 (indicating that under the Ohio trade secrecy law, a duty to protect trade secrets is imposed on anyone who received access to the information "under the express or implied restriction of nondisclosure or nonuse").

[FN240]. Typical examples of illicit means include wiretapping, fraud, or burglary. Restatement (Third) of

Unfair Competition § 43 cmt. c (1995). Sometimes, creative--although not inherently illegal--means of acquiring trade secrets will be treated as illicit. For example, in one well-known case, a company hired someone to fly over its competitor's chemical plant during construction to take aerial photographs in the hopes of learning certain secret information. The court concluded that surveillance by these means was "illicit," even though, had the information in question been plainly visible from the street, it might not have been protected. *E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1015-17 (5th Cir. 1970).

[FN241]. See, e.g., *Smith v. Dravo Corp.*, 203 F.2d 369, 376-77 (7th Cir. 1953).

[FN242]. See Uniform Trade Secrets Act, *supra* note 238. The Uniform Act states that misappropriation of a trade secret occurs if, without the owner's consent, a third person "who knows or has reason to know that the trade secret was acquired by improper means," *id.* § 1(2)(i), or who

at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was (I) derived from or through a person who had utilized improper means to acquire it; (II) acquired under circumstances giving rise to a duty to the maintain its secrecy or limit its use; or (III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

Id. § 1(2)(ii)(B).

The Restatement (Third) of Unfair Competition adopts the same position:

A person who obtains a trade secret by inducing or knowingly accepting a disclosure from a third person who has acquired the secret by improper means, or who induces or knowingly accepts a disclosure from a third person that is in breach of a duty of confidence owed by the third person to the trade secret owner, also acquires the secret by improper means.

Restatement (Third) of Unfair Competition § 43 cmt. c (1995).

[FN243]. After *Bartnicki v. Vopper*, 532 U.S. 514 (2001), that hesitancy seems well founded. The central issue in that case was, of course, whether reporters could be barred from repeating information when they knew it had come from a tainted source. According to the Supreme Court, awareness was not determinative; the legitimacy of a sanction depended on whether the recipient had participated in some way in actual wrongdoing to acquire the information in the first instance. *Id.*

[FN244]. *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745 (E.D. Mich. 1999); cf. *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 946 (2d Cir. 1983) (First Amendment relevant to claims relating to trade secrets).

[FN245]. The court expressed concern, however, about some aspects of the defendant's activities that seemed to involve threats, and the possibly retaliatory publication of some design and product information that, the court said, were of more interest to competitors than to the public. These might be grounds for liability, but not for a prior restraint. *Ford Motor Co.*, 67 F. Supp. 2d at 753. In finding that publication of matters of public concern were protected, even where trade secrets were involved, the Ford Motor Co. court relied heavily on an earlier decision by the Sixth Circuit in *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996). The Procter & Gamble case was a bit more complex than the Ford Motor Co. case. In Procter & Gamble, sealed papers concerning alleged trade secrets were turned over to a reporter for Business Week by an attorney who was not aware of the fact that they were confidential. The reporter who obtained them also seems not to have known that they were covered by a protective order; however, the editor of the story in question did know, and wanted to use the information in a Business Week article. Nevertheless, the appellate court permitted the material to be published, concluding that "[t]he private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint." *Id.* at 225.

[FN246]. *DVD Copy Control Ass'n v. Bunner*, 113 Cal. Rptr. 2d 338 (Cal. Ct. App. 2001), *rev'd*, 75 P.3d 1 (Cal. 2003). The intermediate appellate court relied to a considerable extent on the Supreme Court decision in *Bartnicki*. *Id.*

[FN247]. *Id.*

[FN248]. *Bunner*, 75 P.3d at 1. The court decided that, although the speech in question was covered by the

First Amendment, the regulation in question was "content-neutral" and was designed to protect a "significant" governmental interest in the protection of intellectual property interests. Id. at 7-8.

[FN249]. In addition to *Bartnicki*, the California court also felt compelled to deal with *CBS Inc. v. Davis*, 510 U.S. 1315 (1994), a case in which Justice Blackmun stayed an injunction against a television broadcaster, prohibiting the airing of footage at a beef processing plant that allegedly revealed trade secrets. *Bunner*, 75 F.3d at 18. Justice Blackmun concluded that the injunction was an invalid prior restraint. *CBS Inc.*, 510 U.S. at 1318.

[FN250]. *Bunner*, 75 P.3d at 15 (emphasis in original).

[FN251]. *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

[FN252]. *Bunner*, 75 P.3d at 15-16.

[FN253]. See, e.g., Amy Harmon, *Free Speech Rights for Computer Code?*, N.Y. Times, July 31, 2000, at C1.

[FN254]. The case may still be determined in favor of defendant *Bunner*. The majority remanded to the intermediate appellate court with instructions to decide if the preliminary injunction was proper under California trade secret law. If the information was not still legitimately "secret" when *Bunner* posted it (he is alleged to have downloaded the material from the Internet, where it was presumably freely available to all comers), *Bunner*, 75 P.3d at 7, then it was not protectable and a preliminary injunction against further dissemination would clearly be improper. Id. at 23 (Moreno, J., concurring).

[FN255]. *State ex rel. Sports Mgmt. News, Inc. v. Nachtigal*, 921 P.2d 1304, 1309 (Or. 1996) (citing Or. Const. art. I, § 8). In *Bunner*, California also rejected the claim that the preliminary injunction violated the state constitution. See *Bunner*, 75 P.3d at 18.

[FN256]. *State v. Nachtigal*, 921 P.2d 1304 (Or. 1996).

[FN257]. Id. at 1308 (citing *Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1993)). There are other situations, with slightly different facts, that have also raised free speech questions in relation to trade secrecy protection. In *Religious Technology Center v. Lerma*, 908 F. Supp. 1362 (E.D. Va. 1995), sanctions were sought against the *Washington Post* for publishing material that the *Post* had reason to know that the Church of Scientology and its Religious Technology Center ("RTC") claimed as trade secrets. The court refused to find actionable misappropriation on the ground that, because the material was in open court files and had also been posted to an Internet site, it was no longer secret. Id. at 1368. The court went on to say, however, that even if the material had still been secret at the time it was published by *The Post*, the newspaper's decision to pursue leads from a whistleblower was legally appropriate:

This Court knows of no law which required *The Post* to sit on its hands and do no further investigation into what was obviously becoming a newsworthy event and newsworthy documents. The RTC's allegations are still just allegations. The very court from which the Fishman affidavit was obtained still has under advisement the issue of whether the [Advanced Technology] documents are trade secrets. Although *The Post* was on notice that the RTC made certain proprietary claims about these documents, there was nothing illegal or unethical about *The Post* going to the Clerk's office for a copy of the documents or downloading them from the Internet.

Id. at 1369. In another case, predating these by some two decades, an intermediate appellate court in New York refused to treat information about possible corporate wrongdoing as a trade secret simply because a former employee with no formal contractual obligation not to reveal it had taken the information to the press. *KLM Royal Dutch Airlines v. DeWit*, 418 N.Y.S.2d 63 (App. Div. 1979). To treat this exchange of information as misappropriation of a trade secret, wrote the Court, "impinges upon the First Amendment restraints and extends beyond the usual, established legal protection afforded, in prohibiting revelation of information used in business, which in the hands of a competitor would be either detrimental or give the competitor an added advantage." Id. at 64.

[FN258]. Time does not permit a full exploration of the interesting and important question of when something is public for purposes of the public domain.

[FN259]. Perhaps the most famous statement of this idea comes from the opinion written by Justice Scalia in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). He wrote that the government could selectively proscribe speech on a particular subject matter as long as the form of content discrimination was one that posed no realistic threat of the "official suppression of ideas." *Id.* at 390. He also noted:

(We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of "fighting words," like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

Id.

[FN260]. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); see *supra* notes 128-32 and accompanying text.

[FN261]. 248 U.S. 215 (1918).

[FN262]. Only member papers could carry AP wire copy. This meant that about half of the country's newspapers were excluded from relying on its reporting. The public that relied on papers supplied with news by the INS might not have even had AP papers available in their communities as an alternative. For discussions of the factual background of the *International News Service* case, see Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. Chi. L. Rev. 411 (1983); Benkler, *Constitutional Bounds*, *supra* note 28, at 560-61; Zimmerman, *Information as Speech*, *supra* note 15, at 719-22.

[FN263]. *Int'l News Serv.*, 248 U.S. at 234.

[FN264]. 484 U.S. 19 (1987).

[FN265]. *Id.* at 26-28. Other speech-as-property cases decided by the Court without consideration of the First Amendment implications are *Goldstein v. California*, 412 U.S. 546, 571 (1973) (allowing the state to "copyright" sound recordings that were, at the time, not covered by federal copyright law), and two cases recognizing the validity of trade secrecy as an intellectual property right. *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (holding trade secrets are property for purposes of Takings Clause); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (holding that state trade secrecy law is not preempted by the Intellectual Property Clause of the Constitution). These cases, however, do not present serious challenges to the theory of a First Amendment public domain posited here. The California case protected a form of captured expression from piracy; the federal government clearly could have (and subsequently did) protect this sort of subject matter under its Intellectual Property Clause powers. *Monsanto* and *Kewanee* seem entirely consistent with other aspects of First Amendment doctrine, recognizing that individuals and entities do not merely enjoy the right to speak, but also the right not to speak. This line of precedent was explicitly connected to intellectual property in *Harper & Row*, 471 U.S. at 559-60, to explain why strong protection for a right of first publication under copyright was consistent with First Amendment principles.

[FN266]. *Carpenter*, 484 U.S. at 27. In a third case, *Goldstein*, the Court permitted California to create state copyright in sound recordings, although they were not then protected under federal law. 412 U.S. at 571.

[FN267]. 433 U.S. 562 (1977).

[FN268]. *Id.* at 575-76.

[FN269]. See J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 28:1 (2001); Madow, *supra* note 224, at 147-78; J. Thomas McCarthy, *Human Persona as Commercial Property*, 19 Colum.-VLA J.L. & Arts 129, 131 (1995); Zimmerman, *Right of Publicity*, *supra* note 224, at 57-58.

[FN270]. 483 U.S. 522 (1987).

[FN271]. *Id.* at 532. The Court went on to say:

The SFAA's expressive use of the word cannot be divorced from the value the USOC's efforts have given to it. The mere fact that the SFAA claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right to "appropriat[e] to itself the harvest of those who have sown." The USOC's right to prohibit use of the word "Olympic" in the promotion of athletic events is at the core of its legitimate property right.

Id. at 541 (citations omitted). For a critique of this case, see Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 *Notre Dame L. Rev.* 397 (1990).

[FN272]. Some suggestions about ways to limit these precedents have been made in Baker, *First Amendment*, *supra* note 50, at 945-51; Benkler, *Constitutional Bounds*, *supra* note 28, at 555-56; and Zimmerman, *Information as Speech*, *supra* note 15, at 725-39.

[FN273]. *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918); see also *Goldstein v. California*, 412 U.S. 546 (1973) (allowing state law to prevent piracy of sound recordings). This understanding of the International News Service case is adopted by the American Law Institute in its Restatement of Unfair Competition. See Restatement (Third) of Unfair Competition § 38 (1995). It also underpins the decision in *NBA v. Motorola*, 105 F.3d 841, 853 (2d Cir. 1997) ("[T]he extra elements... that allow a 'hot news' claim to survive preemption are: (i) the time-sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff."). In many ways, the facts of *International News Service* as related in the opinion and the dissent do not lay out a completely compelling case of dire need; however, the issue is not whether we are convinced that the borrowing was a market-destructive practice, but whether the Court so perceived it.

[FN274]. See, e.g., *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (holding that the interest in personal privacy is not sufficiently significant to outweigh free speech rights). A possible counter-example, however, is defamation case law, where the right to recover for defamatory falsehoods has been preserved, although greatly limited by constitutional privileges. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that government officials may recover only for knowing falsehoods); *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974) (holding that private figures may recover for negligent defamation). Here it is unclear whether the interest in reputation outweighs the interest in freedom of speech, or if harmful, false speech is simply outside the protection of the First Amendment altogether.

[FN275]. So vigilant was the Court in the past to prevent this effect that it developed constitutional privileges for defamatory falsehoods specifically to avoid the risk, indirectly, of chilling protected speech by punishing speech that was not protected. *Sullivan*, 376 U.S. at 278-79. The strict standards for testing obscenity, similarly, were intended to create a broad enough safety zone so that protected speech would not be impeded. See, e.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (establishing procedural protections to prevent regulatory spillover to protected works).

[FN276]. For a fuller and insightful discussion of current First Amendment analysis, see C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 *Sup. Ct. Rev.* 57, 114-27 [hereinafter Baker, *Turner Broadcasting*] and Susan H. Williams, *Content Discrimination and the First Amendment*, 139 *U. Pa. L. Rev.* 615 (1991).

[FN277]. Daniel D. Rotunda & John E. Nowak, *Treatise on Constitutional Law-- Substance and Procedure* § 18.3 (3d ed. 1999).

[FN278]. The distinction between content-neutral and content-based regulation is acknowledged by the Court to be problematic. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994). For a recent example of one court's struggle over how to distinguish a content-based from a content-neutral rule, see *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 328-29 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios Inc. v. Corley*, 273 F.3d 429 (2d Cir.

2001). Although the regulation at issue was directed at the suppression of a particular category of content, the court ruled that the regulation was nevertheless content-neutral because it neither favored nor disfavored a particular viewpoint. *Id.*

[FN279]. Compare *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (restrictions based on content, whether aimed at a particular viewpoint, are subject to strict scrutiny), with *Turner Broadcasting*, 512 U.S. at 662 (making clear that strict scrutiny applies to viewpoint discrimination, but leaving uncertain whether or not mere regulation by category of content is subject to the highest level of scrutiny or only to intermediate scrutiny). *Turner Broadcasting* has subsequently been read as saying that only viewpoint discrimination is "content-based." *Universal City Studios, Inc.*, 111 F. Supp. 2d at 328-29 (relying on *Turner Broadcasting* in ruling that restrictions on the communication of computer code used to control access to digitalized versions of copyrighted works are "content-neutral"). See *supra* note 278.

[FN280]. *Turner Broadcasting*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[FN281]. The Supreme Court adopted a form of intermediate scrutiny for commercial speech in 1980. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The application of the so-called Central Hudson test, has, however, been extremely variable, and includes instances in which the scrutiny given to the regulation is fairly minimal and highly deferential toward the state. See *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986). Its range has also extended to cases where the law in question is subjected to rigorous scrutiny. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Similarly, intermediate scrutiny for content-neutral regulations of speech has tended to result in a very forgiving attitude by the Supreme Court toward such regulation. See *Williams*, *supra* note 276, at 623 (referring to the analysis in question as resulting in a "fairly lenient [standard]"). But see *Bartnicki*, 532 U.S. at 514 (applying a quite rigorous scrutiny to a content-neutral rule).

[FN282]. See, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430 (1990) (even if an exception to enforcement of the regulation could be made without harm to the basic purposes of the rule and enforcement has substantial impact on expressive activities, application of a uniform rule is permitted).

[FN283]. Some of the risks this approach poses for First Amendment interests were laid out by Justice Brennan in his concurring opinion in *Boos v. Barry*. 485 U.S. 312, 335-38 (1988) (Brennan, J., concurring in part and concurring in judgment). The Court in *Boos* rejected the government's argument that its restrictions on protests near foreign embassies were content-neutral and subject only to intermediate scrutiny. Justice Brennan, joined by Justice Marshall, wrote separately to point out that such an outcome was by no means foreordained by the Court's precedent. By allowing the level of scrutiny to vary, depending on whether the Court concluded that a law was intended to restrict speech or instead intended to address secondary effects of the speech, the outcome would turn on a judgment that was, by its nature, often a matter of nothing more than guesswork and conjecture. See generally *Baker*, *Turner Broadcasting*, *supra* note 276.

[FN284]. The prototypical example is *O'Brien*, 391 U.S. at 367, a case involving a prohibition on destroying draft cards. Burning one's draft card was a favored form of political protest during the Vietnam war. This sort of case is often called a symbolic speech case and it is argued that the regulation can be justified as a regulation of an action because it is aimed at the effects of speech, and not at the message itself.

[FN285]. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986).

[FN286]. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). In *Cohen*, the Court said a plaintiff, whose identity was disclosed in violation of a promise not to do so, could invoke the state law on promissory estoppel. *Id.* at 665. This was allowed even though the result would be to punish the sort of speech that is ordinarily entitled to the highest degree of First Amendment protection: information about an election campaign and one candidate's attempt to play political "dirty tricks" on the opposing candidate.

Because the law applied was one of general applicability, not one directed specifically at speech, the Court merely used the equivalent of a rational relationship test--that is, it did not scrutinize the impact on speech at all. The refusal to consider the impact of the application of a generally applicable rule on speech has led litigants to ask courts to stretch tort principles like trespass, intrusion, and breach of loyalty to punish the process by which information is gathered as a surrogate for punishing the communication itself. Among some recent examples of this phenomenon are *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (arising from an investigative report on claims of unsanitary conditions and deceptive sales practices in a supermarket chain where supermarket sued reporters for fraud, trespass, and breach of loyalty), and *Sanders v. American Broadcasting Cos.*, 978 P.2d 67 (Cal. 1999) (involving a television expose of psychic telemarketing industry; reporter successfully sued for intrusion into a "private" area for using a hidden camera to record events in an office).

[FN287]. See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001). For examples of scholars who have struggled to make the best of a First Amendment analysis inside the Turner Broadcasting straightjacket, see Benkler, *Through the Looking Glass*, *supra* note 35, at 197 and Netanel, *supra* note 50.

[FN288]. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

[FN289]. Chief Justice Rehnquist, in dissent, was highly critical of the majority for abandoning the three-tier approach in this case, arguing that intermediate scrutiny was appropriate and should have resulted in the law being upheld. *Id.* at 541-56. The majority agrees, he wrote, that the statutes in question are "content-neutral laws of general applicability" and that the government has a substantial interest in privacy. *Id.* at 544. Thus, he argued, "[t]here is scant support, either in precedent or in reason, for the Court's tacit application of strict scrutiny." *Id.*

[FN290]. *Id.* at 534. Justice Stevens acknowledged that a law that prevented any use of the content of the tapes might further the nonspeech objective of discouraging illegal interceptions, but despite this "legitimate nonspeech" objective, ruled that the means selected by the government to achieve its goal were unconstitutional. *Id.* at 535. The Court set aside for purposes of this case the broader issue of whether application of the statute would have been permissible if what had been disclosed was "trade secrets or domestic gossip or other information of purely private concern." *Id.* at 533.

[FN291]. *Id.* at 534. As noted earlier, the concurrence by Justices Breyer and O'Connor could have somewhat undercut the argument that *Bartnicki* revives public concern as a test because they emphasized the importance of the nature of the plaintiffs ("limited public figures"), *id.* at 539, and the fact that the content involved public affairs. *Id.* But after so writing, both joined the majority opinion.

[FN292]. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

[FN293]. 514 U.S. 476 (1995).

[FN294]. See *id.* at 481-82. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496-97 (1996), the majority relied on the passage from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), to the effect that:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

The Court made a similar point about the importance of the availability of information in *Thompson v. Western States Medical Center*, 535 U.S. 357, 376 (2002).

[FN295]. Professor Lessig has pointed out that an important distinction exists between freedom to utilize content without prior permission or the possibility of exclusion, and the right not to pay for it. Lawrence Lessig, *The Architecture of Innovation*, 51 *Duke L.J.* 1783, 1788-90 (2002); Lawrence Lessig, *The*

Creative Commons, 55 Fla. L. Rev. 763, 772-73 (2003). The distinction is also discussed usefully and at length in Boyle, *The Second Enclosure Movement*, supra note 1, at 61-69. Cf. Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. Rev. 557 (1998) (suggesting that copyright owners might voluntarily give up the right to control kinds of uses made of their work in return for automatic payment for each use); Hess & Ostrom, supra note 1, at 121-23 (pointing out the variety of regulatory regimes that are consistent with the existence of a commons).

[FN296]. See, e.g., supra note 1.

[FN297]. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

[FN298]. *Id.* at 573-74. A comment with a somewhat similar import appears in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-57 (1985). In that case, the defendant argued that it had a First Amendment right to publish the news even if it trumped an author's right of first publication under copyright. *Id.* The majority, in ruling against *The Nation*, pointed out that the publication of the infringing article occurred while the book itself was "poised" for public release and therefore could not be excused by any pressing need for public access. *Id.* at 557. The Court then emphasized that it might have viewed the First Amendment arguments in the case differently had the copyright owner tried to use his "monopoly as an instrument to suppress facts." *Id.* at 559. Jane Ginsburg has taken up this idea in an article on permissible protections for data. Ginsburg, *No "Sweat" ?*, supra note 109. She suggests a number of ways that protection of data could be made consistent with free speech principles, one of which is the use of a compulsory licensing mechanism. *Id.* "This device ensures other compilers access to the information, albeit for a fee. Once access is available, however, the First Amendment does not necessarily command that it be gratis." *Id.* at 386-87.

[FN299]. Benkler, for instance, emphasizes that the public domain is "free as the air to common use," and seems to mean by that that it is free from an economic as well as a use perspective. See Benkler, *Free as the Air*, supra note 1. In his most recent article on the public domain, he comes closer to making this notion explicit when he writes that the proper role of the First Amendment is to "stem the expanding range of rights to control information that are intended to sustain the business model of selling information as goods." Benkler, *Through the Looking Glass*, supra note 35, at 223; see also Lange, *Recognizing*, supra note 35, at 150. Lange quotes William Krasilovsky in saying that public domain is "best defined in negative terms" and that "[i]t lacks the private property element granted under copyright in that there is no legal right to exclude others from enjoying it and is 'free as the air to common use.'" *Id.* at 151 n.20. In most of the writing about the public domain, the issue is even less explicitly discussed. This is because most authors start from the assumption that being in the public domain means that the speech good is free of charge as well as free to use. See, e.g., Jaszi, supra note 30; Litman, supra note 35. This, after all, was the general understanding about the status of expressive works once copyright ran out, and the context in which most thinking about the public domain occurred.

[FN300]. *Zacchini*, 433 U.S. at 562.

[FN301]. See *id.* at 578.

[FN302]. Baker, *First Amendment*, supra note 50, at 903.

[FN303]. See *Harper & Row*, 471 U.S. at 547.

[FN304]. I am sensitized to the need to define what I mean by the public domain by the work of Marci Hamilton, who has complained that those who argue that information should be "free" too often fail to specify exactly what they mean by information, and how much of it they intend to include. Marci A. Hamilton, *A Response to Professor Benkler*, 15 *Berkeley Tech. L.J.* 605, 611-13 (2000).

[FN305]. The public domain would not, therefore, contain the fruits of illicit spying, genuine secrets, or information shared only with limited parties on a need-to-know basis (for example, pursuant to narrowly tailored confidentiality agreements) because this sort of information is not "public." This Article does not

purport, however, to define in the space available a proposed dividing line between legally and illegally acquired information, or to probe the limits of secrecy as a barrier to information entering the public domain. The subject of secrecy and secrecy agreements is difficult because if they were used routinely, nothing would enter the public domain. Particularly if one is inclined, as I am, to think that the public domain is a requirement of the First Amendment, too generous a use of "secrecy" as a reason to classify information as private could be constitutionally problematic. For an excellent discussion of secrecy agreements and the First Amendment, see Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 *Cornell L. Rev.* 261 (1998). For a discussion of the legality or illegality of information gathering, see Zimmerman, *I Spy*, supra note 160.

[FN306]. The victim of an automobile accident or a serious crime may be found to have "donated" information to the public domain, even though her participation could scarcely be deemed voluntary.

[FN307]. This can occur if content is either purposefully communicated in ways that make it available to the general public, or if, in some other way, it has become public.

[FN308]. By publicly available, I mean that the information has been disseminated to persons under no express contractual responsibility not to reveal it to others. As already indicated I do not mean to suggest that contracts can be used at will to keep information from becoming "public"; the use of contract to restrict speech is a complex issue that requires more consideration than can be given here. See supra note 305. I would argue that contracts may appropriately be used to restrict dissemination in at least some circumstances. If, however, through breach of such an agreement, a third party learns the information, I would argue at that point, the information has fallen into the public domain. This analysis is quite consistent with the rules governing trade secrets, and is one sensible way to mark the outside boundaries of contract as a limit on free use and reuse of information. The idea that material becomes public property once it is made public is entirely consistent with historical ideas about the public domain. See supra notes 15-16 and accompanying text; see also Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 *The Writings of Thomas Jefferson*, supra note 22, at 180.

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it.

Id.

[FN309]. As noted earlier recognition of trademarks as identifiers of the source of goods or services predates the Constitution, and it would be odd, in my view, to argue that a constitutional theory of the public domain precludes continued recognition of them, at least for such limited purposes as identifying the source or preventing consumer fraud. See supra note 17.

[FN310]. But see *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107 (D.D.C. 2004). Relying on *Eldred*, the court concluded that the First Amendment could constrain the power of Congress to make laws governing speech goods that are the proper subject matter of copyright if the law in question altered the "traditional contours of copyright protection." *Id.* at 119 (citing *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)). The court cited numerous historical examples of what it deemed to have been unchallenged "restorations" of copyright and seems to have relied on that history to conclude that the restoration provided for in 17 U.S.C. § 104A (2000) did not therefore work a change of this kind. *Luck's Music Library, Inc.*, 321 F. Supp. 2d at 113-16.

[FN311]. Since the Copyright Act of 1976, works are automatically copyrighted upon fixation in tangible form. 17 U.S.C. § 102(a). Before the 1976 Act, copyright came into being upon publication with a copyright notice attached. See *Schechter & Thomas*, supra note 77, at 28. Although unpublished works enjoyed protection under common law, works that did not comply with the notice requirements of the federal statute were injected upon publication into the public domain. See *id.* at 157-58.

[FN312]. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

[FN313]. Blasi, *supra* note 158, at 492.

[FN314]. Bartnicki, 532 U.S. at 514.

[FN315]. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

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