THE COPYRIGHT CLAUSE, THE FIRST AMENDMENT, AND THE STRUCTURE OF THE CONSTITUTION

BRETT HARTMAN[*]

ABSTRACT

Countless pages have been written about the conflict between the First Amendment and Congressôs copyright powers. Many scholars considerð and properly rejectð basic arguments about the structure of the Constitution in attempting to resolve this conflict. However, a more robust structural resolution has been lacking. This Article attempts to provide a structural lens through which to view the tension between free speech and copyright. In particular, this Article argues that an expansive view of the First Amendment vis-à-vis Congressôs copyright power would be inconsistent with the enumeration of Congressôs powers in the Constitution. That is, the First Amendment should be read narrowly vis-à-vis the Copyright Clause so as to not too severely undermine Congressôs expressly granted power. This is in contrast with judicial invalidation of a state law under the First Amendment, whereby the stateôs general police power is left almost fully intact. Said differently, an expansive First Amendment could result in a substantial impairment of Congressôs copyright power, which is in contrast to the First Amendmentôs relatively minor impairment of every other enumerated power. While many other standards have been proposed to resolve this conflict, this Article takes seriously the structure of the Constitution in its formulation.

[*] Law Clerk to the Honorable Diarmuid F. OôScannlain, United States Court of Appeals for the Ninth Circuit. J.D. *magna cum laude*, Harvard Law School, 2011; B.S. *summa cum laude* in Economics, The Wharton School, University of Pennsylvania, 2008. I am grateful to the Harvard Law School for funding this Article through a Summer Academic Fellowship. I would like to thank Professor Mark Tushnet for all of his help in writing this Article. The views expressed here are wholly my own and do not necessarily reflect the views of the judge for whom I have clerked. Any errors are my own.

INTRODUCTION

The conflict is almost too obvious to be worth writing down. The Copyright Clause gives Congress the power ñ[t]o promote the Progress of . . . useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . .ò[1] Through this enumerated power, Congress has enacted the Copyright Act,[2] which, *inter alia*, grants the copyright owner, for a limited term,[3] the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work, and publicly perform or display the work.[4] Furthermore, the Copyright Act sets up a deluge of remedies for violations, ranging from injunctive relief to criminal actions.[5] In contrast, the First Amendment provides in pertinent part that ñCongress shall make no law . . . abridging the freedom of speech, or of the press . . . .ò[6]

Put simply, ñCopyright . . . empowers one private party to limit anotherôs speech. It potentially allows one private party, *A*, to tell another, *B*, that she cannot say (or publish or distribute) specific content, for example, because *A* has already said it . . . .ò[7] Yet, there was little actually written about this conflict until 1970.[8] Whether this void was due to formalistic legal thinking[9] or was a

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1 U.S. CONST. art. I, § 8, cl. 8.

2 The latest version is the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541. *See also* codified as amended at 17 U.S.C. §§ 101ï 810 (2006 & Supp. III).

3 *See* 17 U.S.C. § 302(a).

4 *See id.* § 106.

5 *See id.* §§ 502ï 06, 509.

6 U.S. CONST. amend. I.

7 C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 893 (2002); *see also* Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1181 (1970) (ñDoes not the Copyright Act fly directly in the face of [the First Amendment]? Is it not precisely a ólawô made by Congress which abridges the ófreedom of speechô and óof the pressô in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright?ò). Note that while copyright is not a direct congressional restriction on speech, indirect restrictions can come within the First Amendmentôs ambit. *See* Baker, *supra*, at 905; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 262 (1964) (suggesting that a plaintiff might have a right to prohibit or be compensated for a newspaperôs false speech about him if actual malice existed).

8 *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.10[A] (2011).

9 *See* 4 NIMMER & NIMMER, *supra* note 8, § 19E.02[A][3]; *see also* Nimmer, *supra* note 7, at 1180 (ñ[W]e often conceal from ourselves the fact that we ómaintain, side by side as it were, beliefs which are inherently incompatible . . . . We seem to keep these antagonistic beliefs apart by putting them in ñlogic-tight compartmentsòôò (alteration in original) (quoting JEROME FRANK, LAW AND THE MODERN MIND 32 (Transaction Publishers 2009) (1930))).

mere fact of history,[10] it has since been filled by an entire field of academic research.[11]

The purpose of this Article is to explore how best to resolve the conflict between Congressôs copyright power and the First Amendment. This Article proceeds as follows: Part I traces the scholarly debate over the conflict in question, from Professor Melville B. Nimmerôs classic treatment of the conflict, to the more modern scholarly debate. Part II places the debate over this conflict in terms of the debate over rules versus standards. Part II concludes that while rules have much to commend them, especially in the First Amendment context, they can be unworkable. In making this showing, Part II raises three primary critiques of Professor Nimmerôs classic treatment of the conflict. Part III then attempts to formulate a standard-based approach to reconciling the First Amendment and the Copyright Clause, one that gives due consideration to the structure of the Constitution. Part III then goes on to show why the proposed standard might be more desirable than other standards previously proposed in the literature.

I. THE SCHOLARLY DEBATE

There has been much written about the conflict between the Copyright Clause and the First Amendment. This Part surveys that literature. Section A begins by looking at the first breakthroughs in the field. Section B continues by framing the scholarly debate as it persists today.

A. Nimmer's Classic Formulation

In 1970, Professor Melville B. Nimmer wrote his seminal article on the conflict between the Copyright Clause and the First Amendment.[12] After identifying the conflict,[13] Professor Nimmer rejected the use of either structural arguments[14] or ad hoc balancing[15] to resolve the conflict. As Professor Nimmer explained, it cannot be that ñcopyright laws fall within a built-in exception to first amendment protectionò because ñ[i]f the constitutional grants of power to the Congress were not subject to the limitations imposed by the Bill of Rights, then

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10 *See* 4 NIMMER & NIMMER, *supra* note 8, § 19E.02[A][3].

11 *See* 1 NIMMER & NIMMER, *supra* note 8, § 1.10[A].

12 Nimmer, *supra* note 7.

13 *See id.* at 1180ï 81.

14 *See id.* at 1181ï 83.

15 *See id.* at 1183ï 84.

such limitations would have no meaning at all to a government whose only powers are derived from such grants.ò[16] Similarly, Professor Nimmer explained that it cannot be that the First Amendment supersedes the Copyright Clause; such reasoning would mean that, among other things, antitrust laws and perjury laws would be unconstitutional.[17] In rejecting the use of ad hoc balancing to resolve the conflict, which would require courts to ñweigh the interest in free speech as against the conflicting non-speech interest in a given case,ò Professor Nimmer reasoned that such balancing results in a ñóchilling effectô which would deter many from exercising their right to speak.ò[18]

Instead of either structural arguments or ad hoc balancing, Professor Nimmer argued that courts should use definitional balancing to resolve the conflict.[19] Definitional balancing, in Professor Nimmerôs view, requires identifying the interests behind the relevant constitutional clauses,[20] and then seeing whether the existing law serves the interests of one clause without encroaching on the interests of the other.[21] For the conflict in question, Professor Nimmer defined the interests behind the clauses as follows: ñ[T]he dual premises [behind the Copyright Clause are] that the public benefits from the creative activities of authors and that the copyright monopoly is a necessary stimulus to the full realization of such creative activities.ò[22] As to the First Amendment, Professor Nimmer identified three purposes behind freedom of speech and the press.[23] First, free speech is ña means to the achievement of a democratic society.ò[24] That is,

> [F]or a self-governing people, ñthe final aim . . . is the voting of wise decisions. The voters, therefore, must be made as wise as possible. . . . They must know what they are voting about. And this, in turn, requires that so far as

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16 *Id.* at 1181ï 82.

17 *See id.* at 1182ï 83; *see also id.* at 1182 n.7 (ñThe fact that the first amendment was approved by the Congress in 1789 and became effective in 1791 lends added credence to the conclusion that copyright is not prohibited by the first amendment.ò).

18 *Id.* at 1183.

19 *See id.* at 1184ï 86.

20 *See id.* at 1186.

21 *See id.* at 1189.

22 *Id.* at 1186.

23 *See id.* at 1188; *see generally* Whitney v. California, 274 U.S. 357, 375ï 76 (1927) (Brandeis, J., concurring) (noting that the founding fathers believed free speech and assembly discussion was a basis for liberty and freedom).

24 Nimmer, *supra* note 7, at 1188.

> time allows, all facts and interests relevant to the problem shall be fully and fairly presented.ò[25]

Second, free speech is a tool by which individuals can ñrealize self-fulfillment.ò[26] Finally, free speech can act as a safety valve to guard against violence.[27]

After defining the interests behind the Copyright Clause and the First Amendment, Professor Nimmer then applied definitional balancing to copyrightôs idea/expression dichotomy.[28] This dichotomy provides that copyright can extend to ñexpression[s]ò[29] but not ñidea[s].ò[30] Professor Nimmer argued that this dichotomy, in general, ñrepresents an acceptable definitional balance as between copyright and free speech interests.ò[31] However, Professor Nimmer did say that in certain limited situations, particularly those of news photographs, there ought to be First Amendment protections.[32]

The same year that Professor Nimmer analyzed the idea/expression dichotomy in light of the First Amendment, Professor Paul Goldstein similarly noted that internal copyright doctrines serve to accommodate First Amendment principles.[33] In particular, Professor Goldstein focused on the ability of fair use doctrineð which provides an affirmative defense to copyright infringement in limited circumstances[34]ð to accommodate First Amendment ideals.[35] Like Professor Nimmer, however, Professor Goldstein did argue for a First Amendment exception to copyright law, where the public interest demands it.[36]

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25 *Id.* at 1187ï 88 (alteration in original) (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (The Lawbook Exchange, Ltd. 2004) (1948)).

26 Nimmer, *supra* note 7, at 1188.

27 *See id.* (ñThough free speech is no guarantee against violence, it remains true that men are less inclined to resort to violence to achieve given ends if they are free to pursue such ends through meaningful, non-violent forms of expression.ò).

28 *See id.* at 1189ï 93.

29 17 U.S.C. § 102(a) (2006 & Supp. III).

30 *Id.* § 102(b).

31 Nimmer, *supra* note 7, at 1192.

32 *See id.* at 1198ï 1200.

33 *See generally* Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (evaluating the conflicts of interest between the First Amendment and copyrightôs statutory and enterprise monopolies).

34 *See* 17 U.S.C. § 107.

35 *See* Goldstein, *supra* note 33, at 1011ï 14.

36 *See id.* at 1016; *see also* Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 316 (1979) (ñ[T]he copyright system . . . should not be undermined needlessly. The necessity for appropriation there-

B. Recent Developments

What started with two articles has spawned an entire field of academic research.[37] The current scholarly debate regarding the conflict between copyright and the First Amendment can be viewed as clustered in three camps. Some of the literature maintainsð in the mold of Professors Goldstein and Nimmerð that in the ordinary course there is no conflict between the Copyright Clause and the First Amendment because any such conflict is adequately addressed by internal copyright doctrines.[38] Indeed, this seems to be the approach the Supreme Court has taken: The case of *Eldred v. Ashcroft*[39] concerned a challenge to the constitutionality of the Copyright Term Extension Act[40] (ñCTEAò). CTEA sought to extend the duration of protection for new and existing copyrights alike for a period of twenty years.[41] After rejecting the argument that CTEA violated the Copyright Clauseôs ñlimited Timesò[42] language,[43] the Court went on to consider whether CTEA violated the First Amendment.[44] Upholding CTEA under the First Amendment, the Court noted that, ñTo the extent [CTEA] raise[s] First Amendment concerns, copyrightôs built-in free speech safeguards

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fore must be examined carefully in each individual case to identify those situations in which the user cannot adequately exercise the right of free speech without at least limited access to copyrighted expression. . . . The recognition of this rather narrow yet significant first amendment privilege will safeguard not only freedom of speech, but the integrity of the copyright system as well.ò).

37 *See* NIMMER & NIMMER, *supra* note 8, § 1.10[A].

38 *See, e.g.*, Lackland H. Bloom, Jr., *Copyright Under Siege: The First Amendment Front*, 9 COMPUTER L. REV. & TECH. J. 41, 50ï 57 (2004) (ñ[D]espite recent arguments that the free speech doctrine should be interpreted to place a check on copyright, there is no reason to believe that the ordinary enforcement of copyright law poses any significant threat to free speech values. Consequently, . . . the internal copyright doctrines of both idea/expression dichotomy and fair use provide sufficient protection to free speech values.ò); Greg A. Perry, Note, *Copyright and the First Amendment: Nurturing the Seeds for Harvest*, 65 NEB. L. REV. 631, 652ï 53 (1986) (ñSince the internal mechanisms of the copyright law fulfill the free speech goals of the first amendment, it is unnecessary to establish a significant first amendment privilege to infringement, particularly in those cases where an authorôs work is destined for public consumption.ò).

39 537 U.S. 186, 192 (2003).

40 Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (amending scattered sections of 17 U.S.C.).

41 *See Eldred*, 537 U.S. at 193; *see also* Pub. L. 105-298 § 102(b), (d), 112 Stat. 2827ï 28 (amending 17 U.S.C. §§ 302, 304).

42 U.S. CONST. art. I, § 8, cl. 8.

43 *See Eldred*, 537 U.S. at 199ï 218.

44 *See id.* at 218ï 221.

are generally adequate to address them. . . . [W]hen, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.ò[45]

A second strand of the literature argues for a more robust First Amendment exception, as compared to the ñmodestò proposals from Professors Nimmer and Goldstein.[46] For example, Professor Neil Weinstock Netanel argues for several incremental changes in copyright law.[47] He would modify derivative work doctrineð which ñgrant[s] copyright holders proprietary rights to prevent . . . derivative worksò[48]ð such that ñsecondary authors [would] only be required to disgorge to the copyright holder the proportionate share of their profits attributable to using the underlying work.ò[49] Professor Netanel would also shorten the duration for copyright protection.[50] Professor Netanel suggests other modifications, but his overarching point is that it is possible to ñpar[e] back speech-chilling copyright holder control while continuing to provide ample remuneration for market-based authors and media firms dedicated to producing original expression.ò[51] While Professor Netanel recognizes that some of his suggestions might be beyond what is required by the First Amendment,[52] elsewhere, Professor Joseph P. Bauer has argued for wide sweeping expressive protection under the First Amendment itself.[53] There are countless other examples of scholars supporting expansive First Amendment rights in the face of copyright law.[54]

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45 *Id.* at 221.

46 *See* David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281, 283 (2004) (ñProfessors Melville Nimmer and Paul Goldstein published important articles advancing relatively modest arguments about how copyright law and free speech could be reconciled.ò).

47 *See* NEIL WEINSTOCK NETANEL, COPYRIGHTôs PARADOX 195ï 218 (Oxford University Press 2008).

48 *Id.* at 196; *see also* 17 U.S.C. §§ 103, 106(2) (2006 & Supp. III).

49 NETANEL, *supra* note 47, at 197.

50 *See id.* at 199ï 200.

51 *Id.* at 195.

52 *See id.* at 195.

53 *See* Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831, 883 (2010).

54 *See, e.g.*, Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169, 1197 (2007) (suggesting that courts permit First Amendment defenses to copyright law when it would have an ñintolerable impactò); Henry S. Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression?*, 14 PEPPERDINE L. REV. 571, 597 (1987) (ñThe first amendment should protect unconsented use of copyrighted material when the alleged infringer can show (1) necessity, (2) originality, and (3) advance-

A third and final strand of the literature argues for an absolutist version of the First Amendment.[55] For example, Professors David L. Lange and H. Jefferson Powell argue that ñóno lawô should mean *no law*.ò[56] Under the regime they envision, ñ[c]onstraints against appropriation of expressive works that are protected for no other reason than to confer proprietary rights in speech itself will be swept away by the force of a First Amendment that will no longer permit the creation or protection of such rights.ò[57]

Given the plethora of solutions advanced by scholars to reconcile the conflict at hand, it is unsurprising that the courts tend to avoid resolving it, instead relying on internal copyright doctrines.[58] But it seems that, in the right case, the Court would be willing to resolve the conflict.[59] The next Part of this Article turns to look at the best way to choose among the myriad of potential solutions to the conflict.

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ment of first amendment interests. Once the alleged infringer makes out a *prima facie* case for a first amendment privilege by satisfying each prong, the burden of proof shifts to the copyright holder to rebut the presumption of privilege.ò); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 210ï 16 (1998) (arguing in favor of ñsome significant modifications to the law of preliminary injunctions in intellectual property cases,ò); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 86 (2001) (ñThe First Amendment should mandate greater leeway for critical uses of copyrighted works.ò); Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) [hereinafter Tushnet, *Copy This Essay*] (suggesting some possibilities for lessening the tension between the First Amendment and copyright); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 78 (2000) ([C]opyrightôs wide-ranging effects on speech require careful balancing so that the needs of future creators are not lost in the name of protecting the property rights of those who have already spoken.ò).

55 *See, e.g.*, DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW 305ï 24 (2009) (proposing the text of the First Amendment be read absolutely to mean ñno law,ò and discussing the consequences that follow).

56 *Id.* at 305; *see also* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) (ñI read óno law . . . abridgingô to mean *no law abridging*.ò).

57 LANGE & POWELL, *supra* note 55, at 307.

58 *See* Bauer, *supra* note 53, at 872 (ñIn the majority of cases asserting free speech defenses, copyright claims have yielded based on one of the óinternal mechanisms,ô and so First Amendment concerns have been satisfied, even if they were not addressed directly.ò).

59 *See* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

II. RULES VERSUS STANDARDS

How are we to choose among the potential solutions to the conflict between copyright and the First Amendment? The first step in resolving the conflict isð as is the case with many other constitutional puzzlesð deciding whether a ñruleò or a ñstandardò ought to govern.[60] Rules and standards sit along a continuum of discretion, with standards providing jurists more discretion than rules.[61] That is, a rule ñbinds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts,ò whereas a standard ñtends to collapse decisionmaking back into the direct application of [a] background principle or policy to a fact situation.ò[62] The distinction between rules and standards can be analogized to the distinction between categorization and balancing.[63] Whereas categorization ñdefines brightline boundaries and then classifies fact situations as falling on one side or the other,ò[64] balancing ñexplicitly considers all relevant factors with an eye to the underlying purposes or background principles or policies at stake.ò[65]

This Part explores whether a rule or standard ought to govern when courts reconcile the First Amendment and the Copyright Clause. Section A critiques Professor Nimmerôs definitional balancing approachð a rule-based approachð and finds it unworkable. Section B notes the preference for rules and categorization in First Amendment jurisprudence, but suggests that such approaches are often unworkable and instead sets the stage for the introduction of a more manageable standard.

A. The Problems with Professor Nimmer's Approach

As we have seen, Professor Nimmer sets forth a definitional balancing approach to resolve the conflict between copyright and the First Amendment.[66] While the thrust behind Professor Nimmerôs approachð that the First Amendment should only act as a ñscalpelò vis-à-vis copyright[67]ð seems correct,[68] his

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60 *See generally* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57ï 62 (1992).

61 *See id.* at 57.

62 *Id.* at 58.

63 *See id.* at 59.

64 *Id.*

65 *Id.* at 60.

66 *See supra* Part I.A.

67 *See* Nimmer, *supra* note 7, at 1200.

definitional balancing approach is unworkable for three primary reasons: First, Professor Nimmer assumes that the democratic dialogue interest behind free speech is paramount.[69] But this may not be the primary interest behind the First Amendment; indeed, there could be interests behind free speech that go unexplored by Professor Nimmer. Second, even if we accept the primacy of democratic dialogue as the rationale behind free speech, it is not at all clear that Professor Nimmerôs conclusionð that the First Amendment will only do work in limited circumstances[70]ð follows from his premises. Finally, although Professor Nimmer does go on to address the self-fulfillment interest behind free speech,[71] in dismissing it, he fails to account for an adoptive theory of self-expression.[72]

1. The Primacy of Democratic Dialogue.

In his article, Professor Nimmer identified three interests behind the First Amendment.[73] He designated one such interestð ñthe maintenance of the democratic dialogueò[74]ð as the *primary* interest underlying free speech.[75] Thus appears the first problem with Professor Nimmerôs argument: it is not at all clear that ñmaintenance of the democratic dialogueò[76] is the primary interest underlying free speech.[77] As Professor Edward J. Bloustein has noted, ñthere is no evidenceò that the interests behind freedom of speech were ñdiscussed or debated during the period of the drafting and adoption of the Constitution generally, or of the first, or free speech, amendment.ò[78] Not only is it impossible to discern the primary interest behind free speech by looking to the founding generation,

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68 *See infra* Part III.

69 *See* Nimmer, *supra* note 7, at 1191.

70 *See id.* at 1200.

71 *See id.* at 1192.

72 *See generally* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc., 515 U.S. 557, 572ï 75 (1995) (involving a case about First Amendment considerations surrounding the denial of the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) to participate in the Evacuation Day parade).

73 *See supra* text accompanying notes 23ï 27.

74 Nimmer, *supra* note 7, at 1191.

75 *See id.* (noting that this interest is ñthe most important objective that underlies freedom of speechò).

76 *Id.*

77 *See* Edward J. Bloustein, *The Origin, Validity, and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372, 380ï 81 (1981).

78 *Id.* at 381.

but also it is the case that academics disagree about the importance of one interest as compared to another.[79] Indeed, one scholar has suggested that ñmaintenance of the democratic dialogueò[80] might merely be a means to the end of a distinct interest underlying free speechð ñindividual self-realization.ò[81]

A related problem with Professor Nimmerôs argument is that he only considered three interests that might be motivating the First Amendment.[82] There are potentially other free speech interests, which went unconsidered by Professor Nimmer.[83] Most notably, it seems that Professor Nimmer ignored Justice Holmesô famous rationale for free speech ð the notion of the marketplace of ideas.[84] As another example, Professor Frederick Schauer argues that,

> Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of government power in a more general sense.[85]

Professor Vincent Blasi similarly notes that ñfree speech, a free press, and free assembly can serve in checking the abuse of power by public officials.ò[86]

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79 *See id.* at 380 (noting that academics ñmay emphasize one or another value and neglect the othersò).

80 Nimmer, *supra* note 7, at 1191.

81 Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982). The term ñóindividual self-realizationô . . . can be interpreted to refer either to development of the individual's powers and abilities . . . or to the individual's control of his or her own destiny through making life-affecting decisions.ò *Id.*

82 *See* Nimmer, *supra* note 7, at 1187ï88.

83 *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1026ï27 (6th ed. 2009); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 7ï8 (3d ed. 2007).

84 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (ñBut when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideasð that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.ò). Note that Justice Holmes did not use the precise phrase ñmarketplace of ideasò; that term, it seems, was coined by the Court in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

85 FREDERICK SCHAUER, FREE SPEECH 86 (Press Syndicate of the Univ. of Cambridge 1982).

86 Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 527.

2. The Scope of Democratic Dialogue.

Even if we accept, as Professor Nimmer suggests, the democratic dialogue interest behind free speech as primary, that theory holds that ñ[i]t is exposure to ideas, and not to their particular expression, that is vital.ò[87] Said differently, the democratic dialogue theoryð at least as according to Professor Nimmerð holds that ñthe óexpressionô of . . . ideas may add flavor, but relatively little substance to the data that must inform the electorate in the decision-making process.ò[88] If we were to stop there, Professor Nimmerôs framework would yield the conclusion that no First Amendment protection is necessary against copyright.[89]

But Professor Nimmer takes the necessary next step and recognizes that indeed ñthere are certain areas of creativity where the óideaô of a work contributes almost nothing to the democratic dialogue, and it is only its expression which is meaningful.ò[90] Professor Nimmer was, of course, referring primarily to graphic works.[91] To avoid arguing that the First Amendment ought to render copyright vis-à-vis such works void, Professor Nimmer asserts that for these sorts of graphic worksð where all the value *is* in the expressionð the definitional ñbalance still favors copyright protection.ò[92] But Professor Nimmer does carve out a small subset of graphic works for which their ñvisual impact . . . ma[kes] a unique contribution to an enlightened democratic dialogue.ò[93] Professor Nimmer was thinking of such works as the photographs of the My Lai massacre and the Zapruder film of the assassination of President Kennedy.[94] These sorts of images ð a category dubbed ñnews photographsò[95] ð did pose a copyright problem for Professor Nimmer.[96]

Professor Nimmerôs analysis raises a significant concern. In avoiding eviscerating copyright because of the expressive value of graphic works, Profes-

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87 Nimmer, *supra* note 7, at 1191.

88 *Id.* at 1192.

89 *See id.* at 1197 (ñIn general, the democratic dialogueð a self-governing peopleôs participation in the marketplace of ideasð is adequately served if the public has access to an authorôs ideas . . . .ò).

90 *Id.*

91 *See id.*

92 *Id.*

93 *Id.*

94 *See id.* at 1197ï 98.

95 *Id.* at 1199 (internal quotation marks omitted). This category would, of course, include products produced by ñanalogous processes, including motion picture film and video tape.ò *Id.*

96 *See* Nimmer, *supra* note 7, at 1199.

sor Nimmer states that for such works the definitional ñbalance still favors copyright protectionò because,

> The additional enlightenment contributed to democratic dialogue by reason of the visual impact of most graphic works is relatively slight as compared with the intellectual impact of a literary work. . . . [I]ts weight, on balance, does not seem to equal the copyright interest that encourages the creation of graphic works.[97]

Not only is Professor Nimmerôs analysis mere speculation,[98] but also it might not be true. As Professor Neil Weinstock Netanel has noted,

> Many creative works have broad political and social implications even if they do not appear or even seek to convey an explicit ideological message. Literature and art may be subtle, but powerful, vehicles for attitude change or reinforcement. Even what may seem to be abstract, ñpureò artistic expression may challenge accepted modes of thought and belie the efforts of governments or cultural majorities to standardize individual sensitivities and perceptions.[99]

It should be clear that a work need not be a ñnews photographò[100] in order to have a significant impact on democratic discourse. To find a recent, publicized example, one need look no further than the most recent presidential elections, in which Shepard Fairey created the poster of thenï Democratic candidate Barack Obama, which has been described as ñiconic.ò[101]

3. Professor Nimmer on the Self-Fulfillment Interest.

Even though Professor Nimmer deems the democratic dialogue interest behind free speech paramount,[102] he does go on to consider other interests, in particular self-fulfillment.[103] Professor Nimmer, however, merely dismisses the self-fulfillment interest behind free speech: ñ[F]ree speech as a function of

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97 *Id.* at 1197.

98 Indeed, Professor Nimmer provided no support for his statement.

99 Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 350 (1996).

100 Nimmer, *supra* note 7, at 1199 (internal quotation marks omitted).

101 *See, e.g.*, Justin Berton, *A Street Artist Makes His Mark in the Mainstream*, S.F. CHRON., Sept. 18, 2008, at E1. Note that this poster would not qualify as a ñnews photograph,ò under Professor Nimmerôs approach. Nimmer, *supra* note 7, at 1199 (ñ[A] photograph is a news photograph only if the event depicted in the photograph, as distinguished from the fact that the photograph was made, is the subject of news stories appearing in newspapers throughout the country.ò).

102 *See* Nimmer, *supra* note 7, at 1191.

103 *See id.* at 1192.

self-fulfillment does not come into play. One who pirates the expression of another is not engaging in *self*-expression in any meaningful sense.ò[104]

This explanation, however, fails to account for the adoptive theory of self-expression, as implied by *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*[105] *Hurley* concerned the annual Evacuation Day[106] parade in Boston, which has been organized by the private South Boston Allied War Veterans Council (the ñCouncilò) since 1947.[107] Each year, the Council applies for and receives a permit for the parade.[108] Then, ñ[i]n 1992, a number of gay, lesbian, and bisexual descendants of . . . Irish immigrants joined together with other supporters to formò the Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc. (ñGLIBò) in order to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New Yorkôs St. Patrickôs Day Parade.[109]

That year, the Council refused to include GLIB, but GLIB was able to obtain injunctive relief in state court requiring their inclusion.[110]

In 1993, GLIB again unsuccessfully sought permission from the Council to be included in the parade.[111] GLIB sued the Council and others for, inter alia, violation of the Massachusetts public accommodations law.[112] The Supreme Judicial Court of Massachusetts held that the Councilôs refusal to include GLIB violated the public accommodations law and that it was ñimpossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.ò[113]

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104 *Id.*

105 515 U.S. 557 (1995).

106 Evacuation Day commemorates the day in 1776 when British troops evacuated Boston. *See id.* at 560.

107 *See id.* at 560ï 61.

108 *See id.* at 560.

109 *Id.* at 561.

110 *See id.*

111 *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 561 (1995).

112 *See id.* The Massachusetts public accommodations law prohibits, among other things, ñany distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement.ò *Id.* (quoting MASS. GEN. LAWS ch. 272, § 98 (1992)) (internal quotation marks omitted).

113 *See id.* at 563ï 64 (quoting Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc. v. City of Boston, 636 N.E.2d 1293, 1299 (Mass. 1994)) (internal quotation marks omitted).

The Supreme Court reversed.[114] Writing for a unanimous Court, Justice Souter[115] held that the Massachusetts public accommodations law was unconstitutional as applied[116] because GLIB sought to ñcommunicate its ideas as part of the existing parade, rather than staging one of its own.ò[117] Forcing the Council to include GLIB in its parade would violate the Councilôs right not to speak; that is, forcing the inclusion of GLIB would unconstitutionally require the Council to ñaffirm[] . . . a belief with which [it] disagrees.ò[118] An implicit part of the Courtôs reasoning is that ñGLIBôs participation would likely be perceived as having resulted from the Councilôs customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well.ò[119]

Thus, in *Hurley*, the Court is in part articulating an adoptive theory of the First Amendment. Contrary to Professor Nimmerôs assertion that a ñpirate[]ò of expression is not engaged in self-expression,[120] one who adopts, includes, or repeats anotherôs expression is indeed engaged in self-expression.[121] This conclusion can be analogized to the Supreme Courtôs treatment of limits on contributions to candidates in *Buckley v. Valeo*.[122] *Buckley* concerned wide-sweeping campaign finance reform laws enacted in the early 1970s.[123] The Supreme Court simultaneously struck down expenditure limitations and upheld contribution limitations.[124] In upholding the contribution limits, the Court noted that ñ[a] contribution serves as a general expression of support for the candidate and his views.ò[125] Said differently, campaign contributions allow donees to adopt the candidateôs position as their own and thus constitute self-expression of the donees themselves.[126]

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114 *See id.* at 581.

115 *See id.* at 559.

116 *See id.* at 572ï73.

117 *Hurley*, 515 U.S. at 570.

118 *Id.* at 573.

119 *Id.* at 575.

120 Nimmer, *supra* note 7, at 1192.

121 *See Hurley*, 515 U.S. at 572ï75.

122 424 U.S. 1 (1976) (per curiam).

123 *See id.* at 6.

124 *See id.* at 143ï44.

125 *Id.* at 21.

126 The Court allowed such contributions to be limited because, in the Courtôs words:

> The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the

This view of adopted self-expression has also been recognized in academic literature. The view was first articulated by Professor Rebecca Tushnet.[127] As Professor Tushnet noted, ñCopyrighted works often serve as the self-expression of someone other than the author; they can both feel like the products of the copierôs own personality and be perceived by others as such.ò[128] Similarly, as Professor Christina Bohannan has written,

> The speech value of copying is also apparent under an autonomy-based account of the First Amendment. Copying of copyrighted works is a means of self-expression, as the copier surveys available works, chooses those with which she identifies or disagrees, and copies the portions that best capture her thoughts or feelings.[129]

Examples abound: ñSurely the evangelist who reads the Bible aloud in a public place intends to and does convey a message, even though he did not write the Bible himself and did not add to it in any way.ò[130] And ñif a person reads aloud or copies from Barack Obamaôs *The Audacity of Hope* in order to show his support for the new President, he is engaging in speech, even though he did not write that book himself.ò[131]

B. The Need for a Workable Standard

The benefits of rules and categorization in the free speech context have been recognized since at least as early as the landmark case of *New York Times Co. v. Sullivan*.[132] In that case, a public official brought a libel action stemming from a critical advertisement in the *New York Times*.[133] The Court held that the advertisement could notð consistent with the First Amendmentð constitute libel.[134] The Court further held that to make a showing of libel, a public official must show ñthat the statement was made with óactual maliceôð that is, with

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> undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.

Id. at 21ï22.

127 *See* Tushnet, *Copy This Essay*, *supra* note 54, at 568ï75.

128 *Id.* at 568.

129 Christina Bohannan, *Copyright Infringement and Harmless Speech*, 61 HASTINGS L.J. 1083, 1119 (2010); *see also id.* (discussing *Hurley*, 515 U.S. 557).

130 Bohannan, *supra* note 129, at 1120.

131 *Id.*

132 376 U.S. 254 (1964).

133 *See id.* at 256.

134 *See id.* at 264ï65.

knowledge that it was false or with reckless disregard of whether it was false or not.ò[135] In so holding, the Court reasoned that under any rule less protective of speech, ñwould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.ò[136] In other words, a rule less protective of libel defendants would chill speech.[137]

Indeed, for a time, categorization was the dominant approach in First Amendment jurisprudence. In the early-to-mid 1900s, the Court categorically excluded certain types of speech from First Amendment scrutiny altogether.[138] But the Court has scaled back from the categorical approach in recent years.[139] What remains of the Courtôs categorical approach to the First Amendment is

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135 *Id.* at 279ï 80. It is worth noting that the Court later expanded this speech-protecting rule to cover allegedly libelous statements against public figures, in addition to public officials. *See* Curtis Publôg Co. v. Butts, 388 U.S. 130, 154ï 55 (1967) (plurality opinion). But the definition of ñpublic figureò has been narrowed over time. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 452ï 57 (1976).

136 *N.Y. Times Co.*, 376 U.S. at 279.

137 *See generally* Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 688 (1978) (ñ[T]he chilling effect doctrine recognizes the fact that the legal system is imperfect and mandates the formulation of legal rules that reflect our preference for errors made in favor of free speech.ò). The prominence of *New York Times Co.* in the development of chilling effect doctrine has been recognized in the literature. *See id.* at 705 (noting that ñone [can] realize[] the critical role played by the chilling effect doctrine in the resolution of [*New York Times Co.*]ò). The beginnings of the chilling effect doctrine can also be seen in the roughly contemporaneous creation of the First Amendment overbreadth doctrine. *See id.* at 685; *see also* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 846 (1970).

138 *See, e.g.*, Roth v. United States, 354 U.S. 476, 485 (1957) (ñWe hold that obscenity is not within the area of constitutionally protected speech or press.ò); Chaplinsky v. New Hampshire, 315 U.S. 568, 571ï 72 (1942) (holding ñófightingô wordsò to be categorically excluded from First Amendment protection).

139 *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 383ï 90 (1992) (holding thatð even in categories of speech outside the First Amendmentð the government may not engage in content discrimination). *But see* United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (reaffirming the categorical approach). Needless to say, to the extent that the categorical approach remains good law, it seems quite difficultð if not impossibleð to define a new category of unprotected speech. *See* Brown v. Entmôt Merchs. Assôn, 131 S. Ct. 2729, 2734 (2011) (ñ[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the ójudgment [of] the American people,ô embodied in the First Amendment, óthat the benefits of its restrictions on the Government outweigh the costs.ôò (alteration in original) (quoting *Stevens*, 130 S. Ct. at 1585)).

unclear, but it does seem that the categorical approach has proved unworkable.[140]

In attempting to create rules through definitional balancing, Professor Nimmer was attempting to stay true to the chilling effect doctrine.[141] Yet, like the Courtôs categorical approach to the First Amendment, Professor Nimmerôs definitional balancing approach also proves unworkable.[142] It is certainly plausible that a workable rule could be crafted to delineate the boundary between the First Amendment and the Copyright Clause. Indeed, the Supreme Courtôs own rule for balancing the First Amendment against Congressôs copyright powers[143] would seem to yield similar results to the standard proposed by this Article.[144] Yet, as is the case with many rules,[145] the Courtôs formulation merely hides the ball[146]: the Courtôs ñruleò is either a standard in disguise or one that could *never* be used to strike down copyright legislation under the First Amendment. Thus, in balancing the First Amendment with the Copyright Clause there is a need for a workable standard. This Article now turns to formulating such a standard.

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140 *See, e.g.*, *R.A.V.*, 505 U.S. at 384 (ñ[A] city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government.ò); Miller v. California, 413 U.S. 15, 24 (1973) (setting forth a complex, three-part test for determining whether speech is indeed obscenity outside the scope of First Amendment protection).

141 *See* Nimmer, *supra* note 7, at 1183ï84 (ñIf in each case a court would decide whether the importance of the particular speech involved outweighed the importance of the antithetical non-speech interest, who could predict the weight which might be accorded a given speech which had not yet been judicially tested? The result could only be a óchilling effectô which would deter many from exercising their right to speak, even if the courts might ultimately uphold such right.ò).

142 *See supra* text accompanying notes 66ï131.

143 *See* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003) (ñ[W]hen . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.ò).

144 *See infra* text accompanying notes 145ï152.

145 *But see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). *See generally* Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).

146 *See, e.g.*, Steven J. Horowitz, *A Free Speech Theory of Copyright*, 2009 STAN. TECH. L. REV. 2, 2 (ñ[T]his approach confounds consistency in principle and consistency in practice . . . .ò); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 24 n.101 (2008) (ñIn *Eldred* the Court did not provide any guidance on what are the traditional contours of copyright law or how to determine those traditional contours.ò).

III. CONSIDERING CONSTITUTIONAL STRUCTURE

It almost goes without sayingð in formulating legal rules and standardsð that accounting for constitutional structure is both useful and important.[147] This Part attempts to devise a standard that can be used to reconcile the First Amendment and the Copyright Clause while taking seriously the structure of the Constitution. This Part proceeds as follows: Section A explains why scholars have properly rejected various simplistic structural arguments for resolving the conflict in question and proceeds to propose a more nuanced structural argument. Section B explains why the standard developed in Section Að that the First Amendment ought not be read so broadly as significantly to impair Congressôs copyright powerð might be more desirable than standards that fail to account for constitutional structure.

A. Formulating a Standard Accounting for Constitutional Structure

In formulating rules and standards to reconcile the First Amendment and the Copyright Clause, scholars from Professor Nimmer to the First Amendment absolutists fail to adequately account for the structure of the Constitution. To their credit, many scholars do note (and properly reject) two simplistic structural arguments often offered in favor of minimal First Amendment scrutiny of copyright laws.

The first is the argument that the Copyright Clause is an absolute carve-out from the reach of the First Amendment.[148] This argument is, of course without merit: ñ[T]he copyright clause may not be read as independent of and uncontrolled by the first amendment. Because Congress is granted authority to legislate in a given field, it does not follow that such a grant immunizes Congress from the limitations of the Bill of Rights . . . .ò[149] The second is the argu-

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147 *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22ï 23 (1969); *see also* John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 686ï 87 (1999).

148 *See* Bauer, *supra* note 53, at 838 (ñ[A]lthough the First Amendment prohibits Congress from making laws which abridge the freedom of speech, there is a carve-out from this prohibition for legislation enacted pursuant to specific authority in Article I.ò); Nimmer, *supra* note 7, at 1181 (ñIt might be contended that copyright laws fall within a built-in exception to first amendment protection, not by the words of the first amendment, but by reason of . . . the copyright clause . . . .ò (footnote omitted)).

149 Nimmer, *supra* note 7, at 1182; *see also* Bauer, *supra* note 53, at 838ï 39 (ñ[C]ertainly the explicit authority given to Congress to coin money would not justify a statute requiring a portrait of Jesus on all coins, and the authority given to Congress to regulate commerce would not authorize a statute barring the interstate transportation of newspapers critical of the Presi-

ment that the First Amendment trumps the Copyright Clause because it is later in time.[150] This argument too can swiftly be rejected as ñno one . . . really believes that every law which abridges speech falls before the first amendment.ò[151]

Once these structural arguments are cast aside, there remains work to be done. It may be conceded that these simplistic arguments hold no water, but one might still argue that the First Amendment should not be construed broadly vis-à-vis the Copyright Clause because the Copyright Clause is an expressly authorized power. This argument, however, still poses a problem, for all governmental power comes from somewhere, even if just from the general police powers. But we can go a step further and come up with a standard for balancing the First Amendment against the Copyright Clause that pays due attention to the structure of the Constitution: The First Amendment should be read narrowly vis-à-vis the Copyright Clause so as to not too severely undermine Congressôs expressly granted power. Such a reading would be in line with judicial invalida-

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dentôs positions on health care reform. Similarly, I think it is equally obvious that the authority the Copyright Clause confers could not be used to justify a statute denying copyright protection to authors who criticize the governmentôs policy in Afghanistan, and granting protection only to those who are in agreement.ò (footnotes omitted)). It is worth noting, however, that the D.C. Circuit did take this sort of argument quite seriously for some time. *See* Eldred v. Reno, 239 F.3d 372, 375 (D.C. Cir. 2001) (ñ[C]opyrights are categorically immune from challenges under the First Amendment.ò), *questioned on this point, aff'd on other grounds*, Eldred v. Ashcroft, 537 U.S. 186 (2003); *see also* United Video, Inc. v. FCC, 890 F.2d 1173, 1191 (D.C. Cir. 1989).

150 *See* Baker, *supra* note 7, at 893 (ñAs an amendment to a document that previously had authorized legislation creating copyrights, the First Amendment could be read to nullify the prior grant . . . .ò); Bauer, *supra* note 53, at 838 (ñBecause subsequently added constitutional provisions repeal or replace inconsistent previous provisions, one could draw the conclusion that the First Amendment controls, and even if it does not make the copyright laws óunconstitutional,ô it limits any portion of those laws that significantly abridge free speech or freedom of the press.ò (footnote omitted)); Nimmer, *supra* note 7, at 1182 (ñBut if the copyright clause does not render the first amendment inoperative, why does not the contrary conclusion follow? Doesnôt the first amendment obliterate the copyright clause and any laws passed pursuant thereto?ò).

151 Nimmer, *supra* note 7, at 1182; *see also* Baker, *supra* note 7, at 893 (ñThis view of the First Amendment entirely displacing the earlier text is universally rejected, I think properly, as to copyright.ò); Bauer, *supra* note 53, at 838 (ñ[I]t is highly unlikely that in 1790 through 1791 the Founding Fathers intended to repeal or diminish the authority conferred on Congress by the Copyright Clause, which had so recently been placed in the Constitution. Strong support for this conclusion is the fact that early Congresses, whose members included the very people instrumental in drafting both the Constitution and the Bill of Rights, enacted legislation pursuant to the delegation of authority in the Copyright Clause, which conveyed exclusive rights to copyright owners . . . .ò).

tion of a state law under the First Amendment, whereby the stateôs general police power is left almost fully intact.

Consider, for example, the recent case of *Snyder v. Phelps*,[152] in which the Court invalidated one facet of Maryland tort law as applied to funeral picketers,[153] yet leaving open the vast remaining expanse of Marylandôs general police powers. Indeed, the Court specifically left open the possibility that Maryland could prohibit the same conduct through alternative means.[154]

The approach identified here can be contrasted with the invalidation of federal laws under the First Amendment where the enumerated power is left largely intact. What is important to consider is the distinction between application of a robust First Amendment to copyright lawð which might result in a substantial impairment of Congressôs copyright powersð and the application of a robust First Amendment to other enumerated powers, which generally only results in minor impairments of such powers. Consider, for example, *Noerr-Pennington* doctrine: The Sherman Antitrust Act[155] declares illegal ñ[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.ò[156] The Court has held, however, ñthat no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.ò[157] This holding, while technically a matter of statutory interpretation, was also informed by the First Amendment.[158] Yet even though the Court, for all intents and purposes,

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152 131 S. Ct. 1207 (2011).

153 *See id.* at 1219.

154 *See id.* at 1218 (ñMaryland now has a law imposing restrictions on funeral picketing . . . . To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Marylandôs law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.ò). It is also worth noting the parallel between the structural standard advanced by this Article and the critique of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), identified with Professor Alexander M. Bickel. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 6 (1986) (ñ[T]here are such cases which may call into question the constitutional validity of judicial, administrative, or military actions without attacking legislative or even presidential acts as well, or which call upon the Court, under appropriate statutory authorization, to apply the Constitution to acts of the states.ò).

155 26 Stat. 209, 209ï 10 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (Supp. III 2006)).

156 15 U.S.C. § 1 (2001).

157 E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961).

158 *See id.* at 138 (ñ[A different] construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.ò).

used the First Amendment to limit Congressôs antitrust powers, and thereby Congressôs commerce powers,[159] neither Congressôs antitrust powers nor Congressôs commerce powers were undermined in any significant way.

The existence of the sham exception to *Noerr-Pennington* doctrine supports this view. The sham exception provides that *Noerr-Pennington* immunity does not apply to activities that are ña mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.ò[160] Thus, by the sham exception, the First Amendmentôs intrusion into Congressôs commerce authority is even more muted.

As another exampleð one more clearly grounded in the First Amendment as opposed to statutory interpretationð consider the Postal Clause, which grants Congress the power to ñestablish Post Offices and post Roads.ò[161] The case of *Bolger v. Youngs Drug Products Corp.*[162] concerned a federal law that prohibited ñthe mailing of unsolicited advertisements for contraceptives.ò[163] The Court held the law unconstitutional as applied to the appellee in that case.[164] It is not at all unusual to see the First Amendment applied to restrict the Postal Clause; after all, the First Amendment limits all of Congressôs powers. What is important to note with this example, however, is that even though the First Amendment was applied to restrict Congressôs postal powers, those exceptionally broad powers were left overwhelmingly intact.[165]

Other examples abound.[166] And it is not surprising to find many examples of invalidation of federal laws under the First Amendment, which still leave the relevant enumerated power largely intact. Said differently, there is an important distinction between an incidental or minor First Amendmentï based im-

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159 *See generally* Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738 (1976).

160 Profôl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51 (1993) (alteration in original) (quoting *Noerr Motor Freight, Inc.*, 365 U.S. at 144).

161 U.S. CONST. art. I, § 8, cl. 7.

162 463 U.S. 60 (1983).

163 *Id.* at 61; *see* 39 U.S.C. § 3001(e)(2) (2003).

164 *See Bolger*, 463 U.S. at 75.

165 *See generally Ex parte* Rapier, 143 U.S. 110, 134 (1892); *Ex parte* Jackson, 96 U.S. 727, 729 (1877).

166 *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577 (2010) (striking down federal anti-animal cruelty legislation yet leaving the vast majority of Congressôs commerce power intact); United States v. Playboy Entmôt. Grp., Inc., 529 U.S. 803 (2000) (striking down federal law requiring cable operators to scramble or relegate to late-night hours sexually explicit programming yet leaving the vast majority of Congressôs commerce power intact); Sable Commcôns of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (striking down a federal law banning indecent, non-obscene telephone communications yet leaving the vast majority of Congressôs commerce power intact).

pairment of an enumerated power, as in the *Noerr-Pennington* or Postal Clause contexts, and a substantialð though not completeð impairment, as would occur if an expansive First Amendment were applied in the copyright context. The reason that the First Amendment poses a special problem in the copyright context is that copyright law will almost always affect speech, while other congressional powers tend to touch upon speech only at the margins.[167]

B. Undesirability of Other Potential Standards

Many scholars have proposed countless other standards for resolving the conflict between the Copyright Clause and the First Amendment. It could be argued that these standards are deficient merely for failing to account for constitutional structure in their formulation. Such an argument might be necessary to counter, for example, Professor Goldsteinôs standard, which would be quite protective of Congressôs copyright powers.[168] But many scholarsôs proposed standards go much further than Professor Goldsteinôs and can be criticized on the ground that they might serve to undermine the Copyright Clause. In discussing whether an expansive First Amendment might undermine Congressôs copyright powersð and thereby the structural arrangements implicit in the Constitutionð this Article considers derivative work doctrine as a paradigm.

1. The Derivative Work Doctrine Paradigm.

The derivative work doctrine grants copyright holders ñthe exclusive rights to do and to authorize . . . derivative works.ò[169] As provided by statute, a derivative work ñis a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.ò[170] This

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167 These observations regarding the structural interplay between the Copyright Clause and the First Amendment are also consistent with cases using the First Amendment to strike down hate speech regulation and pornography regulation premised on equality grounds. *See, e.g.*, Am. Booksellers Assôn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985). Even if we accept a positive-rights view of the Fourteenth Amendment, the fact still remains that in these situations, a court is faced with balancing two individual rights-granting constitutional provisions, which is a different structural situation than when a constitutional conflict involves a grant of power to government.

168 *See* Goldstein, *supra* note 33, at 1016; *see also* McGowan, *supra* note 46, at 283.

169 17 U.S.C. § 106 (2011).

170 *Id.* § 101.

doctrine is a paradigm worth using since it ñcreates the greatest problems for potential First Amendment clashes.ò[171]

By way of example, consider the *Harry Potter* franchise: In 2007, one magazine valued the franchise in excess of $15 billion.[172] Of that, $4.5 billion, or thirty percent, is directly attributable to the first five (of eight) movies.[173] Six of the seven films released as of 2010 make the list of the twenty top-grossing films of all time, each grossing no less than $875 million.[174] And *Harry Potter* is not the only book-gone-movie success story. *The Lord of the Rings* movies also dominate the list of the top-grossing films of all time, with each movie grossing no less than $870 million,[175] which surely outpaces sales from the novel itself.[176]

Abstracting away from mere anecdotes, Professors William M. Landes and Richard A. Posner have economically modeled the reason for protecting derivative works.[177] Their argument is not that authors and artists would not create works at all but for protection of derivative works. We can intuit that J.K. Rowling would have written *Harry Potter* even if she would not have received protection for derivative works; indeed, J.R.R. Tolkien wrote *The Lord of the Rings* trilogy and passed away long before his creation was turned into a motion picture trilogy. Instead, the argument is that derivative works often have great value, and they themselves are worthy of copyright protection.[178] While this might suggest placing copyright in the hands of the creator of the derivative

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171 Bauer, *supra* note 53, at 880.

172 Beth Snyder Bulik, *Harry Potter, the $15 Billion Man*, ADVERTISING AGE (July 16, 2007), http://adage.com/article/news/harry-potter-15-billion-man/119212/.

173 *See Rowling 'Makes £5 Every Second,'* BBC NEWS MOBILE (Oct. 3, 2008), http://news.bbc.co.uk/2/hi/entertainment/7649962.stm.

174 *See All Time Worldwide Box Office Grosses*, BOX OFFICE MOJO, http://www.boxofficemojo.com/alltime/world/ (last visited May 31, 2011).

175 *See id.*

176 Indeed, one-third of all of the copies of the novel sold were sold after the release of the first film in *The Lord of the Rings* trilogy. *See* Vit Wagner, *Tolkien Proves He's Still the King*, TORONTO STAR, Apr. 16, 2007. This is not terribly surprising. *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 354 (1989) (ñ[A] movie based on a book might reduce or, more likely, expand the demand for the book.ò).

177 Landes & Posner, *supra* note 176, at 325ï 26.

178 *See id.* at 354 (ñTo translate *The Brothers Karamazov* into English is an enormously time-consuming task. If the translator could not obtain a copyright of the translation, he might be unable to recover the cost of his time; for anyone would be free to copy the translation without having incurred that cost and could undersell him at a profit.ò).

work,[179] such a result ñcould distort the timing of publication of both the original and derivative works.ò[180]

This model has been further developed by Professor Jane Ginsburg.[181] Professor Ginsburg suggests that Professors Landes and Posner may have rejected too quickly consideration of an authorôs initial incentive to produce a work.[182] Although J.K. Rowling and J.R.R. Tolkien might have created their initial works independent of any derivative work protection, ñ[p]otential derivative works exploitations are often taken into account in the decision whether to make the initial investment in a workôs creation.ò[183] As Professor Ginsburg suggests, ñhardcover sales of a book may not generate enough revenues to recoup its advance, but subsidiary rights . . . may prove the real source of income.ò[184] Furthermore, ñ[T]he proceeds from control over exploitation of derivative works rights may permit a certain amount of cross-subsidization within the publishing industry: the derivative works profits left over after recoupment of the initial investment may go toward the production of a new work whose success may be more risky.ò[185] Whether looked at from the perspective of Professors Landes and Posner or from the perspective of Professor Ginsburg, it should be clear that derivative work doctrine is integral for a system of promoting creativity efficiently to operate.

2. Application of the First Amendment to Derivative Work Doctrine.

Taking derivative work doctrine as our paradigm, we can analyze whether the First Amendment might be used to undermine Congressôs copyright powers in at least three different ways. First, and least important, perhaps applying an expansive First Amendment to copyright could contravene the original intent behind the Copyright Clause. But, the problem with determining whether a given approach to reconciling copyright with the First Amendment under-

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179 *See id.*

180 *Id.* at 355 (ñThe original author . . . would have an incentive to delay publication of the original work until he had created the derivative work as well . . . .ò). Relatedly, placing copyright protection in the hands of the creator of the original work reduces transaction costs. *See id.*

181 *See* Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1909ï 13 (1990).

182 *See id.* at 1910.

183 *Id.* at 1910ï 11.

184 *Id.* at 1911.

185 *Id.*

mines the original intent behind the Copyright Clause is that there is very little evidence about the Framersô intent in crafting the Copyright Clause.[186] While it is possible that derivative work doctrine, our paradigm, could face a challenge under this approach,[187] taking an originalist approach to the Copyright Clause seems to be an undesirable choice. Of course all of the mainstream arguments against originalism obtain.[188] But the anti-originalist argument is even stronger in this context: given that we have little evidence of the Framersô intent behind the Copyright Clause,[189] looking to original intent would only serve to exacerbate the chilling effect that the use of a standard engenders.[190]

Second, we could take a historical, though less rigid approach to this analysis. For example, we might considerð as the Supreme Court suggestsð whether employing the First Amendment as against the Copyright Clause in a given context would deprive Congress of its right to legislate within the ñtraditional contours of copyright protection.ò[191] Such an approach would be even more indeterminate on the question of the validity of derivative work doctrine than would an original intent approach. While the doctrine certainly does not date as far back as the first Copyright Act,[192] it is unclear what such a fact tells us. Does it mean that Congress never had the power to enact protections for copyright holders against derivative works? Or does it mean that Congress had the power and choseð for whatever reasonð not to exercise it until relatively recently? Just as looking to original intent poses significant problems of indeterminacy, so too does looking to the Courtôs quasi-originalist approach from *Eldred*.

We must then turn to a more purposivist approach; that is, we must ask whether applying an expansive First Amendment to copyright would contravene the purposes behind the Copyright Clause.[193] As Professor Nimmer recognized,

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186 *See* 1 NIMMER & NIMMER, *supra* note 8, § 1.02 (ñIn determining the meaning of this organic law governing copyright, no helpful ólegislativeô history is available in view of the secrecy of the committee proceedings.ò).

187 *See* Bauer, *supra* note 53, at 880 (ñ[F]or the first eight decades of copyright legislation, there was no protection for derivative works . . . .ò).

188 *See, e.g.*, RONALD DWORKIN, JUSTICE IN ROBES 117ï 39 (2006).

189 *See supra* note 157.

190 *See supra* Part II.B.

191 Eldred v. Ashcroft, 537 U.S. 186, 221 (2003).

192 *See supra* note 158.

193 *See generally* James L. Swanson, *Copyright Versus the First Amendment: Forecasting an End to the Storm*, 7 LOY. ENT. L.J. 263, 289 (1987) (ñUnder any guise and abetted by any justification, a First Amendment privilege to commit copyright infringement will cause more harm than good.ò).

ñ[T]he dual premises [behind the Copyright Clause are] that the public benefits from the creative activities of authors and that the copyright monopoly is a necessary stimulus to the full realization of such creative activities.ò[194] An expansive First Amendment could indeed result in invalidation of derivative work doctrine,[195] which is an integral part of the purposes behind the Copyright Clause.[196]

3. *Golan v. Holder*

The desirability of the approach identified in this Article can further be seen by looking at *Golan v. Holder*,[197] a case recently decided by the Supreme Court. *Golan* concerned a challenge to section 514 of the Uruguay Round Agreements Act,[198] ñwhich granted copyright protection to various foreign works that were previously in the public domain in the United States.ò[199] The plaintiffs in the case raised two separate challenges to section 514, both raised in the petition for certiorari;[200] namely, plaintiffs argued that section 514 exceeded Congressôs copyright powers under the Progress Clause[201] and that section 514 violated the First Amendment.[202] In rejecting the First Amendment challenge to section 514, the Tenth Circuit applied intermediate scrutiny and upheld the law.[203] Importantly, the Tenth Circuit accepted as the governmentôs important interest in enacting section 514 ñpreserv[ing] . . . authorsô economic and expres-

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194 Nimmer, *supra* note 7, at 1186.

195 *See* Bauer, *supra* note 53, at 890 (ñThere are a variety of situations in which I believe . . . First Amendment considerations would support the unauthorized use of copyrighted materials . . . . [One] category would include certain derivative works, and in particular parodies or satires.ò).

196 *See id.* at 898 (ñIt is true that the right conferred on an author by the Copyright Act to create a derivative work is an important part of the incentive-reward structure of the statute, and that that right is particularly valuable if the work achieves . . . popularity or notoriety.ò).

197 565 U.S. ___ (2012), 132 S. Ct. 873 (2012).

198 Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976ï 81 (1994) (codified as amended at 17 U.S.C. §§ 104A, 109 (2011)); *see* Golan v. Holder, 609 F.3d 1076, 1080 (10th Cir. 2010).

199 *Golan*, 609 F.3d at 1080.

200 *See* Petition for a Writ of Certiorari at i, *Golan*, 131 S. Ct. 1600 (No. 10-545).

201 U.S. CONST. art. I, § 8, cl. 8 (ñTo *promote the Progress* of Science and useful Arts . . . .ò) (emphasis added). The Progress Clause challenge will be put to the side for the purposes of this Article.

202 *See Golan*, 609 F.3d at 1082.

203 *See id.* at 1083ï 84.

sive interests.ò[204] Such an interest is in-line with the purposes behind the Copyright Clause itself.[205] Thus, the Tenth Circuit seems to be saying that Congress does not run afoul of the First Amendment when it acts within its copyright powers. Yet the Tenth Circuit still applied the First Amendment, undergoing a rigorous intermediate scrutiny analysis.[206]

In conducting such an analysis, the Tenth Circuit misread and misapplied *Eldred*.[207] As the Supreme Court clearly noted, such analysis was unnecessary. Just as in *Eldred*, ñCongress ha[d] not altered the traditional contours of copyright protection, [thus] further First Amendment scrutiny [was] *unnecessary*.ò[208] To be sure, it was not farfetched to argue that section 514 is not within the ñtraditional contours of copyright protection.ò[209] As such, the Courtôs merely reaffirming *Eldred* raises more questions than it solves: What are the traditional contours of copyright protection?[210] Can Congress deviate from the traditional substance of copyright law so long as it retains traditional copyright safeguards?[211] And how much of a deviation is too much? Is it the case that Congress has plenary authority so long as it retains the idea/expression dichotomy and the fair use doctrine?[212]

The approach identified in this Article would obviate the need for such analysis. In this case, we would simply ask whether striking down section 514

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204 *Id.* at 1084.

205 *See supra* text accompanying note 22.

206 *See Golan*, 609 F.3d at 1082ï 94.

207 Eldred v. Ashcroft, 537 U.S. 186, 221 (2003); *see* Brief for the Respondents in Opposition at 23ï 24, *Golan*, 132 S. Ct. 873 (No. 10-545).

208 *Eldred*, 537 U.S. at 221 (emphasis added); *see also Golan*, 565 U.S. at ___ (ñ[W]e concluded in *Eldred* that there was no call for the heightened review petitioners sought in that case. We reach the same conclusion here.ò) (footnote omitted).

209 *Id.*; *see also* Petition for a Writ of Certiorari at 13, *Golan*, 132 S. Ct. 873 (No. 10-545) (ñWorks in the Public Domain remain in the Public Domain and belong to the public. Section 514 upends this bedrock principle. It has taken many thousands of works out of the Public Domain and placed them under copyright protection, often for decades into the future. It thus ódeviates from the time-honored tradition of allowing works in the public domain to stay there.ôò (quoting Golan v. Gonzales, 501 F.3d 1179, 1192 (10th Cir. 2007))).

210 *See supra* note 146.

211 *See* Brief for the Respondents in Opposition at 24, *Golan*, 132 S. Ct. 873 (No. 10-545) (ñWhat matters for First Amendment analysis is whether Congress has altered copyrightôs traditional First Amendment safeguardsð fair use and the idea/expression dichotomyð so as to create obstacles to otherôs use of copyrighted material in the course of making their own speech.ò).

212 *Cf. Golan*, 565 U.S. 889ï 91 (2012), 132 S. Ct. 873 (2012).

under the First Amendment would invalidate too much of Congressôs expressly granted copyright power. In this case, it would. Congress, of course, has the power to enact retroactive laws, so a retroactive copyright law, a law that takes works in the public domain and accords them copyright protections, does not seem novel at all.[213] And to hold that Congress cannot take works in the public domain and accord them copyright protection would potentially severely undermine Congressôs copyright powers. Such undermining could occur in a situation like *Golan*, where Congress is acting in the area of foreign affairs.[214] And it is entirely possible that at some point in the future, economic conditions change such that granting copyright protection to works already in the public domain would be necessary for Congress to meet the purposes behind the Copyright Clause. As such, courts must tread lightly when bringing the First Amendment to bear on copyright legislation.

IV. CONCLUSION

This Article has proposed a new standard for reconciling the First Amendment and Congressôs copyright powers, one that takes seriously the structure of the Constitution. In doing so, this Article reaches the same normative conclusion that Professor Nimmer reached decades agoð that the First Amendment should be a scalpel vis-à-vis the Copyright Clause[215]ð while recognizing that Professor Nimmerôs categorization approach is unworkable, as rule-based approaches tend to be. At the same time, this Article provides an argument against various scholars who similarly propose standard-based approaches to resolving this constitutional conflict.

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213 *Cf. Eldred*, 537 U.S. at 204 (Congress has a ñconsistent historical practice of applying newly enacted copyright terms to future and existing copyrights[.]ò).

214 *See Golan*, 609 F.3d at 1085.

215 Nimmer, *supra* note 7, at 1200.