

COMMENT

**PIRATES OF THE INFORMATION INFRASTRUCTURE:
BLACKSTONIAN COPYRIGHT AND THE FIRST
AMENDMENT**

By Hannibal Travis[†]

ABSTRACT

The author analyzes the ongoing expansion of American copyright law from the standpoint of the comparative history and philosophy of exclusive rights in lands on the one hand, and in creative expression on the other. He documents the persistence of a particularly influential mode of discourse about property rights from the English Enclosure Movement of the seventeenth and eighteenth centuries down to the Internet copyright debates of the present day. During this time, the duration and breadth of copyright have been extended to economically dubious and arguably unconstitutional lengths. At each new incursion into the intellectual commons, substantially the same dual-pronged justification has been brought to bear, combining a one-sided emphasis on certain “natural” rights with a rudimentary and poorly documented account of the “tragedy of the commons.” This unmooring of copyright from the historical limits on its scope and duration threatens to chill the flow of public domain material and transformative works onto the World Wide Web. The author argues that a searching First Amendment inquiry into the dubious origins of Blackstonian copyright, along with a more critical appraisal of its philosophical provenance, should precede implementation of “notice-and-take-down” schemes and other statutory, technological, and contractual restrictions on imitation and quotation in cyberspace and elsewhere. Absent such an inquiry, the redefinition of “piracy” to include evaluation, critique, parody, and even reproduction of public domain works will undo the advances in the accessibility and heterogeneity of information

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that the advent of cyberspace communication has wrought, and that the First Amendment was explicitly intended to achieve.

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It might be said that gradually in the eighteenth century a crisis of popular illegality had occurred. . . . The transition to an intensive agriculture exercised, over the rights to use common lands, over various tolerated practices, over small accepted illegalities, a more and more restrictive pressure. Furthermore, as it was acquired in part by the bourgeoisie, now free of the feudal burdens that once weighed upon it, landed property became absolute property: all the tolerated “rights” that the peasantry had acquired or preserved (the abandonment of old obligations or the consolidation of irregular practices: the right of free pasture, wood-collecting, etc.) were now rejected by the new owners who regarded them quite simply as theft. . . .¹

1. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 84-85 (Alan Sheridan trans., Vintage Books 1979) (1977).

God gave the [Word] to Men in Common; but since he gave it them for their benefit, and the greatest Conveniencies of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational, (and *Labour* was to be *his Title* to it;) not to the Fancy or Covetousness of the Quarrelsome and Contentious.²

I. INTRODUCTION

The legal structure is in place for wholesale censorship of Internet speech by means of overbroad copyright laws. The last few years, a number of writers and scholars have argued, have been a period of accelerating “proPERTIZATION” of cyberspace.³ This trend has followed, perhaps inevitably, the oft-noted tendency towards an ever longer and more expansive copyright monopoly.⁴ As of this writing, federal law provides severe civil and criminal penalties⁵ for those sampling as little as a note or two of music without permission,⁶ using a few too many of a President’s own words

2. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 309 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

3. See, e.g., Heidi Kriz, *Open Source in Open Court*, WIRED NEWS, Apr. 26, 1999 (<http://www.wired.com/news/news/politics/story/19253.html>) (quoting Lawrence Lessig).

4. See, e.g., Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEXAS L. REV. 873, 894 (1997).

5. Under the No Electronic Theft Act, it is a felony to “willfully” copy or distribute infringing portions of works which have an aggregate value of more than \$1,000. See 17 U.S.C. § 506(a) (Supp. IV 1998). The stiff fines and jail sentences envisioned by this act were explicitly intended to apply to those posting copyrighted materials on the Internet; it was enacted in part as a response to the holding of *United States v. LaMacchia*, 871 F. Supp. 535, 545 (D. Mass. 1994), that infringement absent intent to derive financial gain could not be criminally prosecuted. See 143 CONG. REC. H9883, H9885 (daily ed. Nov. 4, 1997) (statement of Rep. Goodlatte, author of the Act).

6. The Supreme Court held in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), that a song that copied a single bass riff and one line could be infringing if its authors could not prove that their version did not work “substantial harm” on the original’s “derivative market for rap music.” *Id.* at 592-93. See also *Tin Pan Apple Inc. v. Miller Brewing Co.*, 30 U.S.P.Q.2d (BNA) 1791 (S.D.N.Y. 1994) (holding that a jury could find the sounds “Hugga-Hugga” and “Brrr” in plaintiff’s song sufficiently original to warrant copyright protection, and support an infringement action against defendant who used the same sounds in his song); *Grand Upright Music, Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991) (holding that defendant’s use of three words and a sample of music from plaintiff’s song to be an infringement of plaintiff’s copyright, and referring the matter for consideration of criminal prosecution).

to publicize or criticize his or her policies,⁷ or posting online the works of James Joyce or other authors who died as long as 70 years ago.⁸

Perhaps it is unsurprising that, at the dawn of an information economy and networked world, we should be facing a massive reconfiguration of public and private rights to the public domain and to fair uses.⁹ Some intellectual property scholars characterize the current period as one in which information industry players are seeking to set the ground rules of the knowledge economy in their favor. This process has been christened a "copyright grab" by Pamela Samuelson,¹⁰ and described more broadly as "an intellectual land-grab" by James Boyle¹¹ and a "creeping enclosure of the informational commons" by Peter Jaszi and Martha Woodmansee.¹² Is such language loose talk, or is there a genuine conceptual or tactical similarity between land grabs proper and mere recalibrations of the copyright balance?

This essay will argue that the ongoing propertization of the copyright monopoly shares a profound resemblance to the English enclosures of common lands. As a prelude to capitalist agriculture and industry, the peoples of Europe found many of their "ancient and venerable" property rights liquidated by a rising class of merchant farmers. This process was perhaps most dramatic in England. The entitlements so appropriated by often illegal or abusive enclosures, once secured, were asserted against their prior holders and the general public as rights of perpetual duration and near-absolute scope.

7. See *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 558 (1985).

8. See Plaintiff's First Amended Complaint, *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999) (No. 99-CV00065), available at http://cyber.law.harvard.edu/eldredvreno/complaint_amd1.html. See generally Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).

9. See Peter Lyman, *The Article 2B Debate and the Sociology of the Information Age*, 13 BERKELEY TECH. L.J. 1063, 1075-1080 (1998) (describing "the flow of information" as "the central analytic concept of the network enterprise" and the threat posed by the "new economic space" of the Internet to the balance of market power between producers and consumers).

10. Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134.

11. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 94 (1997).

12. PETER JASZI & MARTHA WOODMANSEE, *THE CONSTRUCTION OF AUTHORSHIP* 11 (1994). Most recently, Yochai Benkler has written that "[w]e are in the midst of an enclosure movement in our information environment." 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, 354 (1999).

Roughly concurrent with the English enclosures, a new community of discourse arose with regard to private and common property, or what one commentator calls “the right to exclude and the right to be included.”¹³ This discourse, which could be called the “propertarian ideology,” has dominated many legislative and judicial discussions of rights in commons, and to public uses, and continues to do so. It is defined by three closely related claims: (1) that rights in the commons are not really rights, such that expropriation of common land is not really theft; (2) that use of a commons is inherently wasteful and fractious, such that monopolization becomes a moral imperative; and (3) that rights of exclusion convey only benefits, both utilitarian and economic, such that all of the costs remain on the side of inadequate rather than overgenerous property rights. According to this discourse, both the sacred rights of property and the national wealth come to weigh entirely against the continued exercise by the public of its rights in the commons.

These tenets constitute a form of “ideology” as Althusser defined the term, or a representation of “the imaginary relationship of individuals to their real conditions of existence.”¹⁴ It is a discourse that frequently imagines rights in and uses of commons not so much as they actually were and are, but rather in relation to the maintenance and reproduction of social power.¹⁵ It is a *propertarian* ideology precisely because it does violence to the rich tradition of the commons on every point that renders total enclosure more attractive. And it reigns well nigh unchallenged over contemporary legislative and judicial analyses of the public domain, in a form substantially identical to its articulation in the classical liberal political, legal, and economic theories of John Locke, William Blackstone, and Adam Smith.

This essay is not the place to resolve the long-standing debate between enclosure “optimists” and “pessimists” as to whether the remarkable advances in the British standard of living since the seventeenth century could have been achieved without the massive social misery wrought by forcible enclosures and sweepings.¹⁶ Rather, the point is that a form of thinking

13. THOMAS A. HORNE, *PROPERTY RIGHTS AND POVERTY: POLITICAL ARGUMENT IN BRITAIN, 1605-1834*, at 7 (1990).

14. Louis Althusser, *Ideology and Ideological State Apparatuses*, in *CRITICAL THEORY SINCE 1965*, at 241 (Hazard Adams ed., 1986).

15. TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 172-73 (1983).

16. See DOUGLAS HAY & NICHOLAS ROGERS, *EIGHTEENTH CENTURY ENGLISH SOCIETY* 27, 71 (1997) (noting a “marked decline in living standards” for laborers and most of the poor in the latter half of the eighteenth century, along with a “staggering increase of food prices” and a corresponding decline in the bargaining power of labor in those early days of the industrial revolution).

developed that refused to balance the economic benefit of increased productivity against the related costs of displacement, increased economic inequality and social hierarchy, impoverishment, and even famine.¹⁷ This mode of discourse threatens to work analogous harms upon the economy and polity of the Internet, by devaluing the importance of a public domain through the erosion of transformative rights and other fair uses of intellectual property.

The current revolution in, and at times inversion of, established principles of copyright and free expression is thus in principle no different from the dissolution of “ancient and venerable prejudices and opinions” regarding rights in land that took place at the dawn of the age of industrial manufacturing and intensive agriculture.¹⁸ Past real-world experience does not bode well for the universe of public domain materials in cyberspace, or for the right to produce transformative works commenting or expanding upon existing copyrighted expression. Contributors to the great conversation will have their postings “expropriated,” namely deleted. As a consequence, the currently existing class of independent Web publishers, of small, more or less public-interested Internet speakers, will be radically depopulated.

Once this epoch-defining expropriation takes place, the owners of large copyright holdings will vigorously assert absolute rights of exclusion from their informational “estates.” They will claim, with William Blackstone before them, that an author “has clearly a right to dispose of that identical work as he pleases, and *any* attempt to take it from him, *or vary the disposition he has made of it*, is an invasion of his right of property.”¹⁹ Blackstone appears to have advocated a perpetual common-law copyright

17. As two historians write, “famine came to stalk wartime England at the end of the [eighteenth] century in part because of the consequences of a massive restructuring of other entitlements of a large part of the population: to land, to work, and to regulated markets.” *Id.* at 83. This despite the fact that in the early stages of the enclosure movement “harvests were good, food prices were low, and England was a substantial net exporter of grain.” *Id.* at 72. Thus it was that for “the first time in almost two hundred years, the mass of the English poor appeared to be facing starvation,” *id.* at 71, as enclosure increased food prices and deprived the peasantry of the nutritional safety net comprised by common rights, including the “gleaning” of leavings after the harvest, and the “poaching” of meat and firewood. *Id.*; *see id.* at 73 (estimating that gleaning could provide a poor family with up to three months of bread). Some even argue that “in the entire period since 1500 there was never an absolute shortage of food in England that made famine inevitable.” *Id.* at 83.

18. Karl Marx & Frederich Engels, *Manifesto of the Communist Party*, in THE MARX-ENGELS READER 473, 476 (Norton & Co. 1978).

19. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND *405-06 (emphasis added).

of unlimited exclusivity, one that even went beyond prohibiting verbatim quotation for any purpose to preventing imitation of styles or ideas. He alleged that common-law copyright extended beyond the author's expression, and as far as the "style" and "sentiments," as "the thing of value, from which the profit must arise."²⁰ "Sentiments" was the very term used by Blackstone in his famous discussion of liberty of the press to refer to political opinions themselves.²¹ He thus analogized ideas, thoughts, and opinions with tangible objects to which title may be taken by occupancy under English common law, such as the spoils of war, "moveables" found on the earth or in the sea, and wild animals.²²

Neither did Blackstone favor any temporal limits on the copyright monopoly. He argued for perpetual common-law copyright in his influential *Commentaries on the Laws of England*, as well as on behalf of the London booksellers as counsel in *Millar v. Taylor*,²³ and from his seat on the Court of King's Bench in *Donaldson v. Becket*.²⁴ This is unsurprising, insofar as Blackstone, perhaps more explicitly than any other jurist, grounded the exclusive rights of authors in the aforementioned analogy to "title to things personal by occupancy" as a matter of "original and natural right."²⁵ He claimed that just as an owner of land does not forfeit the exclusive right to exploit his or her estate by providing keys to a guest, so copyright holders "may give out a number of keys, by publishing a number of copies; but no man, who receives a key, has thereby a right to forge others, and sell them to other people."²⁶ Blackstonian copyright may therefore be tentatively defined as a more or less "sole and despotic dominion" over a given work, a right of "total exclusion" asserted in perpetuity against any attempt to imitate the sentiments, vary the disposition, or derive any social or economic value from a work.²⁷

20. MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 77 (1993) (quoting *Tonson v. Collins*, 98 Eng. Rep. 181 (K.B. 1761)).

21. See 4 BLACKSTONE, *supra* note 19, at *151-52 ("Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. . . . Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects.").

22. 2 *id.* at *400-07.

23. 98 Eng. Rep. 201 (K.B. 1769).

24. 98 Eng. Rep. 257 (H.L. 1774) (appeal taken from Eng.).

25. 2 BLACKSTONE, *supra* note 19, at *400, *405.

26. ROSE, *supra* note 20, at 91 (quoting *Tonson v. Collins*, 96 Eng. Rep. 169, 188 (K.B. 1761)).

27. 2 BLACKSTONE, *supra* note 19, at *2.

The impending regime of Blackstonian copyright will be characterized by licenses to “read, but don’t download,” to “download, but don’t print,” to “print, but don’t quote from,” or even to “quote from, but don’t criticize.” Ever more generous remedies will be available in cases of boundary disputes; perhaps most troubling is the right to conscript the providers of Internet access and Web hosting space into summary extra-legal adjudication of claimed infringements in the shadow of draconian civil and criminal penalties.

This essay analyzes the ongoing legislative and judicial efforts to transform the hitherto limited monopoly conferred by American intellectual property law into an absolute Blackstonian right to exclude the public from virtually any use, without permission, of once-copyrighted material. More particularly, it traces certain common themes through the various normative defenses of these attempts from the ancient speech and access rights of the public. In so doing, it conceives of these ongoing efforts as a multi-front enclosure of the intellectual commons, as the Information Age counterpart to the expropriation of the English commoner from his pre-industrial rights and privileges over land at the dawn of the Industrial Age.

Part II retells some of the history of the English enclosure of common lands over several centuries. It recounts how, at each incursion into the commons, the same charmed convergence of sacred rights and utilitarian progress was used to gloss over the illegalities and expropriations required for such an epic reconfiguration of public and private rights. Part III shifts over into copyright history, analyzing how “rights-talk,” conclusory incentive-based utilitarian analyses, and distorted representations of the public domain as useless wasteland, have all been deployed in the cause of revoking users’ rights to the intellectual commons. This analysis furthers the thesis, advanced by Mark Lemley, that the trend towards the ever more expansive “propertization” of the copyright monopoly is a result of the “rise of [real] property rhetoric” in intellectual property policy discussions, coupled with a “particular economic view of property rights” as the solution to the tragedy of the commons.²⁸ Although Professor Lemley argues that both rhetorical themes “emerge” from the Chicago school law and economics movement,²⁹ I hope to identify the much older and more profound sources of their influence on our legal and political culture.

Part IV describes the current theoretical and practical campaign to privatize the public’s rights both to the untrammelled use of works whose copyright has expired, and to certain non-licensed uses of works whose

28. Lemley, *supra* note 4, at 897.

29. *See id.*

copyright remains valid. This campaign is taking place on four broad and interrelated fronts, including legislative extension of copyright term, the imposition of liability on Internet Service Providers (“ISPs”) for the activities of their patrons, the legal reinforcement of anti-circumvention technologies, and the judicial enforcement of mass-market informational licenses. Again, on each of these fronts the same lines of argument—the sanctity of property rights, the need for incentives, and the commons as precursor to desolation—are asserted in the cause of the privatization of established public rights and privileges.

The First Amendment as originally intended, I argue in Part V, compels limitations on copyright expansion, and the private censorship rights it may grant. The argument proceeds to analogize the depopulation of the English yeomanry, and its increased dependency on large landowners and industrial enterprises, to the depopulation of the class of Internet publishers independent of media corporations. More meaningful First Amendment inquiry than that customarily provided to copyright defendants is warranted before copyright expansion is permitted to make a clean sweep of so much cyberspace communication.

II. THE ENGLISH ENCLOSURES OF COMMONS AND EXPROPRIATION OF THE YEOMANRY

Land grabs typically proceed along two broad fronts. The first is the enclosure itself, which is fairly straightforward. Those engrossing their estates expel or block out those they deem to be squatters, trespassers, nomads, or otherwise unauthorized users, and step up surveillance and punishment of small tenant farmers, foragers, firewood collectors, etc. Along the second front, those who seek to expand their dominion over the commons recharacterize existing distributions of entitlements as outright theft in any instance where these “rights” would impede the expansion of their holdings. As we shall later see, an analogous process accompanies the enclosure of intellectual commons.³⁰

Thus the “tolerated practices” of Michel Foucault’s analysis,³¹ claimed by the peasant as rights secured by long and bloody struggle, are re-described as illegalities. What the peasant claimed as a right is discovered to have been a crime all along. It is, first of all, a crime against individuals, violating their sacred rights of private property. Secondly, it is a crime against the public, comparable to burglary and brigandry, disrupting settled entitlements and frustrating progress and development.

30. See discussion *infra* Parts III, VI.

31. See *supra* note 1 and accompanying text.

This section depicts several scenes out of this recurring drama. They may be divided into two parts: the enclosure and privatization of the common lands themselves, and the expropriation of the peasantry from its vital rights and privileges over privately-held lands. In each case, self-aggrandizing landowners redescribed disfavored entitlements as unproductive, as trespass, as theft; the holders of these disfavored entitlements were alienated from them; and the resulting redistribution of entitlements was declared to be absolute and eternal.

A. The Theft of Rights

The quasi-feudal system of English agriculture during the fifteenth and sixteenth centuries was, by some accounts, characterized by a majority of free and independent farmers.³² After the collapse of serfdom in the mid-fourteenth century, a new class of yeoman arose, struggling for its freedom throughout the following century. Eventually, the yeomanry successfully “acquired a substantial proprietary interest in the soil.”³³

The yeomanry’s proprietary interest was embodied in the “copyhold,” and rights in the common. The former was the small farmer’s customary right to occupy some part of a feudal estate as a sort of sub-tenant. Copyhold was a sort of “inferior estate that existed within a manor held in fee simple by a lord.”³⁴ The yeoman copyholder was referred to as a “customary tenant,” to reflect that the source of his right was a custom that “hath been in use, time out of mind of man, that certain tenants within the same manor have used to have lands and tenements to hold to them and their heirs.”³⁵

One legal historian defines a commons as “a tract of land subject to common rights of pasture except when in crop and then necessarily fenced against stray animals.”³⁶ Since each of these “free farmers” were allocated arable land of not much more than four acres of land on average, they depended heavily on “the usufruct to the common land [or right to use it

32. See THOMAS BABINGTON (LORD) MACAULAY, 1 HISTORY OF ENGLAND 333-34 (1848-1861) (“The petty proprietors who cultivated their own fields with their own hands, and enjoyed a modest competence . . . then formed a much more important part of the nation than at present. . . . The average income of these small landlords . . . was estimated at between £60 and £70 a year. It was computed that the number of persons who tilled their own land was greater than the number of those who farmed the land of others.”).

33. ROBERT C. ALLEN, ENCLOSURE AND THE YEOMAN 66 (1992).

34. Charles J. Reid, Jr., *The Seventeenth-Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 248 (1995).

35. *Id.* at 247 (citations omitted).

36. ERIC KERRIDGE, THE COMMON FIELDS OF ENGLAND 5 (1992).

without damaging it], which gave pasture to their cattle, furnished them with timber, fire-wood, turf, &c.”³⁷ The importance of the right to use communal property is often emphasized: “We must never forget that even the serf was not only the owner, if but a tribute-paying owner, of the piece of land attached to his house, but also a co-possessor of the common land.”³⁸

By as early as 1509, one historian recounts, a “large portion of English farming . . . was performed by farmers working within an extraordinarily complex system of open fields and common rights.”³⁹ Nevertheless, the rights of the free farming peasant came under continual attack by the land-owning lords and their successors, who desired to enclose for themselves both the land tilled by customary tenants (internally) and the common lands (externally). Both rights in the commons and the customary rights of sub-tenants, mere encumbrances from the perspective of the large land-owners, took centuries to eliminate.

These were centuries marked by violent expropriation, largely ineffective legal and legislative responses to this expropriation, and occasional acts of rioting and collective resistance.⁴⁰ The process of violent expropriation was dubbed the “clearing of estates, i.e., the sweeping men off them.”⁴¹ Typically, the “dwellings of the peasants and the cottages of the labourers were razed to the ground or doomed to decay.”⁴²

37. KARL MARX, CAPITAL (1867), in 50 GREAT BOOKS OF THE WESTERN WORLD: MARX 1-2, at 356 (1984). These common lands included not only so-called “communal property,” but also the large tracts of feudal lands owned by the Catholic Church, and the Crown estates.

38. *Id.* at 356 n.1.

39. Reid, *supra* note 34, at 252.

40. Beginning in the late fifteenth and throughout the sixteenth century, the land-owning nobility, impoverished by the “great feudal wars” and enticed by the rising price of wool in England, entered on a campaign of usurpation of arable land tilled under color of customary rights, with an eye toward converting it into pasture for their large herds of sheep. See MARX, *supra* note 37, at 356. Many of these early enclosures were enshrined in neither royal decree nor parliamentary legislation, but carried out simply by means of individual acts of violence that excluded the copyholding small farmer from the new-found pastures of the powerful. See *id.* at 359.

41. *Id.* at 361.

42. *Id.* at 356. The illegality of the rights asserted in such an absolute fashion was declaimed to little effect. Marx documents that popularly demanded legislation fought “in vain” against this process “for 150 years.” *Id.* at 359. The monarchy approached the issue from a different perspective, which Francis Bacon summarized as the principle that “to make a good infrantry, it requireth men bred not in a servile or indigent fashion, but in some free and plentiful manner.” FRANCIS BACON, THE HISTORY OF THE REIGN OF KING HENRY VII 66 (Brian Vickers ed., Cambridge Univ. Press 1998) (1622). An Act of Henry VII “forbad the destruction of all ‘houses of husbandry’ to which at least 20 acres of land

The seventeenth century saw continued theft of customary rights. This entailed both an “attack on copyhold, which was preeminently the individual rights small landholders enjoyed over particular parcels of land,” and “the limiting of access to open fields and the exercise of rights held in common by broadly defined and diffuse groups of individuals.”⁴³ In the courts, these attacks were conducted by strict construction of customary rights. In *Gateward’s Case*,⁴⁴ the Court of Common Pleas declared that “it would enforce only customs that were certain,” its “chief policy concern” being “that landowners be able to enclose.”⁴⁵

With increasing frequency throughout the eighteenth century, the enclosure of communal property and state lands took place with this kind of legal formality.⁴⁶ The innovation of the times was the “parliamentary form of the robbery,” embodied in “Acts for enclosures of Commons, in other words, decrees by which the landlords grant themselves the people’s land as private property, decrees of expropriation of the people.”⁴⁷ The forum was a “parliament of landlords,” with one house dominated by the landed gentry, the other restricted to those with incomes in the top one percent of the population, and with the king wielding a veto over the whole.⁴⁸ The

belonged,” and fixed “a proportion between corn land and pasture land” to prevent the wholesale incursion of the latter on the former. MARX, *supra* note 37, at 357. A later Act of Henry VIII, this one of 1533, “ordain[ed] the rebuilding of the decayed farmsteads,” and after reciting that “some owners possess 24,000 sheep,” limited the allowable number to 2,000. *Id.* However, in the end both the “cry of the people and the legislation directed . . . against the expropriation of the small farmers and peasants, were . . . fruitless.” *Id.*

43. Reid, *supra* note 34, at 245.

44. 77 Eng. Rep. 344 (C.P. 1607).

45. Reid, *supra* note 34, at 256 n.149.

46. The “Glorious Revolution” of 1688 gave a new impetus to the enclosure movement, as “colossal scale thefts of state lands” ensued. Crown estates were “given away, sold at a ridiculous figure, or even annexed to private estates by direct seizure,” all this “without the slightest observation of legal etiquette.” MARX, *supra* note 37, at 359. As one nineteenth century commentator exclaimed, “The illegal alienation of the Crown Estates, partly by sale and partly by gift, is a scandalous chapter in English history . . . a gigantic fraud on the nation.” F.W. NEWMAN, LECTURES ON POLITICAL ECONOMY 129-30 (London, J. Chapman 1851) (quoted in MARX, *supra* note 37, at 359 n.3).

47. MARX, *supra* note 37, at 359.

48. HAY & ROGERS, *supra* note 16, at 100; *see also* 1 BLACKSTONE, *supra* note 19, at *163 (“it is notorious, that a very large share of property is in the possession of the house of lords”). Blackstone described as “the true excellence of the English government” the fact that “the people are a check on the nobility, and the nobility on the people; . . . while the king is a check upon both.” *Id.* at *150. The class of those eligible to represent the “people” in the House of Commons was, however, restricted to “knights, elected by the proprietors of lands,” and “citizens and burgesses, chosen by the mercantile part or supposed trading interest of the nation. . . .” *Id.* at *154-55. In concrete terms, “every knight of a shire shall have a clear estate of freehold or copyhold to the value of six hun-

landed aristocracy “monopolized the high offices of state,” occupying forty percent of seats in Parliament and dominating many of the rest via patronage.⁴⁹ One historian estimates that “[a]fter 1760 altogether there were about 5,400 enclosure acts and enclosures under general acts, covering . . . more than seven million acres—say a fifth of the area of England.”⁵⁰

B. Justifications for Enclosure: The Rhetoric of Waste

In the seventeenth and eighteenth centuries, the yeomanry’s long-standing rights in the commons were to be denied, transformed into criminal acts, and reassigned to the large landowners. In almost the same breath, use of the commons would be slandered as unproductive and economically useless, as an aimless and wasteful traipsing about lands that would be put to much better use by their new owners, the “capital” or “merchant” farmers.

Major English theorists of property, prominently among them Hobbes, Locke, and Blackstone, argued that pre-feudal rights in the commons were not only not rights at all, but that they were in fact moral and legal wrongs. The justification of capitalist private property on a natural rights rationale is the more familiar contribution of these theorists, but the utilitarian-economic aspects of their arguments are indissoluble components of their thinking, and even serve to ground the rights that they so vigorously champion. The true rights holders were those who enclosed the commons, expropriated the yeomanry, and exploited the land more intensively. The propertarian ideology of early enclosers like Sir Walter Raleigh took on a new and more enduring philosophical form.

dred pounds *per annum*, and every citizen and burgess to the value of three hundred pounds. . . .” *Id.* at *170. Those eligible to vote, according to Blackstone, were those possessing freehold estates earning at least twenty pounds annual income. *See id.* at *166-67. As of 1759, just two years before Blackstone was writing, less than one percent of English families earned an average annual family income of even four hundred pounds, and hundreds of thousands of farming, fishing, laboring and soldiering families earned less than 20 pounds. *See HAY & ROGERS, supra* note 16, at 20. Blackstone deemed these qualifications necessary to assure that members of parliament were “by no means of a degree of yeomen,” nor their electors “persons of indigent fortunes.” 1 BLACKSTONE, *supra* note 19, at *170, *165.

49. HAY & ROGERS, *supra* note 16, at 189; *see id.* at 57-58, 191.

50. W.E. TATE, THE ENGLISH VILLAGE COMMUNITY AND THE ENCLOSURE MOVEMENT 50-51 (1967), *quoted in* Reid, *supra* note 34, at 260. These included 776 enclosure acts enacted by Parliament between 1760 and 1780 alone. *See* THOMAS A. HORNE, *supra* note 13, at 130. The existence and sheer numbers of such Acts demonstrates that the commons were never the landlords’ private property and that a massive reconfiguration of rights was required to transform them into it. *See* MARX, *supra* note 37, at 359-60.

While Hobbes and Locke are often set in philosophical opposition to one another, there is a good deal more continuity than is commonly recognized in their theorizing of the relationship between sovereign power and the right of private property. Their theories share a deep-seated tension, one that reflects their desire to render the rights of the yeomanry unstable, and subject to unlimited sovereign revision, while simultaneously providing strong theoretical grounds for protecting the property rights of the new class of intensive farmers. To accomplish this twin objective, the philosophers weave together rights-based and utility-based arguments to distinguish the two classes of rights—peasant/yeoman and merchant farmer—and to aggrandize the latter over the former.

Both Hobbes and Locke, for example, provide more than adequate grounds for revocation of the small farmers' usufruct in the commons. Writing in the 1640s, a time when efforts at private enclosures and royal giveaways of commons were on the rise, Hobbes took great pains to justify the sovereign's "whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy."⁵¹ This power is contracted to the sovereign in exchange for delivering the people from the nightmarish uncertainty of life and property in the state of nature. In *De Cive*, Hobbes approaches identifying the commons of his day with the state of nature. He inquires, as the motivating question of his "Naturall Justice," into why it was that "what Nature at first laid forth in common, men did afterwards distribute into severall Impropriations," why in other words "when all was equally every mans in common, men did rather think it fitting, that every man should have his Inclosure."⁵²

Hobbes initiates propertarian ideology's philosophical effacement of rights in the commons by equating the commons of his day with untouched nature, in a way that renders such rights an absurd and dangerous anachronism.⁵³ For in the Hobbesian state of nature, the right to every-

51. THOMAS HOBBS, LEVIATHAN 125 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

52. THOMAS HOBBS, DE CIVE 27 (Howard Warrender ed., Oxford Univ. Press 1983) (1651).

53. Sir Walter Raleigh could also claim some credit for this seventeenth century line of thought with his attack on the already moribund sixteenth century anti-enclosure legislation. His first point against the prohibition of enclosures was roughly rights-based; Raleigh argued that the "best course" regarding enclosure "is to set it at liberty, and leave every man free, which is the desire of a true English man." SIR SIMONDS D'EWES, A COMPLEAT JOURNAL OF THE VOTES, SPEECHES, AND DEBATES BOTH OF THE HOUSE OF LORDS AND HOUSE OF COMMONS 674 (1693), *quoted in* Reid, *supra* note 34, at 256 n.147. He remarked that "I do not like the constraining of them to use their Grounds at our wills but rather let every man use his Ground to that which it is most fit for, and

thing reduces into a right to nothing, for since “every man has a Right to every thing; even to one anothers body . . . there can be no security of any man.”⁵⁴ Of course, it cannot be said of the English commons what Hobbes says of the state of nature, that “all men had right to all things.” One commoner could not appropriate the whole to the exclusion of all others, for then it would cease to be a commons. As rights in the commons survived for some time, and an entire way of life built upon them, some degree of compromise and of negotiated uses must have prevailed, about which more will be said in good time.

In more or less attributing to the commons all the horrors of his idiosyncratic conception of the state of nature, Hobbes inaugurates the distorted account of the commons’ disutility that will dominate proprietarian ideology. In some of the earliest statements of a sort of tragedy of the commons, Hobbes speaks of “the publick Wayes, which lye open to all passengers to traverse up and . . . so that with the Impertinencies of some, and the Altercations of others, those wayes never have a seeds time.”⁵⁵ He argues that “from a Community of Goods, there must needs arise Contention whose enjoyment should be greatest, and from that Contention all kind of Calamities must unavoydably ensue, which by instinct of Nature, every man is taught to shun.”⁵⁶ The absence of “Mine and Thine” in the seventeenth-century commons, as much as in the state of nature, leads to the “perpetual warre of every man against his neighbour,” to uncertainty, friction, and waste.⁵⁷ Hence, as we know, “there is no place for Industry; because the fruit thereof is uncertain,” no culture, arts, society, and so on unto an equally nasty death.⁵⁸

This state of war prompts men to forfeit their “right to everything,” except self-preservation, to the sovereign state. They forfeit to the sovereign their “universal right” to all things on the earth, but by this “mutuall Contract” acquire property rights “in recompence.”⁵⁹ Hence, as was noted,

therein use his own Discretion.” *Id.* The second was economic: anti-enclosure acts were counterproductive, he argued, because the yeomanry possessed less capital than the large landowners, and as a consequence “many poor men are not able to find seed to sow so much as they are bound to plough.” *Id.* A number of pro-enclosure tracts throughout the first half of the seventeenth century reiterated these points. *See, e.g., Reid, supra* note 34, at 257-61 nn. 151-70 (collecting sources).

54. HOBBS, *supra* note 51, at 91.

55. HOBBS, *supra* note 52, at 26.

56. *Id.* at 27.

57. HOBBS, *supra* note 51, at 145.

58. *Id.* at 89.

59. *Id.* at 101.

“the Introduction of *Propriety* is an effect of Common-wealth.”⁶⁰ As for “the Land it selfe,” the “Sovereign assigneth to every man a portion, according as he, and not according as any Subject, or any number of them, shall judge agreeable to Equity, and the Common Good.”⁶¹

From a state of perpetual war and mutual ruin of the earth held in common, Hobbes leads the reader to a world in which the sovereign, bound by nothing, allocates the lands as he or she sees fit. With an eye to the “common good” and with no regard for prior restrictions on the land, such as the sub-tenancies or usufructs of the yeomanry, the sovereign creates rights in his wealthier subjects based on their individual economic influence over him. The merchant farmer, who is not only better able to curry favor with the royals but contributes more to the “common good,” can thus appropriate the peasant’s rights as his or her own private property. This theft of rights, in turn, transforms continued use of the common by the peasant into theft, and a crime against the sovereign, a step back towards economic ruin and mutual universal murder. The charmed circle of propertarian thought has been drawn.

Before proceeding to Locke, this is a good place to point out just how the premises of propertarian ideology, as definitively explicated by Hobbes, foreclose critical avenues of inquiry into the costs of increased propertization of social resources. The petitions and pamphlets of Gerrard Winstanley, written more or less coterminously with Hobbes’s great tracts on government, pursue these avenues to the conclusion that indiscriminate enclosure is not only unjust but is inefficient. Winstanley was one of the English Levellers who advocated after the English Civil War that “Victory being obtained over the King, the spoyl which is properly in the Land, ought in equity to be divided now between the two Parties, that is, Parliament and Common-people.”⁶² In these petitions and pamphlets, he con-

60. *Id.* at 171.

61. *Id.*

62. JERRARD WINSTANLEY, A NEW-YEERS GIFT FOR THE PARLIAMENT AND ARMIE (1650), available at <http://www.tlio.demon.co.uk/gift.htm> [hereinafter NEW-YEERS GIFT]. See JERRARD WINSTANLEY ET AL., THE TRUE LEVELLERS STANDARD ADVANCED: THE STATE OF COMMUNITY OPENED, AND PRESENTED TO THE SONS OF MEN (1659), available at <http://www.tlio.demon.co.uk/diggers.htm#True> [hereinafter *True Levellers*]. The Levellers were a radical faction of the Parliamentary Army, and advocated reforms that anticipated by more than a century many of the rights later enshrined in the United States Constitution. They pleaded for the right to jury trial, criminal due process, and a prohibition on disproportionate punishments, compulsory self-incrimination, the monopolization of trade, debtor’s prisons, and the subjection of “matters of religion and God’s worship [to] the compulsive or restrictive power of any authority upon earth.” John

ceded that the “Parliament, consisting of Lords of Manors, and Gentry, ought to have their inclosure Lands free to them without molestation,” on the condition that “the Common-people. . . ought to have the freedom of all waste and common land, and Crown-land equally among them.”⁶³

The arguments marshaled in support of the “true” Levellers’ position are as critical today as are the much more politically dominant ones of Hobbes and his progeny. They appeal not to a complex mythology of an original state of nature, but to the history, experience, and morality of an actually existing people. For example, Winstanley answers Hobbes’s question regarding “who gives the Earth to some part of mankind, and denies it to another part of mankind[?]” very differently, asserting that the one:

that hath the Earth, hath no right from the Law of creation to take it to himself, and shut out others; but he took it away violently by Theft and Murder in Conquest: As when our Norman William came into England and conquered, he turned the English out, and gave the Land unto his Norman Souldiers every man his parcel to inclose.⁶⁴

The very mention of the historical origins of English holdings places Winstanley in distinct contrast to Hobbes, whose account of a primordial social contract whitewashes enclosure by inverting the fact of violent conquest and appropriation into a mythical granting away by the weaker of their equal claim of right in the land.⁶⁵

In addition to this searing criticism of the natural rights rationale for the existing distribution of property rights, Winstanley makes a powerful case that the social costs of increased enclosure of commons may often outweigh the benefits. Against Hobbes and other partisans of the position that enclosure works only utilitarian and economic benefits, he argues that “Propriety,” as the “fruit of War from the beginning,” requires “those Laws that upholds Whips, Prisons, Gallows,” and which are “but the same

Lilburne et al., *The Petition of Sept. 11 1648*, in *THE ENGLISH LEVELLERS* 131, 135-139 (Andrew Sharp ed., 1998).

63. WINSTANLEY, *NEW-YEERS GIFT*, *supra* note 62.

64. *Id.* John Rawls echoes this concern in considerably muted form when he argues in support of his Difference Principle that the “existing distribution of income and wealth . . . is the cumulative effect of prior distributions of natural assets—that is, natural talents and abilities—[and] social circumstances, . . . factors so arbitrary from a moral point of view.” JOHN RAWLS, *A THEORY OF JUSTICE* 72 (1971).

65. *Cf.* Mark Twain, *The Damned Human Race*, in *LETTERS FROM THE EARTH* 209, 226 (Bernard Devoto ed., 1962) (“There is not an acre of ground on the globe that is in possession of its rightful owner, or that has not been taken away from owner after owner, cycle after cycle, by force and bloodshed.”).

power of the Sword that raged, and that was drunk with Blood in the field.”⁶⁶ The flip side of Hobbes’s vicious state of nature is the carnage meted out by that monstrous Leviathan, the state. Similarly, Winstanley inverts Hobbes’s account of common rights as the source of “all kind of Calamities” when he maintains that it is instead “pleading for Propriety and single Interest, [that] divides the People of a land, and the whole world into Parties, and is the cause of all Wars and Bloud-shed, and Contention every where.”⁶⁷

Even more illuminating is his answer to Hobbes’s argument that the act of the sovereign in parceling out the land “as he sees fit” is the best way to advance the common good. Winstanley underlines the possibility, which has become the subject of insistent denials by propertarian thinkers, that improvement and equality could go hand in hand:

[T]hose we call Poor should Dig and freely plant the Waste and Common Land for a livelihood, seeing there is Land enough, and more by half then is made use of, and not be suffered to perish for want. . . . [L]et them quietly improve the Waste and Common Land, that they may live in peace, freed from the heavie burdens of Poverty; for hereby our own Land will be increased with all sorts of Commodities, and the People will be knit together in love.⁶⁸

Winstanley and the “true” Levellers, by illustrating the costs incurred when governments “lock up Treasures of the Earth from the poor,” demonstrate the misleading one-sidedness of Hobbes’s hypothesis that it is only common rights that obstruct improvement and so impoverish everyone involved.⁶⁹ The point is not that Hobbes was entirely wrong in stating that property rights can reduce friction and increase social wealth, but that his account, like those of so many others to come, unjustifiably and disingenuously suggests that such rights inevitably serve these functions, so

66. WINSTANLEY, NEW-YEERS GIFT, *supra* note 62. This point could be described as an early articulation of the administrative costs of property rights, so often minimized in legislative and judicial copyright discourse.

67. WINSTANLEY ET AL., TRUE LEVELLERS, *supra* note 62.

68. WINSTANLEY, NEW-YEERS GIFT, *supra* note 62.

69. *Id.* The idea that exclusive rights in social resources could impose social costs has also been explored in the modern economic literature under the rubric of “rent-seeking.” Rent-seeking expends scarce social resources in order to capture an artificial governmentally authorized transfer of wealth. See JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James Buchanan et al. eds., 1980); Peter Brimelow, *Privilege Seeking?*, FORBES, Sept. 22, 1997, available at <<http://www.forbes.com/forbes/97/0922/6006073a.htm>>.

that there could never come a point where increased enclosure would work a net social loss.

The happy coincidence of the large landowner's sacred rights and economic productivity, and the small farmer's lack of rights and uselessness, is vividly portrayed by Locke in the fifth chapter of his *Second Treatise of Government*, entitled *Of Property*. First published in 1690, the treatise should be understood in context, as the manifesto of a wealthy investor in the Royal Africa Company and Bank of England, whose patron was the first Earl of Shaftesbury, himself a man of extensive holdings in land and stock.⁷⁰ It was also written during the early stages of parliamentary acts of enclosure and the post-revolutionary "illegal alienation of the Crown Estates," a giveaway some have called "a gigantic fraud on the nation."⁷¹

Like Hobbes before him, Locke provides ample grounds for the sovereign's giveaway of lands, subject to various rights of the peasantry,⁷² although he prefers that landowners observe certain parliamentary niceties in acquiring the land.⁷³ At the same time, however, he provides powerful new arguments to convince those who dispose of this unlimited sovereign power that the sovereign's power to regulate property rights should be mobilized behind the enclosure movement.

Locke's seminal work justifying the rights of the "industrious and rational" is well known. In brief, their "subduing and cultivating" of what lay in common "joined [their labor] to" it, and made it their property as a

70. See Peter Laslett, *Introduction to LOCKE*, *supra* note 2, at 25, 43.

71. MARX, *supra* note 37, at 359 n.3 (quoting F.W. NEWMAN, *LECTURES ON POLITICAL ECONOMY* 129-30 (London, 1851)).

72. See LOCKE, *supra* note 2, at 320 ("[I]n governments, the laws regulate the right of property, and the possession of land is regulated by positive constitutions.").

73. Taxation and other takings of property must proceed by "established and promulgated Laws," *id.* at 378, and with "the consent of the People," *id.* at 380. This explains what some have deemed to be an "attack" on enclosure. See JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 153-54 (1980). Thus Locke does say in reference to land held in common, at least in civilized countries like England, that "no one can inclose or appropriate any part, without the consent of all his Fellow-Commoners," because it is "the joint property of this Country." LOCKE, *supra* note 2, at 310. For Locke, however, "consent" never meant unanimity, and parliamentary elections were, of course, limited to property owners. Locke favored a property qualification of fifty acres even in the American colonies' parliaments of limited and subordinate jurisdiction. See John Locke, *The Fundamental Constitutions of Carolina*, in *POLITICAL ESSAYS* 160, 174-75 (Mark Goldie ed., 1997) (1699). As noted above, election to Parliament was impossible for as much as ninety-nine percent of the population even a century after Locke's time, and the right to vote denied to at least half of the adult men. See *supra* note 48.

matter of natural right.⁷⁴ Perhaps more interestingly, Locke declares that mere “inclosure,” “incroachment,” or “appropriation” is sufficient labor to ground rights of exclusion.⁷⁵ The individualistic narrative of the lone pioneer throwing up fences leaves little room for customary common rights, for “cultivating” without “subduing” and “inclosing.”

What is still less well known is how deeply Locke’s rights-based analysis of title to what is appropriated or improved is intertwined with consequentialist arguments about the unalloyed benefits of enclosure of commons. Locke took up Hobbes’s favorite theme almost verbatim: “If all things be left in common, want, rapine and force will unavoidably follow in which state, as is evident, happiness cannot be had which cannot consist without plenty and security.”⁷⁶ While he argues at one point that “the rightness of an action does not depend on its utility; on the contrary, its utility is a result of its rightness,”⁷⁷ the economic case for property rights serves to define and delimit the “property.” The crucial proto-utilitarian concept of “waste” distinguishes the legitimate claims of those whose labor fences in and intensively exploits a part of the commons, from those whose uses of the land are less productive, or amount to something between foraging and full-blown capitalist agriculture. The prohibition against waste is incorporated into Locke’s labor-mixing theory of acquisition as an answer to perhaps the most fundamental objection against it, that “if gathering the Acorns, or other Fruits of the Earth, &c. makes a right to them, then any one may *ingross* as much as he will.”⁷⁸ Recall here the small peasant’s indispensable “usufruct to the common land, which gave pasture to their cattle, furnished them with timber, fire-wood, turf, &c.”⁷⁹ The problem is clear: what is to distinguish the rights of the merchant farmer, with a hedged-in and cultivated estate, from the feudal or customary rights of the yeomanry to cultivate common lands, or to utilize them for foraging or pasture?

74. *Id.* at 310. The natural law bases of property rights are even more explicit in a series of lectures Locke gave as Censor of Moral Philosophy at Christ Church, Oxford, and later published as *Essays on the Law of Nature*. See JOHN LOCKE, *Essays on the Law of Nature*, in POLITICAL ESSAYS, *supra* note 73, at 79, 126, 132 (1663-64) (“[I]t is a law of nature that every man should be allowed to keep his own property, or, if you like, that no one may take away and keep for himself what is another’s property. . . . For what justice is there where there is no personal property or right of ownership. . .”).

75. LOCKE, *supra* note 2, at 309-11

76. John Locke, *Morality*, in POLITICAL ESSAYS, *supra* note 73, at 267, 268 (1677-78).

77. John Locke, *Essays on the Law of Nature*, *supra* note 73, at 133.

78. LOCKE, *supra* note 2, at 308.

79. See discussion *supra* note 36 and accompanying text.

Locke appeals to no less a force than divine command to dispel the specter of a common usufructuary right, pronouncing that: “Nothing was made by God for Man to spoil or destroy.”⁸⁰ Only the labor of “the industrious and rational” conveys title; “inclosed and cultivated land,” with “distinct title,” yields “ten times more” produce, if not “much nearer an hundred” times more, than “[l]and, of an equal richnesse, lyeng wast in common.”⁸¹ The paradigmatic case of land open to enclosure by the rational is “the wild woods and uncultivated waste of America,” where the Indians record no measurable profit and where by want of true labor, rational and industrious labor, even their kings dress in dirty rags.⁸² Thus land “that hath no improvement of pasturage, tillage, or planting, is called, and indeed is, waste; . . . the benefit of it amount[s] to little more than nothing.”⁸³ People that regularly hunt certain lands, or rely upon them for berries, nuts, firewood, or water, be they situated in the wilds of America or in communal lands and crown estates, have no better right to use the land than anyone with the power to exclude them. The “quarrelsome and contentious” have a duty to stand down in the face of those with superior resources and industry, who are better able to “increase the common stock of mankind.”⁸⁴

Everything except the estates of the merchant farmer appears to be up for grabs, save for one problem: Will not some people inevitably enclose a good deal more than they can use, and by letting it “spoil” violate God’s command to “subdue the Earth, i.e. improve it for the benefit of Life”?⁸⁵ Furthermore, will not God’s desire to give the world to “Men in Common” be frustrated if one person may enclose as much as he or she wants, and leave less “than enough, and as good, in common for others”?⁸⁶ Recall that these are precisely the sorts of costs, imposed by enclosure, that Gerrard Winstanley cited to attack its immoral effects and to advocate a more equal distribution of land.⁸⁷

Locke’s answer to this charge is that by using money, those left out of enclosure give tacit consent to infinite inequality, and attendant limitless deprivation. By giving their consent that certain metals would possess a value equal to inherently valuable land and goods, “men have agreed to

80. *Id.* at 308.

81. *Id.* at 312.

82. *Id.* at 315.

83. *Id.*

84. *Id.*

85. *Id.* at 309.

86. *Id.*

87. See discussion *supra* notes 62-69 and accompanying text.

disproportionate and unequal Possession of the Earth” so that “a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and Silver.”⁸⁸ This bizarre argument, invoking a Faustian bargain by the landless peasant, is a necessary step in Locke’s case for an “obligation” of property that is “antecedent to human laws.”⁸⁹ Without this rationale, the anti-egalitarian implications of title by enclosure as a zero-sum game would expose his theory to obvious and damning criticisms.

Another theorist, William Blackstone, Vinerian professor of the English Common Law at Oxford and author of a multi-volume set of *Commentaries on the Laws of England*, has likewise exercised a powerful influence upon the Anglo-American discourse of property rights, from the time of the Framers of the Constitution to the present day.⁹⁰ He weaves together natural rights and utilitarian rhetoric into a seamless argument for enclosure and against the continued exercise by the peasantry of their rights in the common.⁹¹ Like Hobbes and Locke before him, Blackstone helps set the moral and legal stage for the revocation of these customary rights to communal, church, and crown lands.

To begin with, he completes the attack upon customary rights that began in Hobbes’s time.⁹² He argues that “no custom can prevail against an express act of parliament,” even where Blackstone’s own extremely strict requirements for the “legality” of a custom are met.⁹³ He thus embellishes

88. *Id.* at 320.

89. John Locke, *Obligation of Penal Laws*, in *POLITICAL ESSAYS*, *supra* note 73, at 235 (1676).

90. *See, e.g.*, Albert Altschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

91. *See* 1 BLACKSTONE, *supra* note 19, at *134-5; 2 *id.* at *1-15, *400-07.

92. Sir Edward Coke in 1641 spoke of the “two pillars” for customs, namely “common usage, and time out of mind.” SIR EDWARD COKE, *THE COMPLETE COPY-HOLDER* (1641), *quoted in* E.P. THOMPSON, *CUSTOMS IN COMMON* 97 (1991). S. Carter in 1696 spoke of four, namely “antiquity, continuance, certainty, and reason,” such that “a reasonable Act . . . found to be good . . . being continued without interruption time out of mind, . . . obtaineth the force of a law.” S. CARTER, *LEX CUSTUMARIA: OR, A TREATISE OF COPY-HOLD ESTATES* (2d ed. 1701) (1696), *quoted in* THOMPSON, *supra*, at 97. Blackstone listed fully seven “necessary requisites” of the “legality” of a custom, and in the end it is difficult to imagine all of them being met. A custom, he held, must possess: antiquity, defeated “if any one can shew the beginning of it”; continuance, defeated by “[a]ny interruption”; acquiescence, defeated by being “disputed either at law or otherwise”; reasonableness, defeated not only by “every unlearned man’s reason” but by “artificial and legal reason”; certainty, defeated if the value may not “at any time be ascertained”; compulsoriness, defeated by the option of anyone not to obey it; and consistency, defeated by contradiction. 1 BLACKSTONE, *supra* note 19, at *76-78.

93. *Id.* at *76.

on the requirement that a custom possess sufficient antiquity that “the memory of man runneth not to the contrary,” since the statute itself could be deemed as proof of such a time.⁹⁴ Blackstone declares that “all property is derived from society” and can be revoked by society, although not without the blessing of a Parliament representing the propertied classes.⁹⁵ He writes that the “power and jurisdiction of parliament” is “transcendent and absolute,” a “sovereign and uncontrolable authority,” an “absolute despotic power . . . [to] do every thing that is not naturally impossible.”⁹⁶ Blackstone was himself a member of Parliament from 1761 to 1770,⁹⁷ the first half of a twenty-year period that saw fully 776 enclosure acts.⁹⁸

In occasionally stark contrast to the legal positivism implicit in these statements, Blackstone employs, as is well known, the most extravagant natural law rhetoric in favor of private property rights. He holds forth at length about the “sacred and inviolable rights of private property,”⁹⁹ and more particularly of “the absolute right, inherent in every Englishman, . . . of property: which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution save only by the laws of the land.”¹⁰⁰ Finally, of course, we have Blackstone’s famously idiosyncratic definition of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”¹⁰¹

Blackstone’s derivation of property rights is explicitly Lockean, and rests on the “bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.”¹⁰² Yet Blackstone requires as a predicate to exclusive rights, and enclosure, hardly any real labor or cultivation at all. His formulation, extremely destructive to the very idea of a commons, is that “[p]roperty, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a *declara-*

94. *Id.*

95. *Id.* at *289.

96. 1 *id.* at *156.

97. See Altschuler, *supra* note 90, at 15.

98. See HORNE, *supra* note 50, at 130.

99. 1 BLACKSTONE, *supra* note 19, at *135.

100. *Id.* at *134. Blackstone contemplated not much more “diminution” of absolute control than amounted to “restraints in themselves so gentle and moderate . . . that no man of sense or probity would wish to see them slackened,” *id.* at *144, such as entry onto lands to destroy “ravenous beasts of prey, [such] as badgers and foxes,” 3 *id.* at *212.

101. 2 *id.* at *2.

102. *Id.* at *5.

tion that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law.”¹⁰³

Despite the heavy reliance on natural right, Blackstone is no pure Kantian deontological moralist, as Albert Altschuler has pointed out in a recent essay.¹⁰⁴ Following Locke, Blackstone argues that the “eternal, immutable laws of good and evil” closely coincide with utility and economic growth.¹⁰⁵ God, he writes, has “inseparably interwoven the laws of eternal justice with the happiness of each individual,” ordaining an intimate “connection of justice and human felicity.”¹⁰⁶ Blackstone pursues this line of thought so far as to declare that the test of whether an action comported with natural law is whether it “tends to man’s real happiness . . . or, on the other hand . . . is destructive of man’s real happiness. . . .”¹⁰⁷ Private property via enclosure so clearly passes that one wonders whether it was the very source of the test:

It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor? Had not, therefore, a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of nature.¹⁰⁸

For Blackstone, “separate property” proves as much a bulwark against the war of all against all, and against the waste that the commons must always be, as it was for Hobbes and Locke. As it turns out, not only eternal justice, but also human happiness and God’s will, mandate the enclosure of commons and the expropriation of the yeomanry.

The thinker who has come to most embody this line of thinking regarding the distribution of property, tying up its various strands into one vivid and enduring metaphor, bears extended quotation.

It is to no purpose, that the proud and unfeeling landlord views his extensive fields, and without a thought for the wants of his brethren, in imagination consumes himself the whole harvest that

103. *Id.* at *9 (emphasis added).

104. *See* Altschuler, *supra* note 90, at 4.

105. *See* 1 BLACKSTONE, *supra* note 19, at *40.

106. *Id.*

107. *Id.* at *41.

108. 2 *id.* at *7.

grows upon them. The homely and vulgar proverb, that the eye is larger than the belly, never was more fully verified than with regard to him. . . . The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society, and afford means to the multiplication of the species.¹⁰⁹

The metaphor of the Invisible Hand captures with unprecedented elegance the unity of private rights and the public good. It is the same unity posited by Locke as the tendency of distinct title to both vindicate the moral claims of labor and to increase the stock of mankind, and extolled in flowing terms by Blackstone as the intimate “connection of justice and human felicity.”¹¹⁰

109. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 184-85 (D.D. Raphael & A.L. MacFie eds., Clarendon Press 1976) (1759). The corresponding passage from *The Wealth of Nations* is much less revealing:

[E]very individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the publick interest, nor knows how much he is promoting it. . . . [H]e intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.

ADAM SMITH, 1 *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 456 (R. H. Campbell et al. eds., Clarendon Press 1976) (1776). Compare in this regard Gerrard Winstanley’s complaint on behalf of the English landless:

[T]he government we have gives freedom and livelihood to the Gentry, to have abundance, and to lock up Treasures of the Earth from the poor, so that rich men may have chests full of Gold and Silver, and houses full of Corn and Goods to look upon; and the poor that works to get it, can hardly live, and if they cannot work like Slaves, then they must starve. And thus the Law gives all the Land to some part of mankind whose Predecessors got it by conquest, and denies it to others, who by the righteous Law of Creation may claim an equall portion.

WINSTANLEY, *NEW-YEERS GIFT*, *supra* note 62.

110. 1 BLACKSTONE, *supra* note 19, at *40.

The inverse of the tragedy of the commons—or at least of the version that appears in Hobbes through Blackstone and that is destined to conflict, disorder, and waste—is the glory of the enclosure. The “proud and unfeeling landlord,” liberated to make “improvements” upon the wasteful practices of the yeomanry, manages to increase the produce of the lands while simultaneously approximating an equal division of the earth among all of humanity. The benefits of private property are rivaled only by the costs of common ownership. Classical economics makes the same argument, merely “shifting the terms of analysis from a language of rights to a language of markets.”¹¹¹ The content remains the same: the coincidence of rights and utility in favor of “sensibly dividing the country among opulent men.”¹¹²

The great landlords and their allies applied these philosophical and legal arguments with much success. They re-categorized the peasant’s meager but vital customary rights as acts of punishable theft. Regarding internal enclosure, the principle of a landlord “doing as he wills with his own” was marshaled to justify expropriation of the copyhold from the yeomanry.¹¹³

In an equally momentous distortion, the advocates of parliamentary Acts of enclosure, doubtless following a well-established practice, “tried to represent communal property as the private property of the great landlords who have taken the place of the feudal lords.”¹¹⁴ Given this inversion of rights, opponents of enclosure were branded as “‘Buccaneers’ who

111. Istvan Hont & Michael Ignatieff, *Needs and Justice in the Wealth of Nations*, in *WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT* 26 (I. Hont & M. Ignatieff eds., 1983).

112. ROY PORTER, *ENGLISH SOCIETY IN THE EIGHTEENTH CENTURY* 226 (1982) (quoting Adam Smith).

113. MARX, *supra* note 37, at 338 (quoting DR. SIMON, *PUBLIC HEALTH*, SEVENTH REPORT 9-14 (1865)). Another crucial right of the peasantry, the right of the indigent to glean ears of corn and leaves of wheat from harvested fields, was outlawed on similar grounds in 1788, despite being “sanctioned by custom,” “regulated by village by-laws,” and according to one dissenting judge, a common law right. THOMPSON, *supra* note 92, at 138. Lord Loughborough, channeling Blackstone, reasoned that the custom was both “inconsistent with the nature of property which imports exclusive enjoyment,” and “[d]estructive of the peace and good order of society, and amounting to a general vagrancy.” *Id.* at 139 (quoting *Steel v. Houghton et Uxor*, 126 Eng. Rep. 32, 39 (K.B. 1788)). One parliamentarian declared: “To sanction this usage would introduce fraud and rapine, and entail a curse upon the country.” *Id.* at 140 (quoting Justice Heath).

114. MARX, *supra* note 37, at 359.

‘sally out, and drive, or drown or steal, just as it suits them.’”¹¹⁵ Some said that they “wish[ed] to ‘live at large, and prey, like pikes, upon one another,’”¹¹⁶ and that enclosure would “be the means of producing a number of additional useful hands for agricultural employment, by gradually cutting up and annihilating that nest and conservatory of sloth, idleness and misery, which is uniformly to be witnessed in the vicinity of all commons, waste lands and forests.”¹¹⁷ Finally, in what was presumably the greatest slur that could be leveled at the time, advocates of enclosure contended that “Forests and great Commons . . . make the Poor that are upon them too much like the *Indians*” and are “a hindrance to Industry, and . . . nurseries of Idleness and Insolence.”¹¹⁸

But in addition to cries of trespass, the great enclosure was justified by appeal to the progress of agriculture through more expansive and intensive cultivation. Arguments prefiguring the contemporary idea of “economies of scale” abounded, as the advocates of enclosure promised increased efficiency in agriculture through new “capital farms”¹¹⁹ and “merchant farms.”¹²⁰ As one pro-enclosure pamphleteer wrote: “If, by converting the little farmers into a body of men who must work for others, more labour is produced, it is an advantage which the nation . . . should wish for. . . . The produce being greater when their joint labours are employed on one farm. . . .”¹²¹

Their economic calculus, however, depended upon the (mis)characterization of the commons as empty and unproductive. Economists relentlessly assumed away the contributions of the small farmer cultivating arable lands in their calculus of “advantage to the nation.” One prominent advocate of enclosure criticized the notion that “depopulation” was underway, merely “because men are not seen wasting their labour in the open field.”¹²² Political economists and agricultural writers largely focused on the benefits of enclosure and internal consolida-

115. THOMPSON, *supra* note 92, at 163 (quoting W. PENNINGTON, REFLECTIONS ON THE VARIOUS ADVANTAGES RESULTING FROM THE DRAINING, INCLOSING AND ALLOT- TING OF LARGE COMMONS AND COMMON FIELDS 32, 37 (1769)).

116. *Id.*

117. *Id.* (quoting VANCOUVER, GENERAL VIEW OF THE AGRICULTURE OF HAMPSHIRE (1810)).

118. *Id.* at 165 (quoting A. RUTH FRY, JOHN BELLERS, 1654-1725, at 128 (1935)).

119. See MARX, *supra* note 37, at 360.

120. See *id.* at 360.

121. *An Inquiry into the Connection between the Present Price of Provisions, &c.* (London, 1773), quoted in MARX, *supra* note 37, at 124, 129.

122. *Id.*

tion, and ignored the social costs so eloquently declaimed by Thomas More in *Utopia*.¹²³

C. Expropriation and Inequality

In any case, the illegal expansion of the large private estates into the common lands is only half the story. Alongside it came the expropriation of the agricultural population's ancient and venerable rights and privileges, both to the use of the commons for forage and pasture, and to the historic limitations on a "private" landowner's right to exploit his estate. The expropriation was twofold: besides the "the usurpation of the common lands," there was "the forcible driving of the peasantry from the land, to which the latter had the same feudal right as the lord himself."¹²⁴

Some historians and economists subscribe to the proposition that the English peasant enjoyed a "golden age" before the enclosure movement, at least relative to the increasingly difficult conditions that would prevail during and after the massive expropriations of the yeomanry. According to those sources, at the end of the fourteenth century "the labourer . . . could live in plenty, and accumulate wealth."¹²⁵ The fifteenth century, in turn, was deemed "the golden age of the English labourer in town and country."¹²⁶

The yeomanry, according to the Welsh philosopher and economist Richard Price, consisted of "a multitude of little proprietors and tenants, who maintain themselves and families by the produce of the ground they occupy, by sheep kept on a common, by poultry, hogs, etc., and who therefore have little occasion to purchase any of the means of subsistence."¹²⁷ The yeoman relied both upon ownership "of the piece of land attached to his house," and upon ownership of the commons in the form of "the usufruct to the common land, which gave pasture to their cattle, furnished them with timber, fire-wood, turf, &c."¹²⁸

How was this collective exploitation of the common lands possible? What about the "tragedy of the commons"? Garret Hardin, oft-cited for the

123. See THOMAS MORE, *UTOPIA* 46-49 (Paul Turner trans., Penguin Books 1965) (1516) ("Sheep . . . [t]hese placid creatures, which used to require so little food, have now apparently developed a raging appetite, and turned into man-eaters. Fields, houses, towns, everything goes down their throats.").

124. MARX, *supra* note 37, at 356.

125. JAMES E. THOROLD ROGERS, *A HISTORY OF AGRICULTURE AND PRICES IN ENGLAND* 690 (1866), *quoted in* MARX, *supra* note 37, at 333.

126. *Id.*

127. DR. RICHARD PRICE, *2 OBSERVATIONS ON REVERSIONARY PAYMENTS* 159 (6th ed. London, W. Morgan 1803), *quoted in* MARX, *supra* note 37, at 360.

128. *Id.* at 356.

idea, in fact derived his analysis from early nineteenth-century English economists and “propagandists of parliamentary enclosure.”¹²⁹ Hardin argues that just as a “rational herdsman” has no incentive to preserve common pasture, so as a matter of the “remorseless working of things, . . . [f]reedom in a commons brings ruin to all.”¹³⁰

The historian E.P. Thompson has shed some light on why the existence of the commons did not ruin the yeomanry. “Over time and over space,” he writes, “the users of commons . . . developed a rich variety of institutions and community sanctions which . . . effected restraints and stints upon use.”¹³¹ Hardin’s account, like so many others to follow, assumes a “common free-for-all”¹³² where it “is to be expected that each herdsman will try to keep as many cattle as possible on the commons.”¹³³ Historians, in glaring contrast to this stark image of a Hobbesian commons, describe “village by-laws” and other mechanisms that ensured “orderly village agricultural practices [in] medieval England.”¹³⁴ A commons was thus defined by “common rights” to be “a tract of land subject to common rights of pasture except when in crop and then necessarily fenced against stray animals, kept several to the individual cultivators and debarred to all other commoners.”¹³⁵ This account of orderly collective exploitation accords to some extent with Robert Ellickson’s tentative hypothesis that repeat players in small, tight communities develop informal dispute resolution systems and “customary rules” that function as well as, or even better than, legal regimes.¹³⁶ These considerations, taken together, indicate just why the declaiming of commons as inveterate waste in England, resuscitated in America, is so grossly overstated.

129. THOMPSON, *supra* note 92, at 107. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968). Incidentally, Hardin’s thesis was “the necessity of abandoning the commons in breeding,” of relinquishing “our present policy of laissez-faire in reproduction,” for purposes of population control and by “Mutual Coercion Mutually Agreed Upon.” *Id.* at 1243-48.

130. *Id.* at 1244.

131. THOMPSON, *supra* note 92, at 107.

132. *Id.* at 108.

133. Hardin, *supra* note 129, at 1244.

134. THOMPSON, *supra* note 92, at 108.

135. KERRIDGE, *supra* note 36, at 5. As a court in Gloucester held in one case, “a right of common cannot be altered without the consent of all parties concerned therein.” THOMPSON, *supra* note 92, at 108 (quoting *Bruges v. Curwin*, 23 Eng. Rep. 974 (Ch. 1706)).

136. ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 283 (1991). See also *id.* at 1-11; Henry H. Perritt, Jr., *Dispute Resolution in Electronic Network Communities*, 38 VILL. L. REV. 349, 359-60 (1993).

To each of the enclosures of commons discussed above, there was a corresponding seizure of yeoman farmers' rights in the land: to till, to forage, to pasture, and eventually even to occupy a small plot in a meager dwelling as owner or feudal sub-tenant. As the commons was wrested from its rightful owners, the owners of the new "capital farms" embarked upon the next step in the great enclosure. The "dwellings of the peasants and the cottages of the labourers were razed to the ground or doomed to decay."¹³⁷ Those seeking to exercise rights in the common were "turned into vagabonds, and then whipped, branded, tortured by laws grotesquely terrible."¹³⁸

At least one nineteenth century commentator found this massive expropriation to be an appalling violation of the rights of the small farmer. The Privy Council, a prestigious group of advisers to the crown, requested of its Medical Officer, one Dr. Simon, a report on the housing conditions of agricultural laborers in Britain. In his 1864 report, he identified as a major source of the deteriorating housing situation the fact that "[l]arge proprietors . . . have but to resolve that there shall be no labourers' dwellings on their estates, and their estates will thenceforth be virtually free from half their responsibility for the poor."¹³⁹

The cottages and appertaining usufructs to communal property, Church lands, and Crown estates, were all enclosed within the new intensive "capital farms." In the end "agricultural labourers do not find on the soil cultivated by them even the spot necessary for their own housing."¹⁴⁰ One landowner described the result: "I look around and not a house is to be seen but mine. I am the giant of Giant Castle, and have eat up all my neighbours."¹⁴¹

As intensive capitalistic agriculture displaced the remnants of subsistence farming by a more or less self-sufficient class of yeomen, the latter were driven either into the role of agricultural wage laborers, or out of agriculture altogether and into the towns and manufacturing work. The anti-enclosure economist Dr. Price summarized the process:

[T]he little farmers will be converted into a body of men who earn their subsistence by working for others, and who will be under a necessity of going to market for all they want. . . . Towns

137. MARX, *supra* note 37, at 356.

138. *Id.* at 365-66.

139. DR. SIMON, PUBLIC HEALTH, SEVENTH REPORT 9-14 (1865), *quoted in* MARX, *supra* note 37, at 338.

140. *Id.* at 361.

141. *Id.* at 343 n.1 (quoting Lord Leicester).

and manufactures will increase, because more will be driven to them in quest of places and employment. This is the way in which the engrossing of farms naturally operates.¹⁴²

The results of enclosure were that “the place of the independent yeoman was taken by tenants at will, small farmers on yearly leases, a servile rabble dependent on the pleasure of the landlords.”¹⁴³

The effects on the yeomanry, at least in the short term, were dire. The “golden age” for agricultural labor, in which a yeomanry rose out of serfdom,¹⁴⁴ gave way to a period where the buying power of agricultural labor decreased considerably.¹⁴⁵ According to Karl Marx, “the position of the English agricultural labourer from 1770 to 1780, with regard to his food and dwelling, as well as to his self-respect, amusements, &c., is an ideal never attained again since.”¹⁴⁶ Later still, in 1866, Dr. Rogers of Oxford would conclude that “‘the peasant has again become a serf,’ and a serf worse fed and worse clothed.”¹⁴⁷

III. RIGHTS AND UTILITIES IN COPYRIGHT HISTORY

Over the centuries, as we have seen, large landowners who desired to expand their holdings and exploit them more intensively employed a two-fold rhetorical strategy, based on natural right and utility, to liquidate customary and common rights. Thus were estates enlarged, both internally and externally.

History and present-day experience confirm that the conceptual and tactical structure of “land grabs” is not confined to real property, but extends to intellectual property as well. The relevant examples can be

142. PRICE, *supra* note 127, at 159, *quoted in* MARX, *supra* note 37, at 360.

143. *Id.* Scattered farmers and artisans, consuming their own produce and trading for the produce of their brethren, were replaced by a mass of wage-laborers, constituting a “great market provided for by industrial capital.” *Id.* at 371. Centralization made intensive agriculture possible on a larger scale, intensive in “conscious technical application of science, the methodical cultivation of the soil,” and “the economizing of all means of production by their use as means of production of combined, socialized labor.” *Id.* at 378. The process therefore culminates in the “transformation of the individualized and scattered means of production into socially concentrated ones.” *Id.* This is primitive accumulation, the “prelude to the history of capital.” *Id.*

144. *See id.* at 333 n.4 (citing one Dr. Rogers).

145. *See id.* at 334 n.1 (quoting PRICE, *supra* note 127, at 159) (“The nominal price of day-labour is at present no more than about four times, or at most, five times higher than it was in the year 1514. But the price of corn is seven times, and of flesh-meat, and raiment about fifteen times higher.”).

146. *Id.* at 333.

147. ROGERS, *supra* note 125, at 693, *quoted in* MARX, *supra* note 37, at 336.

grouped into two categories: those that extend the duration of copyright, thus excluding the public from access to public domain works, and those that extend the scope of copyright, revoking the public's rights to make private and/or transformative uses of copyrighted material. Expansion of duration resembles the expansion of private estates to enclose external commons, while revocation of rights of access and transformation resembles internal expropriation. This Part will discuss these expansions first from a historical perspective, beginning with duration and then turning to scope, and second from a present-day perspective, in which questions of duration and scope are more conveniently grouped together. As William Fisher has recently argued, "the set of entitlements created by . . . [intellectual property] doctrines has grown steadily and dramatically from the eighteenth century to the present."¹⁴⁸ The remainder of this section will argue that censorship by copyright, even when the effects on social welfare are unknown or are clearly detrimental, has rapidly increased with time and continues to do so.

A. The Public Domain as Theft and Waste

The history of copyright duration vividly demonstrates the truth of Fisher's statement, as the term of copyright protection has been extended far beyond sensible limits, steadily encroaching upon the public domain. With each additional invasion of the public's rights to untrammelled use of what lies in the intellectual commons, we hear the same Lockean-Blackstonian refrain that justified the enclosures of communal lands, namely natural right and the common weal.

The history of attempts to enclose the intellectual commons demonstrates that the struggle between copyright holders and the public on the issue of copyright duration is as old as copyright itself. In England, the Stationer's Company, which enjoyed a total monopoly on printing through a royal charter of 1557, consistently maintained that copyright was perpetual.¹⁴⁹ They justified the eternalization of their monopoly with arguments that closely mirror the large landowners' claims that (1) they *already* owned as private property the common land that they stole, and (2) the refusal of their claims would wreck the agricultural economy.

The earliest rationales the Stationer's Company forwarded in support of its monopoly relied on its ability to restrain political and religious dissent, rather than on economic incentives. This position was in accord with

148. William Fisher III, *The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States* (Sept. 4, 1997) (<http://cyber.harvard.edu/metaschool/fisher/growth.html>). See also Lemley, *supra* note 4, at 894.

149. See ROSE, *supra* note 20, at 12.

the Royal Charter of the guild, which focused on concentrating the “art or mystery of printing” in the hands of those able to practice it responsibly and stamping out the publications of “divers scandalous malicious schismatical and heretical persons.”¹⁵⁰ The Stationer’s Company employed a system of pre-publication censorship (or “licensing”) to secure their property rights and to fulfill their corollary statutory duty to prevent the printing and sale of “heretical schismatical blasphemous seditious and treasonable Bookes Pamphlets and Papers.”¹⁵¹ The regime was very much oriented around “the regulation of public discourse” in the service of Church and State, and around the power to censor and destroy rather than the incentive to produce and disseminate.¹⁵²

In response to public agitation against this censorship,¹⁵³ the Stationers mobilized new arguments, oriented around the reinvigorated doctrines of natural right and utility. The guild members, perhaps to defuse the attacks on their “mercenary” and monopolistic role in British publishing, began to introduce a new rhetoric about the sanctity of their property rights, and relied increasingly on consequentialist, incentive-based rationales for copyright protection. Nevertheless, their monopoly power was limited in 1641 by the collapse of licensing due to the abolition of the monopoly-enforcing Court of Star Chamber. As Mark Rose writes, this collapse meant that “anyone with access to a press, legal or surreptitious, could print.”¹⁵⁴ However, licensing was later reinstated, at least for a time.¹⁵⁵

It would soon become clear how the propertization of copyright could detach the monopoly from service to the Crown or the public, and transform it into an abstract and reified eternal right. As early as 1666, the Sta-

150. 1 A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON: 1154-1640, at xxviii, xxxi (Edward Arber ed., 1950), *quoted in* ROSE, *supra* note 20, at 12.

151. Licensing Act of 1662, 14 Car. 2 ch. 33 (Eng.).

152. *Id.* at 15. Thus, early entries in the Stationer’s Register often conveyed to its members a “license” or “*generall pardon*” from the Stationers’ own private police force and Court of Assistants the liberty to print without censorship. *Id.* at 14.

153. As early as 1644, John Milton decried the nefarious bargain through which the Crown secured religious intolerance and immunity from political dissent in exchange for granting the Stationers huge monopoly profits and near-complete control over the institution of printing in England. In his anti-licensing tract *Areopagitica*, he inveighs against the subordination of the learned author to a licenser “perhaps much his younger, perhaps far his inferior in judgment, perhaps one who never knew the labor of book-writing.” *Id.* at 28 (quoting John Milton, *Areopagitica* (1644), in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 719 (Merritt Y. Hughes ed., 1957)).

154. ROSE, *supra* note 20, at 15.

155. *See id.* at 30-34 (describing passage of the Licensing Act of 1662, and its expiration in 1695).

tioners attempted to invalidate a royal grant of a patent to exclusively print law books, so that they could exploit that lucrative market. The Stationers argued that copyright, just like a landed estate, conveyed “the most absolute property” on its owner, and that the taking of the one is “equivalent to bereaving him of the other.”¹⁵⁶ Therefore, they continued, it would be every bit as “prejudicial to deprive [the purchasers of a copyright] of the benefit of their Purchase, as to Disseise them of their Freehold.”¹⁵⁷ Their argument thus equated the owner of a competing royal grant with a common trespasser plundering a lawful estate, and is one of the first examples of legal use of copyrighted work being recharacterized as theft.

In 1695 the Licensing Act expired, and in 1709 the London booksellers submitted a petition and endorsed a bill for a new type of copyright regime, one focused less on the unfashionable topic of censorship and more on the emergent Lockean rights-utility rationale for vigorous private property rights. The bill they petitioned for would “secur[e] to them the Property of Books, bought and obtained by them,” and end the “Discouragement of all Writers in any useful Part of Learning” wrought by the free market in books.¹⁵⁸

However, once parliamentarians suspicious of monopoly had begun to ask whether protection for a limited time was sufficient “encouragement,” the booksellers rapidly backed away from such arguments. They vigorously reasserted their common law rights, based on reason and the law of nature, claiming that “if we have a Right for Ten Years, we have a Right for Ever.”¹⁵⁹ The booksellers maintained that the author (and, of course, his assigns), was “the absolute Master of his own writings,” and that “this Property is the same with that of Houses and other Estates.”¹⁶⁰ As we shall see, later proponents of the elimination of the intellectual commons will similarly find utilitarian arguments easy to abandon in favor of rights-talk, should circumstances so require.

156. Brief of appellants the Stationers in *The Case of the Booksellers and Printers Stated; with Answers to the Objections of the Patentee*, in ENGLISH PUBLISHING, THE STRUGGLE FOR COPYRIGHT, AND THE FREEDOM OF THE PRESS: THIRTEEN TRACTS 1666-1774 (Stephen Parks ed., 1975), quoted in ROSE, *supra* note 20, at 24.

157. *Id.*

158. 16 H.C. JOUR. 240, quoted in ROSE, *supra* note 20, at 42.

159. MORE REASONS HUMBLY OFFER'D TO THE HONOURABLE HOUSE OF COMMONS, FOR ENCOURAGING LEARNING AND FOR SECURING PROPERTY OF COPIES OF BOOKS TO THE RIGHTFUL OWNERS THEREOF (London, 1710), quoted in ROSE, *supra* note 20, at 44.

160. THE CASE OF THE BOOKSELLERS RIGHT TO THEIR COPIES, OR SOLE POWER OF PRINTING THEIR RESPECTIVE BOOKS, REPRESENTED TO THE PARLIAMENT (London, 1710), quoted in ROSE, *supra* note 20, at 44.

Opposition continued to mount among prominent thinkers and writers to the Stationers' hallowed idea of a perpetual copyright. In particular, Locke had decried the power of the Stationer's Company to deny licenses to, and prevent the printing of, new editions of ancient authors going back to Aesop,¹⁶¹ arguing that such power was "very unreasonable and injurious to learning."¹⁶² Locke's antipathy towards retroactive copyrights, at least as applied to the ancients, was echoed in the eighteenth century by Henry Fielding, who in his *Tom Jones* portrayed the "Antients" as "a rich Common, where every Person who hath the smallest Tenement in *Parnassus* hath a free Right to fatten his Muse."¹⁶³

When Parliament passed the Statute of Anne in 1710,¹⁶⁴ it rejected the arguments of the booksellers that the first Copyright Act should merely confirm their perpetual common-law rights. The Statute departed in significant ways from the Act the booksellers had endorsed, in that it vested rights "in the Authors, or Purchasers, of such Copies," rather than in "the rightful Owners" of "Books," and only vested these rights "during the Times therein mentioned."¹⁶⁵ These statutory rights were thus limited in purpose and duration, rather than consecrating preexisting "natural" and hence eternal common-law rights.

The Statute of Anne's drafters provided for a fourteen-year term of protection, and a second term of the same length at the end of that for authors still living.¹⁶⁶ Nevertheless, the booksellers continued for decades to portray the use of public domain works as piracy and a violation of "the law of Reason and Nature."¹⁶⁷

161. See ROSE, *supra* note 20, at 33.

162. John Locke, *Memorandum* (1693), in PETER KING, *THE LIFE AND LETTERS OF JOHN LOCKE* 208-9 (London, 1884), *quoted in* ROSE, *supra* note 20, at 33.

163. HENRY FIELDING, *THE HISTORY OF TOM JONES* (Fredson Bowers ed., Wesleyan Univ. Press 1975) (1749), *quoted in* ROSE, *supra* note 20, at 116. Parnassus was, according to Greek legend, a mountain sacred to Apollo and the Muses, and hence representative of the arts.

164. Statute of Anne, 8 Anne ch. 19 (1710) (Eng.) [hereinafter Statute of Anne].

165. *Id.* at 46 (quoting original title, and as amended, 16 H.C. JOUR. 369).

166. See ROSE, *supra* note 20, at 47. Books already published as of April 10, 1710, when the act came into force, were to enjoy a fixed 21-year term of protection. *Id.* at 45.

167. ROSE, *supra* note 20, at 55 (quoting *A Letter from an Author to a Member of Parliament Occasioned by a Late Letter Concerning the Bill Now Depending in the House of Commons* (London, 1753)). Thus in 1735 the booksellers lobbied Parliament for a retroactive extension of copyright to a single 21-year term, a measure that would have preserved until 1756 their monopolies over the works of Shakespeare, Milton, and Locke. See *id.* at 52. The still monopoly-wary House of Lords, however, rejected this effort. See *id.* at 56.

The booksellers renewed their campaign for perpetual copyright in the courts. William Murray, later Lord Mansfield, argued as counsel on behalf of the London booksellers, and subsequently from the bench, that their claims to perpetual copyright must prevail because “it is just, that an author should reap the pecuniary profits of his own ingenuity and labour.”¹⁶⁸

Still, Mansfield did not neglect instrumental arguments for the enclosure of commons, in this case literary works whose term of protection under the Statute of Anne had expired. If works were ever allowed to fall into the public domain, he argued, then the author would “not only be deprived of *any* profit, but lose the expence he has been at.”¹⁶⁹ Mansfield would later memorably state his dual argument for copyright:

[W]e 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 their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.¹⁷⁰

This quote is often treated as a precursor to modern attempts to strike a balance between desert/incentives on the one hand and access on the other.¹⁷¹ Given Mansfield’s support of perpetual copyright from the bench, however, one wonders whether he recognized any danger that “the progress of the arts [might] be retarded” by *over-protection*, as he had made crystal clear only his belief that underprotection would impede progress.

It was Blackstone himself who argued the case for the plaintiff booksellers. He basically applied his arguments for landed property to literary property, that any “thing of value” is and should be the “subject matter of property.”¹⁷² Later, in the second volume of his *Commentaries on the Laws of England*, Blackstone would seal his unified theory of landed and literary property by treating them both under the heading of “Title to Things Personal by Occupation.”¹⁷³

168. *Millar v. Taylor*, 98 Eng. Rep. 201, 252 (K.B. 1769) (opinion of Lord Mansfield).

169. *Id.* (emphasis added).

170. *Cary v. Longman*, 102 Eng. Rep. 138, 140 (K.B. 1801) (quotations and citations omitted).

171. See, e.g., Joseph A. Lavigne, Comment, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY L. REV. 311, 321 (1996).

172. ROSE, *supra* note 20, at 77.

173. *Id.* at 90.

Blackstone's and Mansfield's victory for perpetual copyright was to be undone by a House of Lords opposed to monopoly. In *Donaldson v. Becket*,¹⁷⁴ the Lords voted overwhelmingly to reverse a Chancery decision enjoining the reprinting of a public domain work, a decision that had been premised on Mansfield's theory of perpetual common-law copyright.¹⁷⁵ Later that year, the peers rejected yet another proposal for an additional fourteen years of copyright, a measure that had passed in the House of Commons.¹⁷⁶

With the history of English copyright to *Donaldson* as important context, we turn to the history of the term of American copyright. The enumerated power of Congress, as defined by the Constitution, to secure to authors the exclusive rights to their writings, is restricted as to purpose, subject matter, beneficiaries, and duration.¹⁷⁷ The Copyright Clause effectively constitutionalized the rule announced in *Donaldson* that perpetual common-law copyright does not exist.¹⁷⁸ Later, the Copyright Act of 1790¹⁷⁹ provided for a 14 year term from the time of prepublication filing of a copy with the local United States District Court, and gave the author (and apparently only the author) the right to renew the right for an additional 14 years.¹⁸⁰ Thus, the work "fell" into the public domain after 14

174. 98 Eng. Rep. 257 (H.L. 1774) (appeal taken from Eng.).

175. See ROSE, *supra* note 20, at 102.

176. One lord decried the proposal as "nothing but encouraging a Monopoly." *Id.* at 103. Despite these eighteenth century setbacks, however, the proponents of an extended copyright term in Britain became increasingly successful in overcoming anti-monopoly sentiment in the nineteenth and twentieth centuries, and the term stands today at the life of the author plus seventy years. See Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, art 1, 1993 O.J. (L 290).

177. U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."); see *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

178. See ROSE, *supra* note 20, at 102-03 ("[W]hat the House of Lords did in *Donaldson v. Beckett* was . . . to declare by authority that copyright henceforth would be limited in term."). The vote of the peers was not accompanied by an opinion or other official rationale, thus it is unclear whether the vote was premised on the idea that no common-law copyright had ever existed, that it had existed but was preempted by the Statute of Anne, or, more likely, some mixture of these and other views. See *id.* at 102-03 & n.7. Whatever the reasoning, perpetual copyright was soundly rejected.

179. Act of May 31, 1790, § 1, 1 Stat. 124 ("An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned.").

180. See William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread From Authors*, 14 CARDOZO ARTS & ENT. L.J. 661,

years if the author died or failed to renew in time, and after 28 years if he or she lived and renewed the right.

While the Founding Fathers generally supported a copyright law premised on natural rights and instrumental arguments, this support was accompanied by a historical mistrust of monopoly, thought to be a source of innumerable inefficiencies and oppressions.¹⁸¹ James Madison, among others, justified a limited copyright as being simultaneously just and useful. The committee designated by the Continental Congress to deal with the literary property question, of which Madison was a member, concluded in its report that “nothing is more properly a man’s own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius.”¹⁸² Similarly, in a famous passage of *The Federalist Papers*, Madison sounds positively Blackstonian in declaring that: “The utility of the power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. . . . The public good fully coincides . . . with the claims of individuals.”¹⁸³ Still, in drafting the Science and useful Arts Clause of the Constitution, Madison sought to balance the rights of authors, and the encouragement of writing, with the principle, widespread by that time, that “perpetual monopolies of every sort are forbidden . . . by the genius of free governments.”¹⁸⁴ Even those limited monopolies granted to authors and inventors must be “guarded with strictness against abuse.”¹⁸⁵

669-70 (1996). The author’s survivors and assigns might benefit from the renewal if the author died during the renewal period.

181. Anti-monopoly sentiment in the English Parliament was embodied in the Statute of Monopolies, and the Statute of Anne in turn applied the Statute of Monopolies’ term limitation to the author’s monopoly and provided for judicial review of and “redress” for the sale of books at prices “too high or unreasonable.” Statute of Anne, *supra* note 164, § 4. See Statute of Monopolies, 21 Jam., ch. 3, § 1 (1624) (Eng.); see also 2 SMITH, *supra* note 109, at 755 (arguing that monopolies amount to a tax on the public both in terms of “the high price of goods, which, in the case of free trade, they could buy much cheaper,” and of “their total exclusion [of competition] from a branch of business, which might be both convenient and profitable”).

182. William Patry, *The Failure Of The American Copyright System: Protecting The Idle Rich*, 72 NOTRE DAME L. REV. 907, 911 (1997) (quoting 24 J. OF THE CONTINENTAL CONG. 326 (1783)).

183. THE FEDERALIST NO. 43, at 270-71 (James Madison) (Clinton Rossiter ed., 1961). At least three of the former colonies had passed laws for the protection of literary property before the ratification, each of which contained preambles stating the same two-pronged rationale. See *Wheaton v. Peters*, 33 U.S. 591, 682-83 (1834) (Thompson, J., dissenting) (quoting preambles to the copyright laws of Massachusetts, Connecticut, and New York).

184. James Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments*, in *Aspects of Monopoly One Hundred Years Ago*, HARPER’S MAG., March

Thomas Jefferson eschewed any talk of natural or moral rights, favoring instead a careful balancing of the benefits of incentives with the acknowledged costs of monopolies. In 1788, he wrote to Madison that he favored a total constitutional ban on monopolies.¹⁸⁶ He took a more moderate stance in a subsequent letter, after he failed to secure protection from monopolies in the Bill of Rights, writing to Madison that he would have favored an amendment allowing monopolies “for a term not exceeding ___ years, but for no longer term, and for no other purpose.”¹⁸⁷ Jefferson filled in the blank with the span of a generation in his day, or 19 years, reasoning “that the earth belongs in usufruct to the living; that the dead have neither powers nor rights over it.”¹⁸⁸ His circumspection would come under gradual but sustained assault over the next two centuries of American copyright jurisprudence.

Since 1790, the term of copyright in America has expanded ever onward, albeit in fits and starts. In response to the pleas of Noah Webster in particular, Congress made two changes to the term of copyright in 1831.¹⁸⁹ First, the original term was doubled to twenty-eight years; and second, the renewal provision was altered so that the author’s spouse or children could renew even in case of the author’s death.¹⁹⁰ The victory of copyright expansionists was muted, however, as within three years of that Act’s passage, the Supreme Court squarely rejected a claim that perpetual copyright was carried over from English common law and survived the Constitution.

1914, at 490 (published posthumously). This essay, and many other sources regarding the intent of the Framers as to copyright and freedom of speech, are discussed in Timothy Phillips’ voluminously researched draft brief, *The Unconstitutionality of the Copyright Term Extension Act of 1998* (visited January 10, 2000) (<http://www.public.asu.edu/~dkarjala/constitutionality/phillips02.html>).

185. Madison, *supra* note 184, at 490.

186. “The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.” Letter from Thomas Jefferson to James Madison of July 31, 1788, in 13 *The Papers of Thomas Jefferson* 442-43 (Julian P. Boyd ed., 1956).

187. Letter from Thomas Jefferson to James Madison of Aug. 1789, in 5 *THE WORKS OF THOMAS JEFFERSON* 493 (Paul L. Ford ed., 1904).

188. Thomas Jefferson, quoted in *Liber: Jefferson and the Copyright Monopoly* (visited Apr. 8, 2000) (<http://users.vnet.net/alight/jefferson.html>).

189. See Patry, *supra* note 180, at 670. Noah Webster had also been influential in persuading both individual American states and the likes of James Madison and George Washington of the necessity for copyright in the pre-Constitutional period, in hopes of maintaining his monopoly over his popular English grammar. See Irah Donner, *The Copyright Clause of the U.S. Constitution: Why did the Framers Include it with Unanimous Approval?*, 36 *AM. J. LEGAL HIST.* 361, 370-74 (1992).

190. See Patry, *supra* note 180, at 670.

In *Wheaton v. Peters*,¹⁹¹ the plaintiff, a publisher of reports of Supreme Court cases, marshaled a powerful combination of rights and incentive-based rationales in his attempt to recharacterize aspects of intellectual commons as acts of theft. Plaintiff's counsel argued first that, unlike a patent, which amounted to a mere "legalized monopoly," copyright was founded in "natural right,"¹⁹² and second that the plaintiff would have lacked the incentive to "have spent half a year or more in making and publishing these reports, if he had supposed he had not the copyright."¹⁹³ The Court rejected these arguments, confirming the "statutory monopoly of copyright"¹⁹⁴ in its holding that copyright "does not exist at common law," and that "Congress, then, by [the Copyright Act of 1790], instead of sanctioning an existing right, as contended for, created it."¹⁹⁵

Attempts to extend copyright duration received new momentum in the early twentieth century. In 1906, a copyright bill before Congress would have extended the term to life of the author plus fifty years. Lobbying was intensive, as prominent artists, musicians, and writers appeared before Congress to press their cause. Mark Twain appears to have made a particular impression. His speech evoked many of the London booksellers' favorite themes: the moral necessity of perpetual copyright, the analogy to real estate, and the recharacterization of the limits of a state-sanctioned monopoly as simple theft.¹⁹⁶

In the end, Congress extended copyright duration to a 28-year initial term followed by a 28-year renewal term.¹⁹⁷ Curiously enough, the rejection of a "life-plus" term was prompted not only by concern for the fate of the public domain, but also out of solicitude for authors themselves, who

191. 33 U.S. 591 (1834).

192. *Id.* at 598.

193. *Id.* at 614.

194. See L. Ray Patterson, *Folsom v. Marsh and its Legacy*, 5 J. INTELL. PROP. L. 431, 442 (1998).

195. *Wheaton*, 33 U.S. at 663.

196. Twain recounted appearing before the House of Lords on the matter of copyright duration and testifying that the only appropriate limit would be "Perpetuity." After first analogizing literary property with real estate, Twain forwarded the heart of his argument with rare frankness, that any limit to the copyright monopoly, and by extension the continued existence of a public domain, would legalize theft. Noting that the Constitution set limits to the duration of copyright, Twain recalled that "earlier Constitution, which we call the decalogue," which "says you shall not take away from any man his profit. . . . What the decalogue really says is, 'Thou shalt not steal,' but I am trying to use more polite language." Mark Twain, *Copyright*, in MARK TWAIN, SPEECHES 314, 315 (Oxford University Press, 1996).

197. Copyright Act of 1909, 35 Stat. 1075 (1909).

might not want to renew the term if the work was unsuccessful.¹⁹⁸ Thus, the turn of the century push for a vastly extended if not perpetual copyright on the part of publishers and some authors was partially deflected by considerations of the public domain. It achieved no more than a 14-year extension of the renewal term established by the 1834 Act, and on terms distinctly unfavorable to publishers and other assignees.

The most important expansion of the copyright term occurred with the passage of the Copyright Act of 1976, providing a powerful example of the persistent dominance of the dual rights-utility argument for increased privatization and a diminished commons. It was actually the last in a series of retroactive extensions by Congress of the “limited” term of 28 years (56 with a renewal) available to authors under the 1909 Copyright Act.¹⁹⁹ Together, these extensions made certain that except for the three years in which the 1998 Sonny Bono Copyright Term Extension Act (“CTEA”)²⁰⁰ was being debated, virtually nothing in twentieth century America entered the public domain, at least where the authors were attentive to their rights. As a result, “1961 was the last time copyrighted work that had been renewed fell into the public domain,” work which was “originally authored in 1905.”²⁰¹

A barrage of rationales was offered for the switch from a term of 56 years, split by renewal, to one of life plus 50 years for individuals and of 75 years from publication for corporate “authors.”²⁰² Natural rights rhetoric was prominent as ever, surfacing in the legislative history on several

198. Renewal was deemed to be a useful “device for adjusting the term in accordance with the commercial value of the work, so that ‘undeserved or undesired extensions of term’ would not be conferred upon those ‘hundreds of thousands of copyrights of no pecuniary value to the owners.’” R. Anthony Reese, Note, *Reflections On The Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 STAN. L. REV. 707, 717 (1995) (quoting Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on the Bills S. 6330 and H.R. 19853, to Amend and Consolidate the Acts Respecting Copyright, 59th Cong., 1st Sess. 183 (1906) (letter of Charles W. Ames, representing United Typothetae of America)).

199. See Pub. L. No. 87-668 (1962); Pub. L. No. 89-142 (1965); Pub. L. No. 90-141 (1967); Pub. L. No. 90-416 (1968); Pub. L. No. 91-147 (1969); Pub. L. No. 91-555 (1970); Pub. L. No. 92-170 (1971); Pub. L. No. 92-566 (1972); Pub. L. No. 93-573 (1974); Pub. L. No. 94-533 (1976).

200. See discussion *infra* Part VI.A.

201. Memorandum in Support of Plaintiffs’ Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment and in Opposition to Defendants’ Motion for Judgment on the Pleadings, at 11, *Eldred v. Reno*, 74 F.Supp.2d 1 (D.D.C. 1999) (No. 99CV00065), available at http://cyber.law.harvard.edu/eldredvreno/sj_memo.pdf (PDF file) [hereinafter “Eldred Memorandum”].

202. See Reese, *supra* note 198, at 718.

occasions. One rationale for the expansion was “to insure an author and his dependents the fair economic benefits from his works,” especially given the increase in life expectancy since the 1909 Act.²⁰³ Similarly, members of Congress adopted as a *per se* moral principle that “copyright should extend beyond the author’s lifetime,” and that therefore “the present term of 56 years is too short.”²⁰⁴

A series of other rationales focused on the economic and utilitarian benefits of the change.²⁰⁵ These benefits included the simplicity of a single term, the costs of renewal formalities, and harmonization with other countries’ life-based terms, particularly after the U.S. entered the Berne Convention in 1989.²⁰⁶ Incentive-based arguments persisted, despite the increasing improbability that revenue materializing after an already-distant 56 years could motivate or inspire,²⁰⁷ and the absurdity of applying such arguments to retroactive extensions.²⁰⁸

Most importantly, Congress concluded that all of these instrumental benefits could be achieved at virtually no cost, maintaining that “too short a term harms the author without giving any substantial benefit to the public.”²⁰⁹ This refusal in American copyright debates to grapple with the costs of a diminished public domain demonstrates the pernicious influence classical liberal legal and economic theory exert over the debates. The

203. *Id.* (quoting H.R. REP. NO. 94-1476, at 134 (1976)).

204. *Id.* (quoting H.R. REP. NO. 94-1476, at 135). Another fairness- or rights-based rationale was the need to compensate authors for preemption of common law rights in unpublished works. *See id.*

205. *See id.*

206. *See id.*

207. As Macaulay said in opposition to Britain’s enactment of a “life plus” copyright duration, “an advantage that is to be enjoyed more than half a century after we are dead by somebody, we know not whom, perhaps by somebody unborn . . . is really no motive at all to action.” T.B. MACAULAY, WORKS 199 (Trevelyan ed. 1879), *quoted in* Eldred Memorandum, *supra* note 201, at 38. *See also* Stephen Breyer, *The Uneasy Case for Copyright*, 84 HARV. L. REV. 281, 350 (1970) (concluding that pre-1976 maximum copyright term of 56 years was already “too long” in economic terms); Affidavit of Hal Varian in Support of Plaintiffs’ Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment and in Opposition to Defendants’ Motion for Judgment on the Pleadings at 3, *Eldred v. Reno*, 74 F. Supp. 2d 1 (D.D.C. 1999) (No. 99-CV00065), *available at* <http://cyber.law.harvard.edu/eldredvreno/varian.pdf> (PDF file) (applying economic principles discounting net present value of future income streams, and concluding that “the value of investment returns after 50 years . . . [is] miniscule” and thus “has a tiny effect on the present economic incentives to invest in creative works”).

208. *See* Eldred Memorandum, *supra* note 201, at 27 (“Congress cannot now magically expand the incentives that authors faced in 1923.”); *id.* at 39 (“Incentives work forward. Retrospective term extensions look backward.”).

209. Reese, *supra* note 198, at 718 (quoting H.R. REP. NO. 94-1476, at 134 (1976)).

costs that arise have been exhaustively described by William Fisher²¹⁰ and Glynn Lunney,²¹¹ among others,²¹² and include the economic costs of foregone consumer surplus, due to higher prices and outright denials of access, and the administrative costs of licensing, paperwork, and federal litigation (an expensive proposition at any time but particularly so in the case of copyright).²¹³ Moreover, term extension works considerable costs to freedom of expression, a point to which I shall return. The legislative discourse surrounding the 1976 Act provides a powerful example of how the debate over copyright regulation is dominated by time-honored Lockean-Blackstonian rhetoric, an approach that dismisses the commons as barren and lauds enclosure as an untarnished good.

B. Fair Use as Piracy and Market Failure

In discussing the history of the expansion of copyright scope, I will focus on two broad axes. The first axis deals with the expansion of the definition of copyright infringement, which had originally referred to unauthorized multiplying of copies, to encompass literal copying of smaller and smaller fragments of a work, a process that perhaps reached its nadir in *Harper & Row Publishers v. Nation Enterprises*.²¹⁴ The second axis of expansion deals with the expansion of the notion of copyright infringement to include nonliteral as well as literal copying, and even to the copying of only a nonliteral part of a work—such as a character or scene. Not unsurprisingly, each new incursion into the commons, and each corresponding revocation of public rights, has been justified by the providential Blackstonian “connection of justice and human felicity.”²¹⁵

During the nineteenth century and into the twentieth, copyright infringement has expanded from only the unauthorized reprinting of a work to include unauthorized literal copying of some sufficient part of a work, and finally to include unauthorized copying of the nonliteral elements of a

210. See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1669-72 (1988).

211. See Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 655 (1996).

212. See, e.g., Dennis S. Karjala, *The Term of Copyright*, in GROWING PAINS: ADAPTING COPYRIGHT FOR EDUCATION AND SOCIETY 33, 38-39 (Laura N. Gasaway ed., 1997).

213. For example, Borland International incurred more than \$20 million in attorneys fees and costs in its litigation with the Lotus Development Corporation over the “look and feel” of a pull-down menu for spreadsheet software. See *Lotus Development Corp. v. Borland International, Inc.*, 140 F.3d 70, 72, 76 (1st Cir. 1998) (denying prevailing defendant Borland’s request for attorneys fees and costs).

214. 471 U.S. 539, 558 (1985).

215. 1 BLACKSTONE, *supra* note 19, at *40.

work. Under the 1831 Copyright Act, like the 1790 Act and Statute of Anne before it, the copyright holder possessed only “the sole right and liberty of printing, reprinting, publishing, and vending” the work.²¹⁶ As Alfred Yen has noted, these early statutes “adopted a very limited view of infringement.”²¹⁷ One commentator complained that even in 1870s America “all property in books is confined in its enjoyment to a limited period of years, while even for this period it is protected only scantily.”²¹⁸

Abridgments, which are condensed versions of another’s work with perhaps some new additions, enjoyed broad protection. The right of “fair abridgement” was endorsed by all four justices sitting in the much-publicized case of *Millar v. Taylor*,²¹⁹ decided in 1769 by the Court of King’s Bench, the highest common-law court in England, and by some of the most prominent British jurists, including Lord Mansfield, an avowed champion of authorial rights.²²⁰ In the 1830s even the plaintiff in *Wheaton* recognized this right of fair abridgement, but denied that the defendant’s case reporter qualified.²²¹ Early American copyright cases acknowledged

216. Copyright Act of February 3, 1831, 4 Stat. 436-39.

217. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 534 n.119 (1990).

218. Arthur Sedgwick, *International Copyright by Judicial Decision*, THE ATLANTIC MONTHLY, Feb. 1879, at 217-30.

219. See *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769).

220. The court in *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514), ably summarized the law of copyright scope as the Framers understood it:

An author, says Lord Mansfield, has the same property in his book, which the king has to the English translation of the Bible. “Yet if any man should turn the Psalms, or the writings of Solomon, or Job, into verse, the king could not stop the printing or sale of such a work. It is the author’s work; the king has no power or control over the subject-matter. His power rests in property. His whole right rests upon the foundation of property in the copy.” Mr. Justice Willes, in answer to the question, “Wherein consists the identity of a book?” says, “Certainly, bona fide imitations, translations and abridgments are different, and in respect of property, may be considered new works.” And Mr. Justice Aston observes: “The publication of a composition does not give away the property in the work. But the right of copy still remains in the author. No more passes to the public from the free will and consent of the author, than unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve it, imitate it, translate it, oppose its sentiments; but he buys no right to publish the identical work.”

Id. at 207 (quoting *Millar*, supra note 219 (respective opinions of Chief Justice Lord Mansfield, Justice Richard Aston, and Justice Edward Willes)).

221. See *Wheaton v. Peters*, 33 U.S. 591, 651 (1834) (“An abridgement fairly done, is itself authorship, requires mind; and is not an infringement, no more than another work

that a “real, substantial condensation” of a work was “not a piracy” provided that “intellectual labor and judgment [was] bestowed thereon.”²²²

In 1841, however, Justice Joseph Story, a disciple of Blackstone like his friend John Marshall,²²³ would expand infringement to include unauthorized copying of portions of a work, contravening the intent of Congress as expressed in the statutory language of the 1790 and 1831 Copyright Acts.²²⁴ In *Folsom v. Marsh*, Story enjoined the publication of defendant’s book, *The Life of Washington in the Form of an Autobiography*, on the ground that 388 out of its 866 pages, consisting of “writings, correspondence, messages, addresses, and other papers” of George Washington, were copied from the plaintiff’s authorized work.²²⁵ Not surprisingly, natural rights rhetoric peppered his decision.²²⁶ However, incentive-based arguments also played an important part. Justice Story’s opinion asked, rhetorically, who “would undertake to publish, at his own risk and expense, any such papers . . . if, the moment they were successful . . . a rival bookseller might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits?”²²⁷

on the same subject. . . . The [defendant’s] Condensed Reports have none of the features of an abridgement, and the work is made up of the same cases, and no more than is contained in Wheaton’s Reports.”).

222. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C. Mass. 1841) (No. 4,901).

223. Justice Story wrote a three volume series of *Commentaries on the Constitution of the United States*, in which he quotes so many passages from Blackstone’s *Commentaries* that he may have been liable for infringement under *Folsom* or *Harper & Row*, had not Blackstone’s work been in the public domain due to the 1790 Copyright Act’s reservation of its protections to U.S. citizens. See generally JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Cambridge, Brown, Shattuck & Co. 1833).

224. Both of those statutes had copied the language of the Statute of Anne, which had always been interpreted to restrict infringement liability to the act of reprinting something close to the “identical work.” See Patterson, *supra* note 194, at 441.

225. *Folsom*, 9 F. Cas. at 342.

226. See *id.* at 348 (“None are entitled to save themselves trouble and expense, by availing themselves, for their own profit, of other men’s works, still entitled to the protection of copyright.”); *id.* at 349 (“The entirety of the copyright is the property of the author; and it is no defence, that another person has appropriated a part, and not the whole, of any property.”). Story said upon acceding to his professorship at Harvard Law School that the lawyer’s “most glorious and not infrequently perilous duty” was to salvage the “sacred rights of property” from the “rapacity” of the majority’s redistributive impulses. JOSEPH STORY, DISCOURSE UPON THE INAUGURATION OF THE AUTHOR AS DANE PROFESSOR OF LAW, 1829 (Cornell Law School Collection), quoted in Elizabeth Mensch, *History of Mainstream Legal Thought*, in THE POLITICS OF LAW 14 (David Kairys, ed., 1990).

227. *Folsom*, 9 F. Cas. at 347.

Story's expansion of copyright compelled him to articulate the right of "fair abridgment" or "fair use" more elaborately than American courts had done before. If he had not done so, the opinion would have been precedent that even a short quotation in a book review or commentary would be illegal.²²⁸ Perhaps even the plaintiff in *Folsom* would have been guilty of infringement by quotation, and have deserved denial of relief under the equitable doctrine of unclean hands.²²⁹ So Story set down as a rule that a later author "may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism."²³⁰ To distinguish "fair" from unfair quotation, he laid out a number of factors (quantity, effect on market, etc.) that have become familiar in fair use jurisprudence.²³¹

The scope of copyright protection has expanded even further since the *Folsom* decision, to arguably preclude all but the most trivial uses of copyrighted work.²³² The Supreme Court would demonstrate how little protection fair use currently provides to transformative users in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.²³³ In that case, an article in *The Nation Magazine* that quoted some 300 words from Gerald Ford's biography (itself over 200,000 words long) was held to infringe Ford's copyright.²³⁴ The article used Ford's own words to discuss his pardon of Nixon, his relations with Reagan and Kissinger, and his policy on the bombing of

228. *Cf.* *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) (Story, J.) ("In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. . . . If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times.").

229. *See Folsom*, 9 F. Cas. at 347.

230. *Id.* at 344.

231. *Id.* ("In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.").

232. For an extreme example, "sampling" even a few notes of music has been held infringing, frustrating the emerging genres of rap, pastiche, and postmodern music. Ground-breaking records by resource-poor artists like John Oswald (who agreed to a settlement) and Negativland have been enjoined and destroyed for forays into a "copy and paste" aesthetic. *See* David Gans, *The Man Who Stole Michael Jackson's Face*, WIREd, Feb. 1995, at 136; *see generally* NEGATIVLAND, FAIR USE: THE STORY OF THE LETTER U AND THE NUMERAL 2 (1995).

233. 471 U.S. 539, 558 (1985).

234. *See id.* at 569.

Cambodia. Ford was at the time of publication a potential candidate in the 1980 presidential election.²³⁵

The majority opinion in *Harper & Row* seamlessly weaves together rights-based and utility-based arguments. It first notes the incentive for authors, that granting copyright protection to those who “who write and publish factual narratives” ensures that “they may at least enjoy the right to market the original expression contained therein as just compensation for their investment.”²³⁶ The opinion turns quickly, however, to the public interest: “The monopoly created by copyright thus rewards the individual author in order to benefit the public.”²³⁷ The result, at least at first glance, is a somewhat confused combination of various arguments for copyright. As we have seen, however, it stands solidly within the discourse of proper-tarian theory since Locke.

In rejecting *The Nation*'s (and dissenting Justice Brennan's²³⁸) argu-ment that the public interest supported wide dissemination of Ford's views, the Court marshaled a barrage of economic arguments.²³⁹ In a sig-nificant footnote, the Court cited “[e]conomists who . . . believe the fair use exception should come into play only in those situations in which the market fails or the price the copyright holder would ask is near zero.”²⁴⁰ According to this reasoning, where “a fully functioning market exists, permitting fair use to displace normal copyright channels disrupts the copyright market without a commensurate public benefit.”²⁴¹ This argu-ment constitutes an invitation to copyright holders to ask for prices greater than zero for virtually any use (and thus eliminating fair use), to aggres-sively prosecute even private and non-profit uses, and to invent methods of collecting fees for each and every use, no matter how trivial (such as reading more than once, loaning to a friend, copying small sections, etc.).

235. *See id.* at 590.

236. *Id.* at 556-57 (emphasis added).

237. *Id.* at 546.

238. *See id.* at 579 (Brennan, J., dissenting) (“[T]his zealous defense of the copyright owner’s prerogative will, I fear, stifle the broad dissemination of ideas and information copyright is intended to nurture. Protection of the copyright owner’s economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use.”).

239. 471 U.S. 539, 558 (“In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By estab-lishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

240. *Id.* at 568 n.9 (citing T. Brennan, *Harper & Row v. The Nation, Copyrightability and Fair Use*, Dept. of Justice Economic Policy Office Discussion Paper 13-17 (1984); Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)).

241. *Id.* (internal quotation marks omitted).

At the same time, and in classical fashion, this interpretation of copyright law assumes away the “commensurate public benefits” of not requiring a license for fair use of a work. The benefits that the Court might have discussed include cheaper access, broader distribution, less censorship (it is noteworthy that *The Nation* is a left-leaning periodical and Ford a former Republican president), lower transaction costs, less litigation, and reduced administrative costs. Instead, the Court followed Locke, Blackstone, the Stationers, and countless others in deeming that a conclusory public goods argument, with regard to incentives, self-interest, and rational economic actors, was sufficient to bar the plaintiff’s use. Again, the benefits of limiting enclosures are discarded as illusory or irrelevant.

The second axis along which copyright scope has been expanded concerns nonliteral similarity. One early opinion illustrates how far we have come. In *Stowe v. Thomas*,²⁴² the court rejected Harriet Beecher Stowe’s claim that a German translation of Uncle Tom’s Cabin infringed the copyright in the book. Restating the standard for copyright infringement that had prevailed from Queen Anne’s time to that of Justice Story, the court declared that the “author’s exclusive property in a literary composition or his copyright, consists only in a right to multiply copies of his book, and enjoy the profits therefrom, and not in an exclusive right to his conceptions and inventions, which may be termed the essence of his composition.”²⁴³ The court also focused on the transformation embodied in defendant’s translation, saying that translation often requires “more learning, talent and judgment, than was required to write the original.”²⁴⁴ In language unthinkable today, the court concluded that “[b]y the publication of Mrs. Stowe’s 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* (of public right) as Don Quixote and Sancho Panza.]”²⁴⁵

The *Stowe* court’s reasoning, sympathetic as it was to the public’s right to make use of intellectual property, soon came under attack. The court in *Daly v. Palmer* relied upon Justice Story’s trilogy of copyright cases to hold that it is the “quality” rather than the “quantity” of what is taken that matters, and that the “adaptation of [a] series of events to different charac-

242. 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514).

243. *Id.* at 207 (emphasis added).

244. *Id.* Doubtless the same could be said of a great many allegedly infringing transformative works.

245. *Id.* at 208 (second set of brackets in original) (parentheses added).

ters who use different language” is a “piracy.”²⁴⁶ The court accompanied its moral denunciation of the defendant with the canonical economic rationale that free-riding is the ruination of cultural production. The analysis was naturally conducted without reference to the inhibitive and censorial effects, or increased transaction and administrative costs, posed by such a rule.²⁴⁷

Copyright scope has expanded so far in the direction of nonliteral protection that the court’s reasoning in the *Stowe* decision would today be considered anathema to the very core of copyright. Derivative rights, extending far beyond the limits on literal appropriation, have found increasing favor with courts and legislatures.²⁴⁸ Since Judge Learned Hand’s decision in *Nichols v. Universal Pictures Corp.*,²⁴⁹ even paraphrasing and imitation have been disfavored as fair uses, because otherwise a “plagiarist would escape [liability] by immaterial variations” of the work.²⁵⁰ Today’s derivative rights are “so expansive that they allow a copyright owner to assert control over works that have little resemblance with her work and that have little effect on economic prospects of her work.”²⁵¹

As a result, protection from nonliteral copying of phrasings, characters, plots, and scenes has become almost as important as protection from fragmented literal copying. The plot and characters of a Stephen King or Michael Crichton novel are likely to be far more valuable than the mere words. The short animated film *Steamboat Willie* is of negligible value in comparison to the image of the character it introduced to the world: Mickey Mouse.

C. Explaining Copyright Expansion: The Rhetoric and Economics of Real Property

With the benefit of this brief overview, we may reflect upon the reasons for such marked expansions in copyright term and scope. One prominent school of thought on the subject attributes the trend to the “continuing

246. *Daly v. Palmer*, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3552) (infringement premised on copying of scene in which villain ties victim to railroad tracks, to be foiled again by hero at the last moment).

247. See Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1236 n.127 (1997).

248. See Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y 209, 217 (1983); Voegtli, *supra* note 247, at 1234-39 (collecting numerous statutory and judicial sources).

249. 45 F.2d 119 (2d Cir. 1930).

250. *Id.* at 121; see, e.g., *Sid & Marty Krofft Television Prods. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977).

251. Voegtli, *supra* note 247, at 1268.

grip on the legal imagination” of the “full-blown Romantic conception of ‘authorship,’” which devalues collective creative endeavor and effaces the inevitable reliance of writers and others on prior sources and a common cultural heritage.²⁵² In a recent essay, Mark Lemley criticizes this account, claiming that it explains neither the contours of copyright law at the present, nor its development over time. Regarding the extension of terms and proliferation of rights, he questions whether “authorship has gotten more romantic over time.”²⁵³ With regard to other recent changes in the law, Lemley argues that the doctrines of work-for-hire and assignment heavily favor corporate “authors” over starving artists, and that the expansive rights available to “initial creators” to censor what are often far more creative “transformative improvers,” are contrary to what the romantic author theory would predict.²⁵⁴

By contrast to what he therefore believes to be a failed theory, Lemley argues that the increase in the duration of copyright protection, and in the uses that it prohibits, is attributable primarily to the fact that “the rhetoric and economic theory of real property are increasingly dominating the discourse and conclusions of the very different world of intellectual property.”²⁵⁵ On the side of rhetoric, he argues that the “property rights” view of copyright has achieved an unprecedented hegemony in recent years. He notes that the widespread use of the term “intellectual property” itself is a relatively recent phenomenon,²⁵⁶ and that courts are with increasing frequency foregoing nuanced analysis of the hard questions in intellectual property law in favor of the sort of earthy moralisms that inevitably favor copyright plaintiffs.²⁵⁷ He associates this rise of property rhetoric, and the galloping advance of ownership entitlements, with the particular economic

252. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 463. See also JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 51-60 (1996).

253. Lemley, *supra* note 4, at 22. This is a particularly telling argument given that the authors of the eighteenth and nineteenth centuries, when protection was short and thin, so to speak, cut a rather more romantic figure than those of the commercialized and trivialized present.

254. See *id.* at 885-88.

255. *Id.* at 895.

256. See *id.* at 895-96. Since the foundation of the World Intellectual Property Organization in 1967, Lemley notes, the ABA section on Patent, Trademark, and Copyright Law has changed its name to the ABA Section on Intellectual Property Law. See *id.* at n.123.

257. See *id.* at n.126. Lemley’s example is *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991), in which the court resolved the novel issue of music sampling as a fair use by recourse to that “earlier Constitution,” as Twain called it, which declares, “thou shalt not steal.”

view that “emerges from the Chicago School law-and-economics movement,”²⁵⁸ a view which “emphasizes the importance of private ownership as the solution to the economic problem known as the ‘tragedy of the commons.’”²⁵⁹

The question remains whether this trend, and the expansion in the copyright monopoly that has accompanied it, is attributable to the persistence of romantic authorship or the rise of Chicago-style economic analysis. Framed this way, however, the question presents a bit of a false dichotomy. After all, given the history of English thinking on property and copyright, we might ask of Lemley a question analogous to the one he puts to authorship theory, namely has the commons gotten more tragic over time? Not since Hobbes and Locke, certainly. As property theorists, these philosophers stand near the beginning of the line of discourse critical of the commons on the grounds that no one is “liable for the consequences of her own actions,” a line that continues through the very economists from whom Hardin derived his tragically evocative turn of phrase.²⁶⁰ The problem of bolstering private incentives with property-based expectations in the future was hardly invented by the Chicago School out of whole cloth. Romantic authorship should be understood in this context as a crucial buttress to natural rights arguments for expanded copyright. By effacing the moment of collectivity in cultural production, it makes the labor of authors seem all the more arduous and awe-inspiring. By casting transformative users in the role of talentless hacks, it mobilizes the taboo against plagiarism in support of exclusive authorial rights. And by sustaining the impression that copyright is never “a zero-sum game,” that “there is always ‘enough and as good’ left over,”²⁶¹ it papers over the costs of constricting the public domain and narrowing the rights of imitation and appropriation.

IV. CONTEMPORARY MOVEMENTS TOWARDS ENCLOSURE OF THE INTELLECTUAL COMMONS

The frequent characterization of anyone who makes unauthorized use of a once-copyrighted work as a “pirate” is the Information Age analogue to the equation of peasants exercising their rights in the common with

258. *Id.* at 897

259. *Id.*

260. *Id.* Indeed, the point can be traced as far back as Aristotle, who remarked of Plato’s proposal of raising children in common that “[w]hat belongs in common . . . is accorded the least care,” and that parents would “slight them on the grounds that someone else is taking thought for them.” ARISTOTLE, *THE POLITICS* 57 (Carnes Lord trans., Univ. of Chicago Press 1984).

261. BOYLE, *supra* note 252, at 57.

highwaymen. Meanwhile, the old “tragedy of the commons” argument has been resuscitated for application to the Global Information Infrastructure, on which anarchy is said to prevail. The Lockean vision of common lands as waste, and the Stationers’ view of unlicensed printing as waste, are revived in the contemporary propertarian discourse that surrounds the regulation of cyberspace, as we shall see in this Part.

The ongoing copyright grab, which is being carried out on many fronts and which will set the ground rules for speech in the Information Age, shares the conceptual and tactical structure of the Great Enclosure of English common lands and of the efforts of the Stationers and others to revoke public rights in the intellectual commons. The current struggle to transform limited rights in expression to rights of perpetual duration and near-absolute scope is taking place on four broad fronts. The first is outright extension of copyright duration. The second is extra-legal copyright adjudication by Internet Service Providers (“ISPs”). The third is implementation of technological locks to protect content from appropriation in perpetuity (and the legal protection of such locks). The fourth is the transformation, via the Uniform Computer Information Transactions Act (“UCITA”), of sales of copyrighted works, currently governed by the public law of copyright and governed by courts, into licenses for the use of those works, strictly limited in duration and scope by standard form contract language and seamlessly implemented by mechanisms of technological self-help.

Just as the “ancient and venerable rights” secured by the peasants in their long struggle against the feudal landlord were mere theft in the eyes of a rising bourgeoisie claiming the absolute rights of exclusion, so the public’s traditional rights to the public domain and fair use are now being dismissed as mere piracy. Determined to more intensively and efficiently exploit their holdings, the copyright industries will simply dispense with these rights. Once the public has been forcibly driven from the informational commons, the rising class of copyright conglomerates will usher in an age of Blackstonian absolutism in the realm of speech.

A. The Public Domain: Of “Legal Piracy” and “Orphan Works”

The Sonny Bono Copyright Term Extension Act (“CTEA”),²⁶² signed into law on October 27, 1998, retroactively extends the term of copyright to life plus 70 years, or to 95 years for corporate authors. Whereas Mickey Mouse’s copyright would have expired in 2003, Pluto’s in 2006 and Goofy’s in 2008, Disney’s monopoly on each of these characters will now

262. Pub. L. No. 105-298, Title I, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.); *see, e.g.*, 17 U.S.C. § 302.

last another 20 years.²⁶³ Taking up the mantle of the Stationers, et al., are those media corporations whose most bankable characters and works are nearing the end of their current statutory terms of protection.

The movement toward the CTEA gained impetus following the GATT Treaty's mandate for retroactive protection of foreign works that had fallen into the U.S. public domain. These provisions were later used to justify U.S. copyright extension in the name of "harmonization" and "reciprocity."²⁶⁴ Another innovation in Blackstonian discourse, and its criminalization of the intellectual commons, arose during lobbying for these GATT measures, as the falling of foreign works into the public domain was dubbed "legal piracy . . . a calamity that need not occur."²⁶⁵ Further testimony also equated the public domain with theft, alleging that the passage of copyrights into the public domain constituted a "not insignificant portion" of foreign acts of "piracy" that purportedly cost U.S. industries \$2 billion in 1993 alone.²⁶⁶

At the same time as access to the public domain has been criminalized under the umbrella of "piracy," the ancient Lockean theme of commons as waste has been revitalized with a vengeance. For example, proponents of the 1998 extension argued that, contrary to what "[s]ome academics" may believe, it is false that with shorter terms "more public domain works would find wider circulation at cheaper prices."²⁶⁷ As evidence, it is noted that the "theater ticket remains the same price" and that "video stores give no discounts to the public" for public domain works.²⁶⁸ This is as valid an

263. See Dennis Karjala, *Mouse Droppings*, WASH. POST, Oct. 15, 1998, available at (<http://www.public.asu.edu/~dkarjala/commentary/WashPost10-15-98.html>).

264. "Europe would not guard American works beyond the American term limit" without retroactive protection of European works. *The Copyright Term Extension Act of 1995: Hearing on S. 483 Before the Senate Comm. on the Judiciary*, 104th Cong. 41 (1995) (statement of Jack Valenti, Chairman and Chief Executive Officer, Motion Picture Association) [hereinafter Valenti CTEA Statement].

265. *General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing on H.R. 4894 and S. 2368 Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary and the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 103d Cong. 257 (1994) (statement of Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America).

266. *Copyright Restoration and Other Matters: Joint Hearing on H.R. 4894 and S. 2368 Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary and the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 103d Cong. 244 (1994) (statement of Eric H. Smith, Executive Director, International Intellectual Property Alliance).

267. Valenti CTEA Statement, *supra* note 264, at 42.

268. *Id.*

argument as that of Locke and other advocates of enclosure that because some of the common lay in waste, common lands as such were waste. Just because oligopolistic movie theater chains sometimes fail to offer discounts does not mean that public domain works are destined to remain the same price regardless of medium or decade. Witness the proliferation of public domain works of literature and philosophy on the World Wide Web, from the ancient Greeks to Shakespeare to Kant. Joyce's *Ulysses* and Eliot's *The Waste Land*, to cite just two examples, are freely accessible on the Web less than two years after entering the public domain in 1998.²⁶⁹ Evidence of dramatic reductions in the costs to local orchestras desiring to perform classical music pieces, once they fall into the public domain, also demonstrates that a work's passing into the public domain may benefit consumers.²⁷⁰

Proponents of extension further argue that "[a] public domain work is an orphan," and that "[w]hatever work is not owned is a work that no one protects and preserve[s]."²⁷¹ This is the yet another invocation of long-standing, and dubious, "tragedy of the commons" argument. The wide availability of the works of Shakespeare demonstrates that public domain works need not fall into obscurity. In the case of copyrighted examples of early cinema, many copyright holders are not making use of or maintaining old films, and by allowing the film stock to deteriorate may be erasing the works forever; there is evidence that copyright extension would even further "reduce the ability of archivists and film distributors to restore and distribute old films."²⁷²

Perhaps advocates of the public domain need a concept of "tragedy of the enclosure."²⁷³ Otherwise, it seems that extensions like the 1998 Act,

269. See JAMES JOYCE, *ULYSSES* (1922), available at <http://www.bibliomania.com/Fiction/joyce/ulysses/>; T. S. ELIOT, *THE WASTE LAND* (1922), available at <http://www.bartleby.com/201/>. For copyright information on these and many other "subverted" and "near miss" public domain texts, see Dennis Karjala, *Some Famous Works and Year of First Publication (Subverted Public Domain List)* (visited Mar. 8, 2000) (<http://www.public.asu.edu/~dkarjala/publicdomain/PDlist.html>).

270. See letter from Randolph P. Luck, President, Luck's Music Library, to Senator Spencer Abraham, June 28, 1996, available at <http://www.public.asu.edu/~dkarjala/letters/Luck'sMusic01.html>.

271. Valenti CTEA Statement, *supra* note 264, at 42.

272. Letter from Larry Urbanski, Chairman of the American Film Heritage Association, to Senator Strom Thurmond, March 31, 1997, available at <http://www.public.asu.edu/~dkarjala/letters/AFH.html>.

273. Analogous arguments have been made by Carol Rose, speaking of the "comedy of the commons." See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986), and by Michael A.

which Peter Jaszi has dubbed a “down payment on perpetual copyright on the installment plan,”²⁷⁴ will continue at regular intervals, justified each time with the language of natural rights (and its counterpart, the public domain as piracy) and utility (and its counterpart, the public domain as waste). The probability that any works published recently will enter the public domain in most of our lifetimes approaches zero, and is rather low even for works published as long ago as the 1940s.

The public’s reversionary interest in most twentieth-century works is functionally non-existent. The coalition of Internet publishers that signed on to the complaint in *Eldred v. Reno*, a case filed to challenge the constitutionality of CTEA, argued that a copyright term of life plus seventy years violates the Constitutional requirement that protection be “for limited Times.”²⁷⁵ Some arguments in favor of their position are marshaled in Part V below.

B. ISP Liability: Private Copyright Police and Erring on the Side of Caution

The second main front along which copyright protection is expanding at present is ISP liability. The drafting of service providers as “copyright police”²⁷⁶ endangers public rights in the intellectual commons, although the danger may be greater regarding fair use rights than rights in the public domain. This trend began with isolated yet disturbing court decisions,²⁷⁷ and received its major impetus from the Report of the Working Group on

Heller, referring to the “tragedy of the anticommons,” See Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163 (1999).

274. Peter Jaszi, *Caught in the Net of Copyright*, 75 OR. L. REV. 299, 303 (1998) (internal quotation marks omitted).

275. See First Amended Complaint, *Eldred v. Reno*, 74 F.Supp.2d 1 (No. 99-CV00065) (D.D.C. 1999), available at <http://cyber.law.harvard.edu/eldredvreno/complaint.html>; see also *United Christian Scientists v. First Church of Christ*, 829 F.2d 1152, 1169 (D.C. Cir. 1987) (stating that even if a copyright of a duration of around 150 years is not a “copyright in perpetuity,” it at least “purports to confer rights of unprecedented duration”).

276. Samuelson, *supra* note 10, at 188.

277. See *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993) (holding BBS operator directly liable for enabling subscribers to distribute and display copies of photographs); *Sega Enters., Ltd. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (granting preliminary injunction against BBS operator for direct and contributory copyright infringement for soliciting and enabling subscriber’s uploading and downloading of video games); cf. *Religious Tech. Ctr. v. Netcom*, 907 F. Supp. 1361 (N.D. Cal. 1995) (rejecting theory that defendant ISP directly infringed copyrights in written works by distributing and displaying them, but finding that genuine issues of fact existed as to whether failure to delete postings after receiving notice of potential infringement grounded contributory liability, and as to whether Netcom’s role constituted fair use).

Intellectual Property Rights (the “White Paper”).²⁷⁸ That document advocated “maintaining” what it described as the current state of the law on ISPs—namely, strict liability.²⁷⁹ ISPs would then have the incentive to “react promptly and appropriately to notice by copyright owner that infringing material is available on their systems,” and implement technological protections, such as tracking mechanisms.²⁸⁰

The White Paper refused to consider the possibility that copyright owners might overreach and demand “prompt reaction” to public domain material or fair uses. Numerous copyright plaintiffs have pursued meritless claims through years of litigation and heavy financial costs in hopes of a broader monopolistic privilege or censorial prerogative than the law grants.²⁸¹ It stands to reason that the same parties will hardly shy from a little bad publicity stemming from enforcement sweeps demanding the deletion of web sites, even where premised on bogus claims of infringement.

The White Paper, under the rubric of “response to notice of infringement,” lumped together the complex policy questions of how ISPs should be forced to resolve two competing legal claims: one by the copyright holder that infringement is occurring, and the other by the putative infringer that only legal activity is at issue.²⁸² James Boyle has noted that ISPs would be induced to violate privacy, and to curtail “fair use rights so as to make sure that no illicit content was being carried.”²⁸³ Indeed, the White Paper encouraged ISPs to do so, effectively interpreting fair use out of existence.²⁸⁴

278. INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1995) [hereinafter WHITE PAPER].

279. *See id.* at 114-24.

280. *Id.* at 124.

281. *See, e.g.,* Universal City Studios, Inc. v. Nintendo Co., 615 F. Supp. 838, 862 (S.D.N.Y. 1985) (holding that Universal had sought in bad faith to enjoin Nintendo from shipping Donkey Kong on grounds that it infringed King Kong, after having threatened large legal costs in settlement negotiations).

282. *See* WHITE PAPER, *supra* note 278, at 122 (it would “encourage intentional and willful ignorance” to allow ISPs to refuse to disconnect “subscribers who break the law,” or in other words, alleged infringers).

283. James Boyle, *Foucault in Cyberspace* (visited Mar. 10, 2000) (<http://www.wcl.american.edu/pub/faculty/boyle/foucault.htm>). *See also* Samuelson, *supra* note 10, at 188-90.

284. *See* Samuelson, *supra* note 10, at 188-90; *compare* WHITE PAPER, *supra* note 278, at 73-82 (interpreting precedent to state that *any* harm to an actual or “potential” market for a use will “in most cases” invalidate defense of fair use) *with* Sony Corp. v. Universal Studios, Inc., 464 U.S. 417 (1984) (holding that plaintiffs, in suits for contribu-

The Clinton administration officials who drafted the White Paper, failing to achieve passage of their proposed bill, sought to include strict liability for ISPs in the 1996 WIPO Copyright Treaty.²⁸⁵ A letter from copyright law professors to the Patent and Trademark Office echoes Boyle in expressing concern that strict liability encloses large swaths of public domain material and alienates the rights of the public to fair use access and transformation. As the law professors put it: “Over-expansive liability would inhibit free speech while attempts to police this requirement by the providers themselves would undermine privacy and access and subject fair use to the conservative interpretation of a private body.”²⁸⁶ But the treaty passed without the recommended free speech protections against excesses by copyright plaintiffs.

The White Paper Task Force glosses over such concerns, focusing instead on the evils of theft and the utility of the broadest possible rights. The White Paper suggests that ISPs “educat[e] their subscribers about infringement”²⁸⁷ as part of a “comprehensive program” to teach consumers about the overall rightness and utility of “seeking permission” from copyright holders, and why they should “just say yes” to pervasive licensing schemes.²⁸⁸ At early grades, such a program was to include educating children about the need to pay for intellectual property by means of an analogy to a playmate stealing one’s pencil,²⁸⁹ yet again treating physical and intellectual property rights as though they are identical.

The White Paper similarly weighs in with the kind of conclusory public goods analysis that typically accompanies radical movements towards

tory infringement of copyright premised on manufacture of copy equipment, must show that the equipment is not capable of substantial noninfringing use) *and* *Sega Enter. Ltd. v. Accolade, Inc.* 977 F.2d 1510 (9th Cir. 1992) (holding that Accolade’s disassembly of Sega’s object code for purposes of interoperability of game cartridges was fair use).

285. See WIPO Copyright Treaty Art. 8, available at <http://www.wipo.int/eng/diplconf/distrib/94dc.htm> (“Right of Communication to the Public: . . . authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”); Gregory Alexander et al., *Letter from 50 Law Professors to USPTO Against WIPO Treaty* (visited Oct. 7, 1998) (<http://www.public-domain.org/copyright/law-profs.html>) (criticizing the WIPO right of communication, arguing that this “new exclusive right of communication to the public apparently subjects online service providers to strict liability for copyright infringement”).

286. Alexander et al., *supra* note 285.

287. WHITE PAPER, *supra* note 278, at 134.

288. *Id.* at 226.

289. See *id.* at 224.

privatization and enclosure.²⁹⁰ The exclusive focus on the incentive effects of rewarding authors tends to justify expanding protection indefinitely, until the full social value of a work is captured at whatever the cost. The questionable proposition that ISPs—“and perhaps only they—are in a position to know the identity and activities of their subscribers and to stop unlawful activities,”²⁹¹ goes unaccompanied by the equally vital consideration that they, and perhaps only they, are in a position to wrongfully delete public domain or fair use materials, and to summarily revoke the Internet access of those who post such materials.

The Digital Millennium Copyright Act (“DMCA”),²⁹² passed by Congress in October of 1998, embodies a compromise between ISPs and the large content providers to the effect that ISPs will not be strictly liable for their role as an automatic conduit between Internet publishers and the browsing public.²⁹³ Service providers shall, nevertheless, be threatened with liability for information that they “store”²⁹⁴ if, upon notice of a copyright holder’s “good faith belief”²⁹⁵ that infringement is occurring, they do not “respond expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”²⁹⁶

One wonders how much of a “compromise” this actually represents. Were ISPs even in a strict liability regime really going to be able to control “everything users do,” a feat requiring “continuous monitoring of user

290. *See id.* at 7-15.

While, at first blush, it may appear to be in the public interest to reduce the protection granted works and to allow unfettered use by the public, such an analysis is incomplete. Protection of works of authorship provides the stimulus for creativity, thus leading to the availability of works of literature, culture, art and entertainment that the public desires and that form the backbone of our economy and political discourse. If these works are not protected, then the marketplace will not support their creation and dissemination, and the public will not receive the benefit of their existence or be able to have unrestricted use of the ideas and information they convey. . . . [A] legal free-for-all would transform the [Global Information Infrastructure] into a veritable copyright Dodge City. As enticing as this concept may seem to some users, it would hardly encourage creators to enter its confines.

Id. at 14-15.

291. WHITE PAPER, *supra* note 278, at 117 n. 377 and accompanying text.

292. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

293. *See* 17 U.S.C. § 512 (Supp. IV 1998).

294. *Id.* § 512(c).

295. *Id.* § 512(c)(3)(A)(v).

296. *Id.* § 512(c)(1)(C).

accounts” for anything that copyright owners might not like?²⁹⁷ Such a regime would have entailed the legal review of “trillions of bits representing millions of messages and files.”²⁹⁸ An expeditious and probably disproportionate response to anything that is claimed to infringe copyrights seems to have been the real aspiration of the copyright industries all along.

In any case, adjudication of copyright disputes by profit-oriented service providers occurring “in the private realm, far from the scrutiny of public law” has perhaps the most sweeping potential to curtail legal rights of free expression and fair use of any of the ongoing enclosures of speech.²⁹⁹ But these speech- and access-related concerns were largely ignored, obscured by the fog of anti-theft and public goods rhetoric that dominated the legislative debate.

C. Copyright Plus I: Anti-Circumvention Legislation

On the third major front of the enclosure movement, the legal framework is very nearly in place for extending the duration and scope of the copyright monopoly via some combination of mass-market licensing and technology backed by anti-circumvention prohibitions. Appearing in their usual rhetorical roles are the sanctity of rights, the iniquity of trespass, the fragile incentive to produce, and the devastation that, according to enclosure proponents, inevitably accompanies common or public rights, regardless of century or context.

Some have argued that the legal limits to copyright may be avoided by means of so-called “trusted systems.”³⁰⁰ Mark Stefik, one of the most prominent architects of these systems, describes them as strings of computer code that can “specify terms and conditions for using a digital work

297. Samuelson, *supra* note 10, at 188.

298. WHITE PAPER, *supra* note 278, at 116. A coalition of telephone, computer, and online service companies made this argument in opposition to the attempt to get strict liability in the WIPO treaty, explaining that “[j]ust like the postal service cannot (and indeed should not) monitor the contents of all the envelopes it handles, it is simply not possible for an infrastructure provider to monitor whether the millions of electronic messages it transmits daily have been authorized.” Pamela Samuelson & John Browning, *Confab Clips Copyright Cartel*, WIRED, Mar. 1997, at 61, 63.

299. Dave Powell’s Copyright Control Services has developed “fast-track” relationships with 1,000 ISPs across the globe: “We’re into 5,000 sites shut down in a year. . . . [A]s long as you act quickly, we aren’t even interested in suing.” Chris Oakes, *Stamping Out Pirated Tunes*, WIRED NEWS, Jan. 29, 2000 (<<http://www.wired.com/news/mp3/0,1285,33940,00.html>>); see also BOYLE, *supra* note 252, at 10.

300. See, e.g., LAWRENCE LESSIG, CODE, AND OTHER LAWS OF CYBERSPACE 127-30 (1999). See also the various writings of Lawrence Lessig on this topic collected at (<<http://cyber.harvard.edu/~lessig>>).

in an agreement between a publisher and a consumer.”³⁰¹ As the recent *ProCD v. Zeidenberg*³⁰² case shows, software and content publishers will hardly be inclined to adopt terms that limit their ability to make money or control the reception of their works, as the right to copy after a certain date obviously does and as the right to copy for public purposes is believed to do.

Soon these unilateral “terms” will be enforceable through a panoply of technological locks that will enable content owners to 1) restrict access to a picture or article on a pay-per-view basis; 2) deny the ability to copy even small portions of a work, even for non-profit scholarly or educational purposes; and 3) track any and all references to and uses of a work in cyberspace. None of these technological measures need comply with limits on copyright duration or scope, and from this technological fact arises the legal problem of absolute and perpetual protection of digital works. As Lessig notes, such systems could and perhaps are already being deployed to curtail our ability to copy and paste fragments of copyrighted material, including presidential speeches and battlefield reports, into critical and transformative works.³⁰³ In other words, the “loss of fair use is a consequence of the perfection of trusted systems.”³⁰⁴

The general public will be defenseless against such encroachments upon its rights in the intellectual commons. The tiny minority who possess the ability to circumvent technological protections, to defend rights in the public domain and in fair uses, prompted the DMCA’s prohibition on circumvention technologies. The anti-circumvention provisions of the DMCA impose civil and criminal liability on those helping consumers hack trusted systems. Specifically, the DMCA makes it a felony to manufacture, import or distribute “devices, products, components,” and to perform acts “that defeat technological methods of preventing unauthorized use.”³⁰⁵ Furthermore, the DMCA prohibits noncompliance with technical copyright management systems, specifically for intentionally removing

301. Mark Stefik, *Round Two: Response; Roundtable; Life, Liberty, Copyright?*, ATLANTIC UNBOUND, (visited Apr. 27, 2000) (<http://www.theatlantic.com/unbound/forum/copyright/stefik2.htm>).

302. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (holding that no-republication clause in license for a directory of public domain phone numbers on a CD was enforceable).

303. See LESSIG, *supra* note **Error! Bookmark not defined.**, at 128.

304. *Id.* at 137.

305. 17 U.S.C. § 1201 (Supp. IV 1998).

copyright management information,³⁰⁶ and for providing or distributing false information.³⁰⁷

The Digital Future Coalition (“DFC”), an organization of academics, librarians, and concerned members of the technology industry, characterized this new anti-circumvention provision, section 1201 of the DMCA, as an epochal enclosure of the public domain, both in terms of duration and scope. A representative of the group testified before Congress that the provision “allow[s] copyright owners to ‘lock up’ public domain materials.”³⁰⁸ On the matter of scope, Peter Jaszi, a founding member of the DFC, expressed the concern that:

[A]n electronic information vendor who wished to restrict the ability of readers, viewers and listeners to comment negatively on its products could use technological protection measures backed up with the threat of legal sanctions against circumvention to frustrate such criticism, even though the copyright doctrine of “fair use” authorizes the use of quotations from protected works for this purpose.³⁰⁹

Because “a defense to copyright infringement is not a defense to the prohibition,”³¹⁰ the expiration of the statutory term of copyright or the fairness of a use will likely be irrelevant to copyright holders and courts. Uncompromising anti-circumvention laws thus permit copyright holders to expand their rights to encompass every conceivable use for an indefinite period of time.

The lobbying for the DMCA employed the classic strategies of lumping legal and illegal activity together as theft. The Creative Incentive Coalition, the lobbying arm of the large software and media corporations for the DMCA, produced an informational CD-ROM and mounted an ad

306. Copyright Management Information includes the name of the author and copyright owner, the terms of use, and anything else the Register of Copyrights proclaims should qualify. See 17 U.S.C. § 1202 (Supp. IV 1998).

307. See *id.*

308. *WIPO Copyright and Phonograms Treaties: Hearing on H.R. 2281 Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 105th Cong. 243 (1997) (testimony of the Digital Future Coalition, presented by Douglas Bennett, President, Earlham College), available at <http://www.dfc.org/issues/wipo/benhos.html>.

309. *WIPO Copyright and Phonograms Treaties: Hearing on H.R. 2281 Before the Senate Foreign Relations Comm.*, 105th Cong. (1998) (testimony of the Digital Future Coalition, presented by Peter Jaszi, Professor of Law, Washington College of Law, The American University).

310. Jonathan Band, *The Digital Millennium Copyright Act* (visited Apr. 24, 2000) (<http://www.dfc.org/issues/wipo/JP-Index/JP-Memo/jb-memo.html>).

campaign along precisely these lines.³¹¹ Jon Newcomb, President and CEO of Simon & Schuster, wrote a reply in response to Samuelson's "copyright grab" article³¹² on behalf of the CIC, arguing that content creators would provide work for the Internet only if they could be assured that users could not "hijack" or "digitally burglarize[]" their work, or engage in "online looting."³¹³ Coalition members argued before Congress that any attempt to preserve public rights would entail "crippling amendments," and rejected out of hand efforts to amend the law so that "liability under section 1201 require proof . . . of an act of copyright infringement"; that "liability under section 1201 . . . be made subject to the copyright defense of fair use"; or that the distribution of anti-circumvention technology "be excused if it is proven to have a substantial non-infringing use."³¹⁴ A proposed right to circumvent for the purpose of obtaining access to "public domain materials" was equated with the "right to break and enter" or "pick locks," for example, in an attempt to snatch the Declaration of Independence from the National Archives.³¹⁵

The language of the White Paper presaged much of the rhetoric of the DMCA debate, representing the rejection of trusted systems as an invitation to a legal free-for-all on the Internet, a "copyright Dodge City"³¹⁶ from which the determined settler would be driven by marauding copyright outlaws. To avert this vast wasteland brought on by piracy, the White Paper favored absolute control by IP owners over their property, arguing that

[c]reators and other owners of intellectual property rights will not be willing to put their interests at risk if appropriate systems . . . are not in place to *permit them to set and enforce the terms and conditions* under which their works are made available in the

311. See Avant Digital, *Clients: The Creative Incentive Coalition*, (visited Apr. 16 2000) (http://www.morgana.de/avant/html/body_cic.html) (Users of the CD-ROM "can tour pirated web sites, watch testimonials of content creators and read about the impact of copyright industries on the U.S. economy.").

312. See Samuelson, *supra* note 10.

313. Jon Newcomb, *Rants and Raves: The Copyright Grab Bag*, WIRED, Apr. 1996, at 30 (letter to the editor).

314. *WIPO Copyright Treaties Implementation Act: Hearing on H.R. 2281 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 57 (1998) (statement of Steven J. Metalitz on behalf of the Motion Picture Association of America).

315. *Id.* at 208 (statement of Allan R. Adler Vice President for Legal and Governmental Affairs Association of American Publishers).

316. WHITE PAPER, *supra* note 278, at 15.

NII environment. . . . All the computers . . . in the world will not create a successful NII, if there is no *content*.³¹⁷

The economic benefits of anti-circumvention legislation are in this way magnified to the extent that without it the public will have no access to “literature, culture, art, and entertainment” whatsoever. The only restrictions on public access or transformative uses that are recognized are those that flow from underprotection, essentially assuming away the costs of overprotection.³¹⁸ This argument seems overstated even considering an all or nothing choice about copyright protection; it is ludicrous as applied to the choice between present levels of protection and additional controls via legally enforced mechanisms of technological protection.

The Creative Incentive Coalition took up these economic themes in its lobbying campaign for the DMCA. As the CIC’s representative testified before Congress, section 1201 would “benefit every Internet user who wants to see the network employed to make available a richer selection of movies and other audiovisual materials—as well as other copyrighted works.”³¹⁹ Serendipitously, these benefits would be unequivocal and attainable at no cost, for the “only parties it will hurt are those who wish to go into the business of disseminating the means to hack through [trusted systems] so that valuable intellectual property can be stolen.”³²⁰ According to the Coalition, any attempt to distinguish actual “pirates” from members of the public exercising their long-standing rights to the public domain would foreclose the benefits of copyright laws for no good purpose. As in Locke’s time, any attempt to safeguard rights to the commons is dismissed as doing nothing more than endorsing highway robbery and raising uncompensated barriers to progress. Any amendment limiting liability for circumvention was rejected, under the assumption that the public could only be harmed, and could receive no benefit, from circumvention.

317. *Id.* at 10-11 (emphasis added). See also Mark Stefik, *Trusted Systems*, SCI. AM., Mar. 1997, at 81 (“Trusted systems address the lack of control in the digital free-for-all of the Internet.”).

318. See Julie Cohen, *Some Reflections On Copyright Management Systems And Laws Designed To Protect Them*, 12 BERKELEY TECH. L.J. 161, 180 (1997) (noting the “White Paper’s deliberate lack of concern for the practical difficulties that attend unauthorized but lawful uses of works under a CMS [copyright management systems] regime”).

319. Metalitz, *supra* note 314, at 57.

320. *Id.*

D. Copyright Plus II: Mass-Market Licensing

The latest ongoing effort to enclose swaths of the public domain is taking place under the auspices of the Uniform Computer Information Transactions Act ("UCITA"), formerly proposed Article 2B of the Uniform Commercial Code. The advocates of UCITA in its current form employ a twin rhetorical strategy, much like that used by publishers from the Stationers on down, to argue against any sort of public domain or fair use. The strategy's first prong invokes private natural rights, while ignoring the theft of public rights; its second prong promises that unbounded utilitarian/economic benefits will flow from increased monopolization, yet assiduously ignores the costs of monopoly.

The scope of UCITA has been narrowed from that of Article 2B, which was to govern all transactions in information. Instead the Act will govern only "computer information transactions," which is nevertheless a crucial subset of copyrightable material, insofar as it includes, in addition to software, "electronically disseminated" news, opinion, pictures, and possibly even movies.³²¹ There is a distinct possibility that the "shrink-wrap" and "click-through" licenses accorded protection under that provision will not need to observe even the Copyright Act's ever-receding limit on copyright duration.³²² The power of licensors to set the boilerplate terms of mass-market licenses create the conditions for displacing limited

321. See National Conference of Commissioners on Uniform State Laws, *New Uniform Act Meets Immediate Needs of the Information Age* (July 1999) ("UCITA covers software and information that is electronically disseminated. It does not cover other kinds of licenses of information such as motion picture contracts. Also excluded are distribution of information in traditional written form, such as books, magazines and newspapers."); see also Carlyle C. Ring, Jr., Chair of UCC2B Drafting Committee, *Summary of Actions at Article 2b Meeting November 13-15, 1998* (visited Apr. 24, 2000) (<http://www.2BGuide.com/docs/cr1198sum.html>).

322. Compare *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (protecting arguably uncopyrightable database from copying on basis of shrinkwrap license), with *DSC Communications v. DGI Technologies*, 81 F.3d 597 (5th Cir. 1996) (declaring copyright unenforceable on basis of copyright misuse in attempt to expand copyright scope into "a patent-like monopoly" in hardware), *Lasercomb America v. Reynolds*, 911 F.2d 970 (4th Cir. 1990) (holding that a ninety-nine year license amounted to misuse, although the preclusion of licensees from developing competing products likely played greater role than the length of the license), and Mark Lemley, *Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 132-33 (1999) (arguing that a license purporting to withdraw a work from the public domain may be unenforceable). The version of UCITA passed by the NCCUSL includes a "public policy" provision that may or may not override attempts to expand copyright duration.

copyright duration and scope with licenses restricted to narrowly defined uses and asserted in perpetuity.³²³

Section 105 of UCITA incorporates federal preemption doctrine, and provides that a court may refuse to enforce a contract term that “violates a fundamental public policy,” at least “to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.”³²⁴ UCITA simply assumes that the enforcement of a contract outweighs a licensee’s fair use or First Amendment rights: “In practice, enforcing private contracts is most often consistent with these policies, largely because contracts reflect a purchased allocation of risks and benefits.”³²⁵

The comments to section 105(b) offer a wealth of examples of mass-market license terms that “promote interests in free expression and association” in this way, such as a term restricting “libelous or obscene language in an on-line chat room,” or terms that prohibit the licensee from making multiple copies, using the information for commercial purposes, allowing access by unauthorized users, or modifying software or informational content without the licensor’s permission.³²⁶ Even a prohibition on “quotation of limited material for education or criticism purposes” could be enforced under UCITA upon “a showing of significant commercial need.”³²⁷ If UCITA’s statutory language and comments are given much weight, then even the vaunted “neutrality” of UCITA and its predecessor, the proposed Article 2B,³²⁸ toward federal rights would seem to provide scant protection to a licensee wishing to use the material in a “fair” but unauthorized manner.

The *ProCD* decision demonstrates that even in the absence of this burden-shifting provision of UCITA, many courts have already been inclined to take an expansive view of the freedom to “opt out” of copyright and

323. See, e.g., Julie Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1119 (1998).

324. National Conference of Commissioners on Uniform State Law, UCITA §105(b) (1999) (http://www.law.upenn.edu/bll/ulc/ucita/UCITA_99.htm). This incorporates a motion made at the November 1998 meeting of the UCC2b drafting committee. See Ring, *supra* note 321.

325. National Conference of Commissioners on Uniform State Law, Comment to 105(b), available at (<http://www.law.upenn.edu/bll/ulc/ucita/cita10cm.htm>).

326. *Id.* (citing *Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782 (N.D. Ill. 1998) (finding that “no commercial use” term in Internet contract was enforceable)).

327. *Id.*

328. Jessica Litman, *The Tales that Article 2B Tells*, 13 BERKELEY TECH. L.J. 931, 933 (1998).

into licensing, and have held restrictive views of preemption, public policy override, and First Amendment interests. Furthermore, there is no disputing that the existence of UCITA will be a force operating to contract rather than expand the intellectual commons.³²⁹ This is true even if reference to UCITA decides only “marginal cases” of infringement, affecting mostly “resource-poor defendants” who can ill afford to litigate, or merely operates “in terrorem” to chill speech that might result in breach-of-license litigation.³³⁰ The right of the licensor under UCITA to engage in self-help without going to court may permit a technological end run around the public policy provisions.³³¹ In short, this system of legal and technological locks and keys may thus fulfill Blackstone’s vision of an intellectual property system whereby producers “may give out a number of keys” to the nooks and crannies of their literary estates, while maintaining in perpetuity the absolute right to exclude the universe from the remainder.³³²

The reference to Blackstone is apposite because we see in the advocacy for legal enforcement of mass-market information licenses another convergence of his “inseparably interwoven” principles of right and utility. In this case, the natural right is the right of contract. The drafters’ comments regarding UCITA’s treatment of preemption and public policy argue that “the fundamental interests in contract freedom” render “inappropriate” the “limitations on the information rights of owners that may be imposed in a copyright regime.”³³³ Section 605, for example, disturbingly sanctions “electronic regulation of performance” without judicial supervision—read digital repossession.³³⁴ As part of Article 2B, these measures

329. *See id.*; *see also* Cohen, *supra* note 323, at 1128-29.

330. *See* Lemley, *Beyond Preemption*, *supra* note 322, at 125 n.33.

331. *See id.* at 122-23 (discussing provision in latest draft for licensor “electronic self-help” without going to court, subject to consequential damages in restricted circumstances).

332. ROSE, *supra* note 20, at 91 (quoting *Tonson v. Collins*, 96 Eng. Rep. 169, 188 (K.B. 1761)).

333. National Conference of Commissioners on Uniform State Law, Comments on Uniform Computer Information Transactions Act (1999) at 19; *available at* (<http://www.law.upenn.edu/bll/ulc/ucita/cita10cm.htm>).

334. *See* National Conference of Commissioners on Uniform State Law, UCITA § 605(b)(2) (“prevents a use that is inconsistent with the agreement or with informational rights that were not granted to the licensee”); *see also id.* §§ 618, 701, 801; *cf.* American Law Institute and the National Conference of Commissioners on Uniform State Law, U.C.C. Art. 2B: Licenses (Annual Meeting Draft August 1998), § 2B-310(b)(2) (“restraint prevents uses of the information which are inconsistent with the agreement or with informational rights which were not granted to the licensee”), *available at* (<http://www.law.upenn.edu/library/ulc/ucc2b/2b898.htm>). *See generally* Cohen, *supra* note 323, at 1096-98.

were justified by reference to “[t]he basic principle . . . that a contract can be enforced,”³³⁵ thus implying that leases and other types of contracts with limited self-help remedies are somehow unenforceable.³³⁶ Similarly, the preface to the August 1998 draft of Article 2B listed as some of the Article’s main benefits that it “confirms contract freedom in commercial transactions,”³³⁷ and that it supports the “fundamental tenet of the common law . . . freedom of the parties to contract.”³³⁸ This despite the manifest absence of freedom of consumers to alter contract terms in markets uniformly characterized by pro-seller mass-market contracts of adhesion.³³⁹

Economic justifications, which could be portrayed as issuing from “the other end of the epistemological spectrum,”³⁴⁰ but which have virtually always followed close upon rights-talk, are perhaps even more prominent in the movement for enclosure via licensing. The primary economic argument for such licensing regimes is that regulation intended to safeguard consumers’ rights, whether to the commons, to free expression, or to privacy, is inefficient “friction” on the flow of commerce. Such arguments support the *ProCD* decision, in which standardized mass-market contracts drafted by sellers, and invisible to consumers until after purchase, are characterized as “a means of doing business valuable to buyers and sellers alike.”³⁴¹ This is because “adjusting terms in buyers’ favor might help individual litigants, “but would lead to a response, such as a higher price, that might make consumers as a whole worse off.”³⁴² In the end, any doubts about the convergence of freedom of contract and consumer welfare are resolved, because sellers will hypothetically compete for fair use and copyright terms.³⁴³ “Competition among vendors, not judicial revision

335. Proposed UCC Art. 2B-310, Reporter’s Note 1 (August 1998 draft).

336. See Cohen, *supra* note 323, at 1101-02.

337. American Law Institute and the National Conference of Commissioners on Uniform State Law, U.C.C. Art. 2B: Licenses (Annual Meeting Draft August 1998), “Preface” (“General Benefits” section).

338. *Id.* (“Freedom of Contract” section).

339. Cohen, *supra* note 323, at 1125-26 (“In the mass market context, consumers are contract takers; they can refuse to buy, or hold out for a lower price, but they generally cannot demand a particular package of contract terms or product characteristics.”).

340. *Id.* at 1120. Cohen also notes the “substantial overlap” and common “normative premises” of “libertarianism” and “neoclassical economic theory.” *Id.* at n.107.

341. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449-50 (7th Cir. 1996).

342. *Id.* at 1451.

343. An analogy is provided by the luxury cruise industry, where cruise lines already presumably compete to provide the most consumer-friendly boilerplate on choice of forum in case of wrongful death suits. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 585-86 (1991).

of a package's contents, is how consumers are protected in a market economy."³⁴⁴

The August 1998 draft of Article 2B, from which UCITA was largely adapted, stands firmly in the tradition of representing enclosures as a source of net increases in the general welfare. The draft begins with a laundry list of "general benefits," "benefits to licensors," and "benefits to licensees."³⁴⁵ Costs to licensees and third parties are imagined away, initially under the questionable assumption that the courts will prevent overreaching by licensors, and later under the pretense that the interests of consumers and producers are identical in every case.

The question of potential conflicts between the exclusive exploitation of information as a commodity and the wide circulation of information as a First Amendment value is quickly and easily resolved. In terms quite reminiscent of the White Paper's assumption that without expanded protection there will be "no content" on the NII, the draft maintains that "[c]ommercialization is not inconsistent with the role of information in political, social and other venues of modern culture. If it were, newspapers, books, television, motion pictures, video games, and other sources of informational content could not exist."³⁴⁶

The section concludes with the observation that First Amendment values "argue strongly for an approach to contract law in this field that does not encumber, but supports incentives for distribution of information and its distribution."³⁴⁷ Thus, like the White Paper and countless other documents advocating expanded monopoly rights in information, the draft stresses the need for incentives while ignoring the costs. Once more, a non-exhaustive list of such costs would prominently feature the increase in outright refusals of access, the increase in prices owing to diminished competition, pervasive censorship of transformative works, and the increased transactions and court costs attendant to the proliferation of exclusive rights by contract.³⁴⁸

344. *ProCD*, 86 F.3d at 1453.

345. American Law Institute and National Conference of Commissioners on Uniform State Laws, *supra* note 320, U.C.C. Art. 2B: Licenses (Annual Meeting Draft August 1998), "Preface" ("Informational Content" section).

346. *Id.*

347. *Id.*

348. *See generally* Fisher, *supra* note 212.

V. THE FIRST AMENDMENT CHALLENGE TO BLACKSTONIAN COPYRIGHT

The crucial difference between enclosures of the intellectual commons, and land grabs proper, is that the former are regulations of speech that demand heightened judicial scrutiny as to whether legislative invocations of natural rights and utilitarian-economic benefits are sufficiently persuasive to justify the attendant impact on the public sphere. Although Blackstone's principle of the "sovereign and uncontrolable authority"³⁴⁹ of parliament survives in America in deferential rational basis review of social and economic legislation, a like deference is not warranted for regulations that curtail freedom of expression.

The Framers explicitly sanctioned judicial suspicion of laws that inhibit the exercise of constitutional rights to free expression.³⁵⁰ The Supreme Court has repeatedly held that these "choicest privileges," first and "transcendent" among all our natural rights in the American tradition,³⁵¹ are not to be "sacrificed . . . for too speculative a gain."³⁵² As the Court has held, freedom of expression possesses "a sanctity and a sanction not permitting dubious intrusions."³⁵³ Yet courts and commentators, if not the Congress, are increasingly recognizing the fact that copyright largely determines the accessibility and cost of information in a democratic society, and that it grants rights holders substantial powers of censorship through the threat of prosecution for infringement.

349. BLACKSTONE, *supra* note 19, at *156.

350. In proposing the language that was eventually enacted in the First Amendment, James Madison remarked that, "[t]he freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution." *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) (providing that the preferred place given in our scheme to the great democratic freedoms secured by the First Amendment gives them "a sanctity and a sanction not permitting dubious intrusions"); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (stating that the usual presumption of constitutionality will not rescue legislative invasions of rights indispensable to the democratic process); *Board of Education v. Barnette*, 319 U.S. 624, 639 (1943) ("The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."); *cf.* James Madison, *Memorial and Remonstrance Against Religious Assessments*, para. 3 (1785) ("it is proper to take alarm at the first experiment on our liberties"), available at <http://www.regent.edu/acad/schgov/polinet/histdoc/madisonm.html>.

351. *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) (Brennan, J.).

352. *Denver Area Educ. Telcoms. Consortium, Inc. v. FCC*, 518 U.S. 727, 760 (1996).

353. *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

This Part describes the definite and palpable costs posed to free expression on the Internet by the incursion by copyright holders into the public domain and fair use rights. The discussion commences with the observation that the view the Constitution's Framers held on freedom of expression was as generous as Justice Story's was stingy. Such views, if respected today, would limit the regulation of the Internet on First Amendment grounds. The argument then turns to the unparalleled capacity of Internet communication to fulfill the vision of Madison and Jefferson that "full information of their affairs . . . should penetrate the whole mass of the people."³⁵⁴ Finally, this section argues that the galloping advances of Web publishing and Internet discourse will be chilled to a slow crawl by the revision of copyright from a right to publish and vend into a right to privately censor expression otherwise protected under the First Amendment. Such an abridgement of a fundamental right should follow only after the sort of searching inquiry that prevails in analyses of seditious and private libels, and of the right to jury trial.³⁵⁵

A. Copyright and First Amendment Originalism

In *Harper & Row*,³⁵⁶ the Court held that the "definitional balance" struck by the idea-expression distinction, along with "the latitude for scholarship and comment traditionally afforded by fair use," resolves most if not all First Amendment difficulties posed by the copyright laws.³⁵⁷ What is so troubling about *Harper & Row* from a First Amendment perspective is that by endorsing protections against quotation and imitation exceeding even those of Justice Story's opinion in *Folsom v. Marsh*,³⁵⁸ the

354. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), in LETTERS (Merrill D. Peterson, ed., 1984).

355. Overbroad speech regulations were compared by Justice Marshall in words that foresaw the sort of treatment in store for Internet speech under *Harper & Row* and the DMCA. "That this Court will ultimately vindicate [a person] if his speech is constitutionally protected is of little consequence—for the value of a sword of Damocles is that it hangs—not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

356. 471 U.S. 539, 558 (1985).

357. *Id.* at 555, 560.

358. 9 F. Cas. 342, 345 (C.C. Mass. 1841) (No. 4,901). The *Harper & Row* Court was, it should be noted, interpreting provisions of the 1976 Copyright Act that it believed to render fair use an affirmative defense, and harm to potential markets a factor weighing against it. *See Harper & Row*, 471 U.S. at 561. The characterization of fair use as a "defense" rather than a "right" is increasingly relied upon to curtail what is in any case an ancient privilege. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (holding that copyright defendant not entitled to fair use defense unless he or she presents "favorable evidence about relevant markets").

Court relied upon doctrines developed in an age in which the First Amendment did not even protect against fundamental infringements of the freedom of speech.³⁵⁹ These doctrines were themselves only necessary to rein in and delimit Justice Story's unprecedented expansion of copyright liability to shelter activities that were legal at the time the Constitution and Bill of Rights were drafted.

Story, in turn, derived his restrictive interpretation of the First Amendment from the foremost advocate of perpetual and broad-ranging common law copyright, William Blackstone.³⁶⁰ We have already seen what Blackstone thought about copyright duration and scope, as well as liberty of the press.³⁶¹ Story may be called, without exaggeration, the author of the American variant of Blackstonian copyright, favoring a form of protection as undying as that prescribed by his mentor. Story remarked, echoing Blackstone, that it is "indeed, but a poor reward, to secure to authors and inventors, for a limited period only, an exclusive title to that, which is, in the noblest sense, their own property; and to require it ever afterwards to be dedicated to the public."³⁶² On the matter of scope, Story approached Blackstone's protection even of "sentiments," declaring that it

Section 107 of the 1976 Copyright Act by its literal terms appears to provide that no prima facie case of infringement will lie against a fair use, as opposed to a fair use claim serving as an affirmative defense to infringement. Section 106 grants copyright holders certain exclusive rights "subject to" section 107, which is itself titled "Limitations on exclusive rights" and refers to fair use as "not an infringement of copyright," rather than as an infringement saved by a defense. 17 U.S.C. §§ 106-07 (1976). The legislative history, however, appears to have cast section 107 as an affirmative defense. *See* H. R. REP. NO. 90-83, at 37 (1967); WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 477-78 n.4 (1985) (stating that educational groups sought unsuccessfully to have burden of proof regarding fair use shifted to plaintiffs, although they "freely acknowledged that fair uses as developed by the courts put the burden of proof on the defendant").

359. *Folsom v. Marsh* was decided in 1841, and the idea-expression distinction was established in 1879 in *Baker v. Selden*, 101 U.S. 99 (1879). The first Supreme Court case striking down a prior restraint on First Amendment grounds, by contrast, appears to be *Near v. Minnesota*, 283 U.S. 697 (1931). *See also* *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (stating that the Seditious Act, 1 Stat. 596 ch. 74 (1798), "was inconsistent with the First Amendment" because "of the restraint it imposed upon criticism of government and public officials").

360. *See* Story, *supra* note 223, at Ch. XLIV, § 995 (quoting Blackstone's discussion of liberty of the press at length).

361. *See* 4 BLACKSTONE, *supra* note 19, at *151-52.

362. Joseph Story, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* (New York, American Book Co. 1840) (quoted in Phillips, *supra* note 184).

was “no defence, that another person has appropriated a part, and not the whole, of any property.”³⁶³

The Framers of the Constitution envisioned quite a different First Amendment from that of Blackstone or Story, and their vision must continue to be respected when addressing the matter of copyright.³⁶⁴ If it is true that few statements on the intersection between copyright and freedom of speech have survived, it is equally true that the Framers had little reason to make any. The tiny footprint left by copyright in post-revolutionary America was the combined result of the 14-year term of the Statute of Anne,³⁶⁵ the 28-year maximum term of the Copyright Act of 1790,³⁶⁶ and an English common law of copyright scope that proffered an expansive right of fair abridgement.³⁶⁷

363. *Folsom*, 9 F. Cas. at 349. *See also id.* at 348-49 (“None are entitled to save themselves trouble and expense, by availing themselves, for their own profit, of other men’s works, still entitled to the protection of copyright. . . . The entirety of the copyright is the property of the author.”). Story was also the first American judge to grant exclusive rights to compilers of preexisting or unprotected material, according to the U.S. Copyright Office. *See also* U.S. COPYRIGHT OFFICE, REPORT ON LEGAL PROTECTION FOR DATABASES 4 (1997), available at <http://www.loc.gov/copyright/reports/>; compare *Kilty v. Green*, 4 H. & McH. 345 (Gen. Ct. Md. 1799) (denying protection to compilation of statutes), with *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728) (Story, J.) (favoring protection), and *Emerson v. Davies*, 8 F. Cas. 615, 618-25 (C.C.D. Mass. 1845) (No. 4,436) (Story, J.) (holding that a compiler’s original “plan, arrangement and combination of materials” for a series of arguably original arithmetic lessons was copyrightable, and finding infringement because a compiler of such an arrangement is entitled to exclusive rights by virtue of “his own expense, or skill, or labor, or money”).

364. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1889) (“The construction placed upon the constitution . . . by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight.”).

365. *See* Statute of Anne, *supra* note 164.

366. *See* Copyright Act of 1790, Act of May 31, 1790, § 1, 1 Stat. 124. The persistence of this term for more than forty years should be considered by courts confronting the meaning of the “for limited Times” language of the Copyright Clause and the First Amendment implications of term extension. *See Printz v. United States*, 521 U.S. 98 (1997) (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926), which held that “contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions”). Also crucial to the Framers’ comparative indifference to copyright as a tool of censorship must have been the vigorous public domain ensured by the complete denial of protection to books published in Britain, which outnumbered American works by a large number into the nineteenth century. “American law made it impossible for foreign publishers to secure copyrights until 1891 Dickens and Trollope were but two of the many noted European authors who thought their livelihood threatened by rampant piracy on these shores.” William Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 INT’L L.

The danger posed by the national government to the liberty of the press was an explicit subject of debate in both the original constitutional convention and the state conventions on ratification. Yet so oblivious were those debating the new document as to the lengths that copyright protection would be taken that The Federalist Papers rejected a constitutional protection of press freedom on the grounds that “no power is given by which restrictions may be imposed.”³⁶⁸

What is the relation of this endorsement of a wide-ranging and well-nigh unlimited freedom of the press to early American copyright law? Simply this: it is likely that the early American intellectual property balance was influenced, not only by anti-monopoly sentiment, but also and perhaps more decisively by a profound rejection of licensing and censors especially, and of restraints on speech in general, for any reason. The transcendent value of free expression for rational agents and democratic self-governors may account in part for the dearth of successful copyright suits in the early decades of the United States.³⁶⁹

The Supreme Court arguably resolved the question of abridgement of the freedom of speech by copyright in rather too hasty a fashion. In relying solely upon the internal structure of copyright as influenced by the frankly anti-constitutional views of Justice Story, it neglected to engage in the sort of inquiry into the type of abridgements that the Framers anticipated would actually occur under the Copyright Clause in drafting the Bill of Rights.³⁷⁰ Compare this refusal to discuss the Copyright Act of 1790 or the common law of copyright in determining a minimum standard for abridgement of “the freedom of speech” to the careful attention devoted to the English and American law of both seditious and private libel in cases like *Sullivan*,³⁷¹ or to the common law right to jury trial in Seventh Amendment cases.³⁷²

& POLITICS 135, 147 (1996-97). See Jane Ginsburg & John Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1, 1-18 (1988).

367. See, e.g., *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

368. THE FEDERALIST NO. 84, at 535 (Alexander Hamilton) (B. Wright ed., 1961).

369. See Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, at n.24 (1998) (collecting copyright cases denying injunctions in 1820s and 1830s).

370. See Phillips, *supra* note 184.

371. See *New York Times Co. v. Sullivan*, *supra* note 359, at 273-77.

372. See *Patton v. United States*, 281 U.S. 276, 288 (1930) (interpreting the right to jury trial under the Seventh Amendment to preserve at a minimum “a trial by jury as understood and applied at common law, and [to] include[] all the essential elements as they were recognized in this country and England when the Constitution was adopted”). The

My analysis of the First Amendment implications of the creeping advance of copyright to encompass uses of works formerly sheltered by limited term or restricted scope is not meant as a rigorous application of contemporary free speech doctrine. The Court's recent case law on intermediate scrutiny of content-neutral speech regulations has been ably and exhaustively applied to copyright extension by the briefs of the plaintiffs in *Eldred v. Reno*.³⁷³ Yochai Benkler has performed a similar task with regards to the DMCA's anti-circumvention prohibitions, UCC Article 2B, and the proposed Collections of Information Antipiracy Act.³⁷⁴

What I advocate here is an originalist inquiry into copyright and free expression, and into the need for a reading of the First Amendment that would provide as much protection against censorship via copyright as by any other means. In the absence of such a thorough and systematic inquiry into the historical and philosophical conflict between speech interests and print monopolies, it will be all too easy for courts to conclude, as the *Eldred* court did, that "there are no First Amendment rights to use the copyrighted works of others."³⁷⁵

The reception toward First Amendment defenses to copyright claims in the courts will depend on whether judges perceive First Amendment rights to be threatened by increasingly broad copyright laws.³⁷⁶ Far from being "no essential part of any exposition of ideas,"³⁷⁷ like obscenity or fighting words, imitation and quotation "is almost as much a part of free

language of the Seventh Amendment parallels that of the First in that both are unequivocal. Compare U.S. CONST., amend. VII ("the right of trial by jury shall be preserved") with U.S. CONST., amend. I ("Congress shall make no law . . . abridging the freedom of speech. . ."). Recently the Supreme Court relied upon early American practice under the Copyright Act of 1790, under which copyright actions for damages were tried at law and before a jury, along with the similar English practice under the common law and Statute of Anne, to strike down a section of the Copyright Act that abridged the Seventh Amendment right to jury trial. See also *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

373. See, e.g., *Eldred Memorandum*, *supra* note 201, *passim*. The Berkman Center for Internet and Society at Harvard Law School maintains a website on the *Eldred v. Reno* case with links to the legal documents at <http://cyber.law.harvard.edu/eldred-reno/legaldocs.html>.

374. See Benkler, *supra* note 12.

375. *Eldred v. Reno*, 74 F. Supp.2d 1, 3 (D.D.C. 1999) (granting judgment on the pleadings against plaintiff's First Amendment challenge).

376. Cf. 1 MELVILLE NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10[A], at 69 (1998) ("Rather surprisingly, up to now the Supreme Court of the United States has not found it necessary fully to delineate the respective claims of copyright and freedom of speech.").

377. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

speech as the right to use our tongues.”³⁷⁸ The view must be fostered among judges and legislators alike that cyberspace deserves First Amendment protection as much from expansive copyright enforcement as from the vague indecency provisions of the Communication Decency Act held invalid in *ACLU v. Reno*.³⁷⁹

Congress should be required to use more “sensitive tools” to enforce the “separation of legitimate from illegitimate speech” in making copyright legislation.³⁸⁰ However, whether judges in particular will take the trouble to test a proposal for overbreadth, vagueness, or similar vices may rest on how well they have been convinced that constitutional values will be served by doing so.³⁸¹ Hence some discussion is needed as to whether copyright’s “engine of free expression” is not in fact operating more like a series of brakes, roadblocks, and checkpoints on the information super-highway.

B. Independent Web Publishing: The Rise of the Cyber-Yeoman

In one entry, the Oxford English Dictionary defines the “yeoman” as “one who cultivates his own land.”³⁸² The yeomanry was often juxtaposed on the one hand to the nobility, the gentlemen, and on the other to the

378. *Milwaukee Social Democratic Publ'g Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting) (referring to the use of the mails).

379. *See Copyright Piracy, and H.R. 2265, The No Electronic Theft (Net) Act: Hearing on H.R. 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. of the Judiciary*, 105th Cong. 156 (1997) (statement of David Nimmer) (arguing that with overbroad intellectual property laws, “the danger arises that the Internet itself could [be] prosecuted out of existence”).

380. *Speiser v. Randall*, 357 U.S. 513, 525 (1958). *See also, e.g., NAACP v. Button*, 371 U.S. 415, 433 (1963).

381. *Cf. Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp 2d 211, 222 (S.D.N.Y. 2000) (weighing society-wide benefits of the DMCA’s anti-circumvention provisions only against the costs to particular defendants prevented from publishing computer code, information “best treated as a virtual machine” and “arguably” of no First Amendment value therefore disregarding the society-wide costs imposed by encryption technologies that render the fair use of digital content impossible); *but see Los Angeles Times v. Free Republic*, No. 98-7840 (C.D. Cal. Nov. 9, 1999), available at <http://www.techlawjournal.com/courts/freerep/19991108.htm> (relying upon *Harper & Row* to hold that while “defendants and users of freerepublic.com might find [linking] less ideal than being able to copy entire news articles verbatim, their speech is in no way restricted by denying them the ability to infringe on plaintiffs’ exclusive rights in the copyrighted news articles”) (emphasis added); *see also Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1295-96 (D. Utah 1999) (cursorily rejecting First Amendment defense to contributory infringement action premised upon hyper-text links, and granting preliminary injunction against defendant’s linking to sites that posted religious documents “alleged to infringe plaintiff’s copyright”).

382. 20 OXFORD ENGLISH DICTIONARY, “yeoman,” definition II.4.a., at 41.

class of farmers more beholden to the landowners, whether as renters or as agricultural wage-laborers. Dr. Price distinguished this class by its self-sufficiency, saying that since they “maintain themselves and families by the produce of the ground they occupy” and by cattle “kept on a common,” they “therefore have little occasion to purchase any of the means of subsistence.”³⁸³ As we have seen, the English yeomanry is said by some to have enjoyed a “golden age” between the decline of serfdom and the growth of an agricultural and manufacturing proletariat.

Whether this is an accurate historical characterization or not, it is an apt analogy to contemporary developments in cyberspace, or more formally, on the National and Global Information Infrastructure. The rise and explosive growth of the World Wide Web has represented a movement “up from serfdom,” by providing an alternative to the well-documented moral and intellectual serfdom imposed by the mass media. Television and radio, and to a lesser extent print, suffer from a restricted range of political coverage,³⁸⁴ a narrow and stultifying range of debate,³⁸⁵ excessive dependence upon the favor of the political officials it claims to cover objec-

383. DR. RICHARD PRICE, 2 OBSERVATIONS ON REVERSIONARY PAYMENTS 159 (6th ed. London, W. Morgan 1803), *quoted in* MARX, *supra* note 37, at 360.

384. See The Freedom Forum Online, ABC, CBS, NBC, *Downsizing Overseas Bureaus, Discuss Shared Effort with CNN* (Oct. 17, 1998) (<http://www.freedomforum.org/professional/1998/10/27downsize.asp>) (“It’s . . . cheaper and easier to use more entertainment-driven news rather than complex international stories, said Ed Turner, former CNN executive and now a fellow at The Freedom Forum’s Media Studies Center.”).

385. Dissenting voices and facts and images unfavorable to the war effort were almost entirely silenced during the buildup to and prosecution of the Persian Gulf War. See DOUGLAS KELLNER, *THE PERSIAN GULF TV WAR* (1992) (criticizing media complicity with Pentagon propaganda); JOHN MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR* (1992) (same). To take another example, during the 1999 Kosovo bombing campaign, only 5% of sources on ABC’s Nightline were critical of the Administration’s policy, along with only 10% of those on PBS’s News Hour with Jim Lehrer. See Fairness and Accuracy in Reporting, *Slanted Sources in NewsHour and Nightline Kosovo Coverage* (May 1999), available at (<http://www.fair.org/reports/kosovo-sources.html>). And it has long been the practice of political discussion programs, including those on PBS, to stage a “debate” between far-right pundits such as Pat Buchanan, Robert Novak, or John McLaughlin, and centrists such as Bill Press, Mark Shields, or former CIA official Tom Braden. See Jim Naurekas, *Crossfire: Still Missing a Space on the Left*, EXTRA! UPDATE, (Apr. 1996) (<http://www.fair.org/extra/9604/crossfire.html>); *Public TV Tilts Toward Conservatives*, EXTRA!, (June 1992) (<http://www.fair.org/extra/best-of-extra/public-tv-conservatives.html>); Jeff Cohen, *Television’s Political Spectrum*, EXTRA! (July/August 1990) (<http://www.fair.org/extra/best-of-extra/tv-spectrum.html>).

tively,³⁸⁶ and the distortions wrought by for-profit operation and advertiser influence.³⁸⁷

These considerations account for much of the enthusiasm many felt with the advent of the Internet, perceived as a forum for the exchange of information and opinion. Justice Stevens' majority opinion in *Reno v. ACLU*³⁸⁸ captured the radical difference between the Internet and "old media" by describing this new communications space in language rarely used in reference to print publishing, radio or television. Cyberspace, he wrote, is characterized by "astoundingly diverse content,"³⁸⁹ and indeed, he went on, the "content on the Internet is as diverse as human thought."³⁹⁰ There reigns online a "relative parity among speakers."³⁹¹ For between zero and a few hundred dollars annually, anyone can become a modern-day Tom Paine, a "town crier with a voice that resonates farther than it could from any soapbox."³⁹²

386. The print and broadcast media corporations depend upon the federal government to pass legislation relating to the broadcast spectrum, content regulation, and copyright law; to approve mergers; to funnel large amounts of advertising their way; and for preferential treatment in wartime. Lawsuits were brought during the Persian Gulf War by *The Nation* magazine and Agence-France Presse challenging discriminatory grants of access to a system of "press pools" organized by the U.S. Department of Defense as a "trusted agent of the U.S. military." Capt. Jon Mordan, *Press Pools, Prior Restraint and the Persian Gulf War*, AIR CHRONICLES (visited Apr. 27, 2000) (<http://www.airpower.maxwell.af.mil/airchronicles/cc/mordan.html>); cf. Thomas G. Havener, *Assault on Grenada and the Freedom of the Press*, 36 CASE W. RES. L. REV. 483 (1986) (discussing the constitutional arguments in favor of press access to military operations and concluding that such a right exists). A number of broadcast interests contributed at least \$9.5 million over the past decade in lobbying and unknown amounts of in-kind compensation for the estimated \$70 billion giveaway of the digital broadcast spectrum. See Common Cause, *Channeling Influence: The Broadcasting Lobby and the \$70 Billion Free Ride* (1997) (http://www.commoncause.org/publications/040297_rpt.htm). Political campaigning accounted for some \$400 million in television advertising revenue in 1996 alone. See *id.* The multi-billion dollar merger of AOL and Time Warner awaits potential FTC/DOJ enforcement actions and Congressional hearings. See *AOL's Big Bite*, THE NATION, Jan. 31, 2000, at 3 (editorial).

387. See generally DEAN ALGER, MEGAMEDIA: HOW GIANT CORPORATIONS DOMINATE MASS MEDIA, DISTORT COMPETITION, AND ENDANGER DEMOCRACY (1998); BEN BAGDIKIAN, THE MEDIA MONOPOLY (5th ed. 1997).

388. 521 U.S. 844 (1997).

389. *Id.* at 2343.

390. *Id.* at 2344 (internal quotation marks omitted).

391. *Id.*

392. *Id.* As of 1998, over 88.5% of the 461 public libraries serving populations of 100,000 or more offered Internet access to the public, along with more than 50% of classrooms in the public schools. See American Library Association, *How Many Libraries Are on the Internet?* LARC Fact Sheet Number 26 (visited Apr. 24, 2000)

In short, as Andrew Shapiro has written, “new technology is allowing individuals to take power from large institutions such as government corporations and the media. To an unprecedented degree, we can decide what news and entertainment we’re exposed to, . . . and even how . . . political outcomes are reached.”³⁹³ The benefits of such a system of information storage and retrieval was prophesied as long ago as 1945, in Vannevar Bush’s proposal of a “memex” which would harness the associational genius of the human mind such that “books, records, and communications . . . may be consulted with exceeding speed and flexibility.”³⁹⁴ Cyberspace reveals the first faint glimmers of a sort of “groupmind,” the “Over-soul” that Emerson called the “Supreme Critic on the errors of the past and the present, and the only prophet of that which must be . . . within which every man’s particular being is contained and made one with all other.”³⁹⁵

In cyberspace, thinkers and writers may speak frankly and from the heart, without worrying about offending bosses, advertisers, or politicians. Thus liberated, they go about constructing in tandem a cultural “operating system,” using “the entire world as its talent pool.”³⁹⁶ Not only has that

(<http://www.ala.org/library/fact26.html>). Home Internet access is available to anyone who can manage between zero and a few hundred dollars in installment payments for a computer, a telephone connection, and between zero and another hundred or so dollars annually for dial-up access. PeoplePC, among others, offers “new computer, a suite of software, and unlimited Net access” for \$24.95 monthly, and recently “brokered” the deal between Hewlett Packard and Ford that will provide the auto maker’s 350,000 global workforce with 500-megahertz computers and unlimited Internet access for \$5 monthly. See Leander Kahney, *PeoplePC Drives Easy Bargain*, WIRED NEWS (Feb. 3, 2000) (<http://www.wired.com/news/business/0,1367,34096,00.html>); Keith Bradsher, *Ford Offers Workers PC’s and Internet Service for \$5 a Month*, N.Y. TIMES, Feb. 4, 2000, at A1, available at (<http://www.nytimes.com/library/tech/00/02/biztech/articles/04ford.html>). None of this is to say that all Americans, let alone citizens of other nations, have the ability and desire to acquire home access. See Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT L.J. 47, 122 nn.381-82 (1999) (noting that many home Internet users tend to be affluent, and that many Americans do not have telephones).

393. ANDREW SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* xiii (1999).

394. Vannevar Bush, *As We May Think*, THE ATLANTIC MONTHLY, July 1945, at 106-07. As he concludes: “The applications of science have . . . enabled [man] to throw masses of people against one another with cruel weapons. They may yet allow him truly to encompass the great record and to grow in the wisdom of race experience.” *Id.*

395. Ralph Waldo Emerson, *The Over-Soul*, in *ESSAYS: FIRST SERIES* (1841).

396. Eric S. Raymond, *White Paper: The Cathedral and the Bazaar*, (visited Apr. 13, 2000) (http://www.redhat.com/support/wpapers/cathedral/whitepaper_cathedral.html) (essay outlining some of the founding principles of the Open Source movement, which advocates the open licensing of software so as to be freely used and adapted).

talent pool amassed a digital library comparable in terabytes of data to the Library of Congress,³⁹⁷ but that library is searchable with unprecedented efficiency.³⁹⁸

A few examples of the Net's diversity will make this discussion concrete. Unparalleled access to the array of thinkers and writers from Aesop and Louisa May Alcott to Emile Zola and Zoroaster is provided by thousands of commercial, educational, and personal Web pages.³⁹⁹ The world-views represented by such collections may not be "as diverse as human thought," but they do more or less encompass Western thought, with increasingly comprehensive multicultural additions.

The Internet also provides a wealth of political information and opinion of far more depth and breadth of scope than anything available on television or radio. For example, Think for Yourself, a site devoted to the adverse consequences of the war on drugs, reproduces a wide range of views from ACLU Position Papers to a 1996 Rand Corporation study on mandatory minimum sentencing and the efficiency of incarceration versus treatment.⁴⁰⁰ On the foreign policy side, the Iraq Action Coalition, maintained by Rania Masri, has assembled an impressive array of evidence and

397. While the Library of Congress is estimated to house around 20 terabytes of text, the Internet Archive has saved more than 14 terabytes of public Internet content as of early 2000. See Brewster Kahle, *Archiving the Internet*, SCI. AM., Nov. 4, 1996, at 82. The images on the Internet alone would fill over 1 million printed volumes. See Brewster Kahle and Peter Lyman, *Archiving Digital Cultural Artifacts: Organizing an Agenda for Action*, D-LIB MAGAZINE July/Aug. 1998, available at <http://www.dlib.org/dlib/july98/07lyman.html>.

398. See, e.g., Google.com, *Company Info* (<http://www.google.com/company.html>) (describing how Google's associational system for searching the Internet "uses the collective intelligence of the web to determine a page's importance").

399. These sites include Project Gutenberg, (<http://promo.net/pg>), the *Online Books Page* at the University of Pennsylvania, (<http://digital.library.upenn.edu/books>), the Malaspina Great Books page, (<http://www.mala.bc.ca/~mcneil>), the Internet Classics Archive at MIT, (<http://classics.mit.edu>), the Internet History Sourcebooks at Fordham, (<http://www.fordham.edu/halsall>), the Christian Classics Ethereal Library at Wheaton, (<http://ccel.wheaton.edu>), the Constitution Society, (<http://www.constitution.org>), Findlaw.com, (<http://www.findlaw.com>), the McMaster Archive of the History of Economic Thought, (<http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/>), and those of countless individuals. The *Online Books Page* alone provides access to over 10,000 free, and freely modifiable and adaptable, electronic books. See (<http://digital.library.upenn.edu/books>). Project Gutenberg has published over 1,700 public domain texts. See (<http://promo.net/pg>).

400. See Think for Yourself, *War on Drugs Archives* (visited Dec. 20, 1999) (<http://turnpike.net/~jnr/wodarts.htm>).

argumentation in support of the view that economic sanctions are unproductive and brutal.⁴⁰¹

While the Internet has continued to broaden public discourse, the major media have devoted even more time and resources to the minutiae of the Simpson and Menendez cases, the death of Lady Diana, and Monica Lewinsky's shopping sprees, than to, for example, the plight of the Iraqi people or the justifications for maintaining sanctions. The old mass media has thus relinquished its claim as servant to the public sphere, to be supplanted in that role by Internet discourse and independent web publishing.

C. Digital Fencing and Estate Clearing in Cyberspace

Traditional media have characterized the noncommercial Internet in a manner closely resembling the view of the public domain held by the Stationers and other copyright industry players: that it is a waste, an incoherent babble, a thicket of weeds and brambles. Internet content is commonly portrayed as untrustworthy, fanatical, or merely frivolous.⁴⁰² Many argue that in the absence of expanded intellectual property protections, Internet content will "devolve into something akin to advertising, or more specifically, infomercials," and will therefore "slide toward information that someone is attempting to foist on the viewer—partisan, untrustworthy, and thin in usable content."⁴⁰³

While independent web publishing cannot exist without its small plots of "land" on university servers and free web hosting sites, just as vital are

401. Through many dozens of available documents, the site contends that the policy of economic sanctions on the Iraqi people leads to thousands of avoidable deaths monthly, violates international law, strengthens the regime, decimates the Iraqi middle class, and has been condemned by people ranging from human rights advocates and U.N. officials to Catholic bishops. See Iraq Action Coalition, *Impact of the 8-Year Sanctions War on the People of Iraq* (visited Dec. 20, 1999) (<http://leb.net/~iac/factsheet.html>) (collecting sources).

402. The New York Times, in an article about drug information on the Internet, writes that "[p]artly owing to free-speech protection, the Internet lacks a quality-control mechanism to separate fact from hyperbole or from outright falsehood." Christopher S. Wren, *A Seductive Drug Culture Flourishes on the Internet*, N.Y. TIMES, June 20, 1997, at A1. After the Heaven's Gate suicides, the cult's use of the Web was regarded by the Times as "one more shred in an accumulating pile of evidence that there are networks of people lurking out there with alien values, and that anyone, any age, might stumble onto them with a mouseclick." *Id.* The Wall Street Journal's editor of online services, responsible for one of traditional media companies' few pay sites, claims that: "Search engines cull the equivalent of 18 months of junk mail." Jesse Freund, *Just Outta Beta: The Street Strikes Back*, WIRED, June 1997, at 157. Then again, maybe some people are simply not very good at using search engines.

403. Carol Rose, *The Several Uses of Property*, 83 MINN. L. REV. 129, 148 (1998).

its easements through the intellectual commons. In order to transcend the monolithic public sphere constituted by the New York Times, the Washington Post, Disney-GE-Westinghouse, and now AOL Time Warner, and to enshrine a new panoply of “counter-public” spheres, the Tom Paines of cyberspace must be able to ground their discourse in the copyrighted material of Big Media (which themselves enjoy at best an arbitrary association with reliable information⁴⁰⁴). Without the public domain, without the right to transform works new and old *sans* prior approval, independent Web publishing will have its vital economic and discursive conditions ripped out from under it.

Contemporary pushes toward the enclosure of the intellectual commons threaten to do just that. As I have argued, the most pressing threat in the short term is posed by ISP liability, of private profit-oriented copyright dispute resolution in cyberspace. Media companies will more frequently request that telecommunications and Internet companies, often owned by those same media companies and in any case frightened by the prospect of massive civil and criminal liability, delete the allegedly infringing content of a subscriber paying between zero and twenty dollars per month.⁴⁰⁵ The post-DMCA Internet will feature even more of those damnable “404 - file not found” messages than it currently does. As media companies expand their demand-letter operations from commercial “piracy” to include negative commentary, transformative uses, and what they deem to be a little bit too much sampling or quotation, the ranks of the independent Internet publishers will be radically depopulated.⁴⁰⁶

404. See, e.g., Jim Naureckas, *Legitimate Targets? How U.S. Media Supported War Crimes in Yugoslavia*, EXTRA!, July/Aug. 1999 (<http://www.fair.org/extra/9907/kosovo-crimes.htm>); Jim Naureckas, *Rescued from the Memory Hole: The Forgotten Background of the Serb/Albanian Conflict*, EXTRA!, May/June 1999 (<http://www.fair.org/extra/9905/kosovo.html>); Seth Ackerman; *Withholding the News: The Washington Post and the UN-SCOM Spying Scandal*, EXTRA!, Mar./Apr. 1999 (<http://www.fair.org/extra/9903/unscom.html>); Jeff Cohen & Norman Solomon, *CNN's "Tailwind" and Selective Media Retractions*, EXTRA!, Aug. 1998 (<http://www.fair.org/extra/9808/tailwind.html>); Fairness and Accuracy in Reporting, *Gulf War Stories the Media Loved - Except They Aren't True*, EXTRA!, 1991 (<http://www.fair.org/extra/best-of-extra/gulf-war-not-true.html>); Jeff Cohen & Norman Solomon, *30-Year Anniversary: Tonkin Gulf Lie Launched Vietnam War*, MEDIA BEAT, July 27, 1994 (<http://www.fair.org/media-beat/940727.html>).

405. Various companies, including Prodigy Internet, have demonstrated their willingness to censor user content to increase profitability. See HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 277 (1993) (“[T]here are actually banks of people sitting in front of monitors somewhere, reading postings from Prodigy subscribers, erasing the ones with offensive content.”).

406. See *Zeran v. America Online Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (“Whenever one was displeased with the speech of another party conducted over an interactive

Even presidential candidates are taking advantage of copyright's un-mooring from precisely delimited rights. George W. Bush's campaign sent a cease and desist letter to Zack Exley, the creator of (gwbush.com), a savage parody of Bush's own site, threatening legal action for Exley's infringing "graft" of "inappropriate" material "onto the words, look and feel of the Exploratory Committee's site."⁴⁰⁷ Bush's own response to the site was that "[t]here ought to be limits to freedom."⁴⁰⁸ In a clear case of overreaching, the letter demanded that Exley "remove immediately from [the] site all of the materials and arrangements you have taken from georgewbush.com, with the exception of such *pure facts*" as "may be shown by you as a permitted 'fair use.'"⁴⁰⁹ The letter cited *Harper & Row* to clear up any "confusion" on Exley's part as to the "certain amount" of fair use available in "particular defined and reasonable circumstances."⁴¹⁰ Whether because of concern for the reaction for telecommunications companies or ignorance of legal remedies, no demand appears to have been made on Exley's ISPs, which might have threatened the site's existence.

Yet another piece of copyright litigation, crucial to the prospects for independent Web publishing, deals with a questionable expansion of copyright scope. The Los Angeles Times and the Washington Post are well on their way to securing an injunction and damages against Free Republic, a conservative web site, premised upon its practice of allowing users to post newspaper articles for discussion.⁴¹¹ The owner of the site claims that

computer service, the offended party could simply 'notify' the relevant service provider, claiming the information to be legally [infringing]. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability.").

407. Letter from Benjamin L. Ginsburg to Zack Exley of April 1999 *available at* (<http://www.gwbush.com/litigiousbush.htm>). Incidentally, Exley's posting of the letter itself could even be argued to constitute infringement under *Harper & Row*, despite its public interest ramifications (the Bush campaign's threats received widespread national and international media coverage). Exley was subsequently referred to the FEC for violation of the campaign finance laws. *See* (www.gwbush.com) for developments.

408. *See* George W. Bush (visited Apr. 24, 2000) (<http://www.georgewbush.com>).

409. Letter from Benjamin L. Ginsburg, *supra* note 407. Fair use is, of course, hardly limited to "pure facts" (even now). Furthermore, to require every political speaker to somehow demonstrate to the satisfaction of a politician's legal representatives that their quotation of his campaign materials is indisputably protected is virtually the definition of a prior restraint on speech.

410. *Id.*

411. *See* Greg Miller, *Web Copyright Suit Goes to Heart of Debate; Internet: L.A. Times, Washington Post Take Action against Free Republic, which Copies and Posts their Articles*, L.A. TIMES, Oct. 1, 1998, at D1.

“posting the whole article is necessary so readers can dissect them for liberal bias.”⁴¹²

The site appears to have commercial elements, however, including advertisements for other conservative sites and its owner’s business,⁴¹³ and this could adversely affect a claim of fair use under the standard test. Nevertheless, the case could set a broad precedent regarding posting articles on the Internet.⁴¹⁴ Noncommercial sites routinely post articles for discussion, or to document claims made on a site, a practice not dissimilar to the reading of news articles into the Congressional Record.⁴¹⁵ The examples are far too numerous to paint a representative picture of, but they range from web pages about copyright⁴¹⁶ to Antiwar.com⁴¹⁷ and the Iraq Action Coalition discussed above.⁴¹⁸

The Free Republic case represents a first step towards the depopulation of the independent Web publishing community, by revoking its “ancient and venerable rights” under the First Amendment and fair use doctrine.⁴¹⁹ But the matter will not end with Free Republic. Eventually the charmed convergence of rights and utility tends towards an absolute right of copy-

412. Malcolm Maclachlan, *Conservative Site Named in Copyright Suit*, TECHWEB, Oct. 2, 1998 (<http://www.techweb.com/wire/story/TWB19981002S0017>).

413. *See id.*

414. *See* Miller, *supra* note 411, at D1 (“It’s a very important lawsuit because it’s a question that needs to be settled. . . . The Net is one giant copying machine, and producers, authors and content providers have been worried that the Net would threaten their basic economic incentives.” (quoting John Shepard Wiley, Jr.)).

415. The beginnings of a new democratic republic arose from the English coffee houses and Parisian salons of the eighteenth century, thanks to a “commercialization of cultural production” that allowed a mass public to emerge. Much as it does today, this mass public depended upon the widespread ability to participate in the new “market for cultural goods,” e.g., novels, journals, and other types of cultural production. *See* JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 38 (Thomas Burger trans., 1989) (1962).

416. *See* Dennis Karjala, *Opposing Copyright Extension* (visited Apr. 24, 2000) (<http://www.public.asu.edu/~dkarjala/>).

417. *See* Antiwar.com (visited Apr. 24, 2000) (<http://www.antiwar.com>).

418. *See* Iraq Action Coalition, Iraq Action Coalition (visited Apr. 24, 2000) (www.leb.net/~iac); *see also* Sudan Net, *Sudan Net Home Page* (visited Apr. 24, 2000) (www.sudan.net) (numerous news articles on southern Sudanese famine and American cruise missile attack on Khartoum pharmaceutical plant).

419. This fact may be obscured by the case’s unsympathetic defendant: after all, he allegedly used the site to promote his business and is listed by Yahoo! under Government: Politics: Political Opinion: Conspiracy: United States. In many respects, he is as well chosen for such a “groundbreaking” suit as are the various artistic and political sites used by the ACLU to challenge the Communications Decency Act and Child Online Protection Act (since, after all, hardcore commercial pornographic sites probably economically benefit even more than they do when such laws are struck down).

right holders will prevent even small uses of their works, as represented by the retraction of fair use in the *Nation* case and by the DMCA's incentive structure for ISPs to err on the side of overprotection. The right of the small Internet speaker to gain credibility for marginalized positions by appealing to mainstream sources will be revoked, and the class of modest but relevant Web publishers wiped out.

The extension of the copyright term will only exacerbate the threat that ISP liability poses, by expanding the realm of copyrighted material; any reference to this material will be subject to conclusory claims of infringement and subsequent deletion. A case brought by Eric Eldred and others challenges the recent retroactive 20-year extension of copyright.⁴²⁰ Michael S. Hart, director of the Gutenberg Project, one of the largest free book sites, estimates that the new law "will essentially prevent about one million books from entering the public domain over the next 20 years."⁴²¹ Eric Eldred, who like Zack Exley runs his independent e-text site, Eldritch Press, out of his home, warns that "[i]f everything is private property forever, which is the way things are going, then there can't be a growing, global, free public library."⁴²² The independent web will be increasingly silenced as copyright industries reassert control over the "legal piracy" of public domain works through synergistic combination of legislation, licensing, and technology.

Charles Nesson makes a compelling case that such an expansion of copyright "impedes scholarship," with his story of an MIT Shakespeare database, intended to study the Bard and his context, that contains "all of the texts which precede Shakespeare."⁴²³ The problem is that

as the MIT scholars move forward towards the present, they run into copyright, and they begin to omit texts . . . there is no feasible way to clear rights for a project this comprehensive. . . . The holes become larger and larger until they eventually merge, and the content of the database effectively evaporates.

This means a Faulkner scholar can't do what a Shakespeare scholar can. The electronic revolution in scholarship brings unequal benefits. How do authors benefit if their work is omitted

420. See *Eldred v. Reno*, 74 F. Supp. 2d 1 (1999).

421. Carl S. Kaplan, *Free Book Sites Hurt by Copyright Law*, N.Y. TIMES ON THE WEB, Oct. 30, 1998 (<http://www.nytimes.com/library/tech/98/10/cyber/cyberlaw/30law.html>).

422. *Id.*

423. See Charles Nesson, *Fair Use* (visited Nov. 23, 1998) (<http://cyber.harvard.edu/fairuse/index.html>).

from an online database which may become the new virtual, global public library?⁴²⁴

The same story could be told about the Gutenberg Project and other “Great Books” pages, the plethora of web sites posting historical documents, and Web museums; even the Perseus Project at MIT, comprising ancient texts, is threatened with regard to its store of translations and commentary. Matters will only get worse as the “holes,” and the point in time in which they merge, recede further into the past with the advance of copyright law and trusted systems into the commons.

In the longer term, however, the threat to independent Web publishing posed by ISP liability may be eclipsed by the unprecedented power of trusted systems to afford complete control over access to a work. The DMCA’s legal protection of trusted systems, accompanied by UCITA’s provisions for technological enforcement of mass market information licenses, will provide the legal framework for the transition to complete control. As Lawrence Lessig writes, “Far more efficiently and far more completely than law, this code will give copyright holders the power to control access and use, the power to disable fair uses, and the ability to keep control of their material for much longer than the statutory life.”⁴²⁵ To the extent that the one-sided rhetoric of rights-piracy and utility-waste continues to dominate the official discourse on copyright policy, the Net’s version of the English yeomanry will have no means of resisting the theft of their monopoly-restraining rights, nor of preserving their valuable transformative works.

As the public’s easements in the public domain are transformed into piracy, into trespass, independent Web publishing will be steadily displaced by intensive exploitation of established works. The Oversoul that is cyberspace will give way to the Celestial Jukebox, to the corporate synergies of the diminishing number of publishers, networks, and studios. The agenda hinted at by the *Harper & Row* opinion, and aggressively advocated by the White Paper and other documents, namely the capture by copyright holders of the full social value of their works and the expansion of copyright infringement to encompass interference with any new licensing scheme, leaves no room for the independent Internet publisher’s necessary easement upon the intellectual commons.⁴²⁶ Before this counter-

424. *Id.*

425. Lawrence Lessig, *Opening Remarks, Atlantic Unbound Roundtable: Life, Liberty, and . . . the Pursuit of Copyright?* (visited Dec. 17, 1998) (<http://www.theatlantic.com/unbound/forum/copyright/lessig1.htm>).

426. *See, e.g.,* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590, 593 (1994) (remanding for determination of “whether unrestricted and widespread conduct of the

revolution in the nature and composition of cyberspace communication is permitted to occur, an inquiry into the historical and philosophical intersection between copyright and the First Amendment must be conducted in the courts. As was said in another context, “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”⁴²⁷

VI. CONCLUSION

In England, over time, the twin principles that it is the property owner’s right to do as he wills with his own and that freedom in a commons brings ruin to all⁴²⁸ advanced hand in hand to subvert more and more of the yeomanry’s “ancient and venerable rights and privileges.” As Foucault wrote, the “transition to intensive agriculture exercised, over the rights to use common lands, over various tolerated practices, over small accepted illegalities, a more and more restrictive pressure.”⁴²⁹ In the same way, the transition from the Industrial Age’s paradigm of the sale of literary works to the Information Age’s paradigm of intensive synergistic exploitation of cultural products is exercising an increasingly restrictive

sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original,” namely the “effect of 2 Live Crew’s parodic rap song” on the “potential licensing market” for a “derivative . . . non-parody, rap version of ‘Oh, Pretty Woman’” (internal quotes omitted); *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 568 (1985) (holding that the “fair use . . . inquiry must take account not only of harm to the original but also of harm to the market for derivative works”); *Princeton Univ. Press, Inc. v. Michigan Document Serv., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc) (mandating licensing scheme for photocopying of course materials); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994) (mandating licensing scheme for research photocopying); *WHITE PAPER*, *supra* note 278, at 79 (interpreting precedent to state that the economic effect of the use “weighs against a defendant not only when a current market exists for a particular use, but also when a potential market could be exploited by the copyright owner. Harm in either market, will, in most cases, render a use unfair.”) (citation omitted); *see also* Fisher, *supra* note 212, at 1669-71 (arguing that broad definition of harm to actual or potential markets “will almost always tilt in favor of the plaintiff”). *But see, e.g.*, *Sony v. Universal Studios, Inc.*, 464 U.S. 417, 431-32 (1984) (holding that, despite existence of plaintiff’s proposed licensing scheme for VCRs, existence of substantial noninfringing uses of them provided grounds for a finding of fair use); *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1990) (holding that, despite existence of licensing system for video game cartridges, disassembly of object code for purposes of interoperability was fair use).

427. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (Powell, J., concurring) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

428. Hardin, *supra* note 129, at 1244.

429. FOUCAULT, *supra* note 1, at 85.

pressure on the public's rights to articulate its world and to access a common store of knowledge and expression.

As the yeomanry in its "golden age" had "little occasion to purchase any of the means of subsistence"⁴³⁰ so many users of the Internet have little need to depend on the captains of the content industries for "all the news that's fit to print." But those who feel liberated from a kind of intellectual serfdom by the Internet's advent may yet suffer the fate of the yeomanry after the enclosures and sweepings: "the peasant has again become a serf."⁴³¹ Relegated to the forums, chat rooms, and "letters to the editor" pages of the mega-sites of the content industries, made voiceless by revocations of rights in the public domain and "Fear, Uncertainty, and Doubt" campaigns against "untrustworthy information," the yeomanry of cyberspace will revert to Microserfs.⁴³²

As we know, the erstwhile English yeomanry, having been driven from its homes and into wage labor on capital farms or in the manufacturing towns, eventually rebelled against the Dickensian conditions and its return to serfdom, and extracted political concessions by concerted action. A new discourse of the "natural rights of man," and new forms of economics, provided the theoretical ammunition for their struggle.⁴³³

430. MARX, *supra* note 37, at 360.

431. *Id.* at 336.

432. "Fear, Uncertainty, and Doubt," or "FUD," is a marketing technique used when a competitor launches a product that is both better than yours and costs less, i.e. your product is no longer competitive." Roger Irwin, *What is FUD?* (<http://www.geocities.com/SiliconValley/Hills/9267/fuddef.html>) (providing a brief history of FUD tactics in the hardware and software industries).

433. See Thompson, *supra* note 92 (discussing the popularity of Thomas Paine's *The Rights of Man* and other rights-based political theories among advocates of workers and the poor in Britain); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 402, 437-46 (1988) (describing the theoretical "revolutions" in English political economy that helped enact the Factory Acts regulating the working hours of children and adults alike). Keynesian or demand-side economics, along with the theory of externalities, were influential in establishing that impoverishment and victimization by laissez-faire policies could be inefficient as well as unjust. See John Maynard Keynes, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 372-84 (1964).