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The Public Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access through Secrecy or Intellectual Property

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The Public's Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property

EDWARD LEE*

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INTRODUCTION

On August 20, 2002, the secret court established by the Foreign Intelligence Surveillance Act ("FISA") did something truly remarkable. Not only did the full FISA Court¹ reveal that government agents had made "misstatements and omissions of material facts" in 75 applications that were filed to obtain secret electronic surveillance of individuals in the United States, the court issued a published opinion about the events.² That opinion was the first ever published by the full FISA Court in its entire twenty-five-year history.

In the opinion, the FISA Court revealed that it had convened a special meeting to seek explanation from the government about "the troubling number of inaccurate FBI affidavits" it submitted "in so many FISA applications."³ The government, however, offered no explanation why government agents had made and submitted these inaccurate affidavits to the FISA Court, although a government investigation was underway.⁴ So troubled was the court that it even barred one FBI agent from appearing before it again.⁵ A few months later the government admitted to the FISA Court that agents had made even more misrepresentations in other affidavits. The misrepresentations were quite stark: government agents had averred that they had applied the minimization procedures⁶ approved by the court that required "a 'wall' between separate intelligence and criminal squads in FBI field offices to screen FISA intercepts,

1. The FISA Court is comprised of eleven district court judges appointed to serve on the court by the Chief Justice of the U.S. Supreme Court. See 50 U.S.C. § 1803(a) (2000), amended by USA PATRIOT Act, Pub. L. No. 107-56, § 208, 115 Stat. 272, 283 (2001). The FISA Court is also referred to as the FISC.

2. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 620 (Foreign Int. Surv. Ct. 2002). The opinion, which is dated May 17, 2002, was not released for publication until August 20, 2002. See Letter from Judge Kollar-Kotelly, Presiding Judge, Foreign Intelligence Surveillance Court, to Senators Patrick J. Leahy, Arlen Specter, & Charles E. Grassley, at <http://fas.org/irp/agency/doj/fisa/fisco82002.html> (Aug. 20, 2002).

3. *In re All Matters Submitted to the Foreign Intelligence Surveillance Ct.*, 218 F. Supp. 2d at 620. These many misrepresentations appear to bear out the conclusions of Richard Scruggs, a federal prosecutor, who conducted an internal review in 1993 of the office that handles FISA applications. Scruggs found "the review process to prevent factual and legal errors was *virtually nonexistent*" in the office. JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE 329 (1996) (emphasis added). Scruggs concluded that "mistakes were being made" and the process was "untenable." *Id.* at 330.

4. *In re All Matters Submitted to the Foreign Intelligence Surveillance Ct.*, 218 F. Supp. 2d at 621.

5. *Id.*

6. Minimization procedures are procedures "that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information." 50 U.S.C. § 1801(h) (2000).

when in fact all of the FBI agents were on the same squad and all of the screening was done by one supervisor overseeing both investigations.”⁷ Even after the government had more than a year to identify the cause of the problem, it still had not explained to the court “how these misrepresentations occurred.”⁸

The ruling prompted an equally remarkable response from the FISA appellate court some six months later. The FISA Court of Review⁹ also issued its first published opinion ever.¹⁰ Reversing a longstanding interpretation of FISA that the lower court had followed,¹¹ the court held that FISA does not require the government to show that the “primary purpose” of its requested surveillance is to gain foreign intelligence: the primary purpose of the surveillance could be to conduct a criminal investigation, and FISA would still authorize the surveillance as long as a significant purpose was also to gather foreign intelligence.¹² Thus, the government is no longer obligated to follow the previous minimization procedures that required it to keep any criminal investigation of targets of surveillance separate from its use of FISA surveillance for foreign intelligence purposes.¹³ Although this latter holding has received the lion’s share of public attention, the court revealed in a footnote another startling fact: apparently, the government still had not explained why it made so many misrepresentations to the FISA Court.¹⁴

In the end, what is most extraordinary about the FISA Court’s opinion is not its revelation of repeated misrepresentations made by government agents to obtain secret surveillance of individuals in the United States. Although it is rare for a court to find that government agents have

7. *In re All Matters Submitted to the Foreign Intelligence Surveillance Ct.*, 218 F. Supp. 2d at 621 (emphasis added).

8. *Id.*

9. The FISA Court of Review is comprised of three federal judges appointed to the court by the Chief Justice of the U.S. Supreme Court. See 50 U.S.C. § 1803(b) (2000).

10. *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002) (per curiam). In fact, it was the first appeal ever to reach the court because never before had the government been denied a request for FISA surveillance. The Supreme Court denied the ACLU’s petitions to intervene and for a writ of certiorari to challenge the FISA Court of Review’s decision. *Id.*, cert. denied, 123 S. Ct. 1615 (2003).

11. See *United States v. Megahey*, 553 F. Supp. 1180, 1192 (E.D.N.Y. 1982) (holding FISA search proper “only if foreign intelligence surveillance is the Government’s primary purpose”), *aff’d sub nom.*, *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984). Accord *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991); *United States v. Pelton*, 835 F.2d 1067, 1075–76 (4th Cir. 1987); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987).

12. *In re Sealed Case*, 310 F.3d at 727, 735. The Court of Review held that FISA, both as amended by the Patriot Act and as originally enacted, did not require that the primary purpose of the FISA search be limited to foreign intelligence gathering. *Id.*

13. *Id.* at 746.

14. *Id.* at 729 n.18.

been making repeated material falsities in affidavits submitted to it, probably no system of justice or law enforcement is immune from such conduct. Instead, what is most extraordinary about these events is the simple fact that we even know about them.

Although many may not be aware of it, the FISA Court is a special court that operates virtually in total secrecy.¹⁵ There are no open proceedings, no opportunity for the subject of an investigation to appear before the court,¹⁶ and, until now, no published opinions to reveal even a glimpse of the inner workings of the full FISA Court.¹⁷ People who are the target of a FISA search may not even know it, and even if they eventually find out a FISA search has been used against them (usually following an indictment), they have no right to see the affidavit the government used to obtain the authority for conducting the FISA search.¹⁸ This contrasts with the procedures under the Federal Wiretap Act, which requires notice to the target of the surveillance once it is completed¹⁹ and which affords defendants the right to see and contest the affidavits the government used to obtain surveillance.²⁰ Nor is there public scrutiny of what happens behind the closed doors of the FISA Court, at least not until the published opinion of August 20, 2002 appeared to invite such public attention.

Given the shroud of secrecy that envelops nearly everything the FISA Court does, that the FISA Court published its opinion is striking. The court sought refuge in publishing information about potential government misdeeds that had occurred, up to that time, in secret. Perhaps to underline the seriousness that the court ascribed to the issue, the court declared its intention to publish "any [other] unclassified opinions or orders in the future" in a letter to ranking senators on the Committee on

15. See 50 U.S.C. § 1803 (2000). The court reportedly meets in a "cipher-locked, windowless, secure room on the top floor of the Department of Justice." Gerald H. Robinson, *We're Listening! Electronic Eavesdropping, FISA, and the Secret Court*, 36 WILLAMETTE L. REV. 51, 61 (2000).

16. See 50 U.S.C. §§ 1805, 1824 (ex parte orders); *id.* §§ 1806(f), 1825(g) (ex parte and in camera review of challenges to FISA searches used against criminal defendants).

17. In the 1980s, one FISA judge issued a published opinion ruling that (at the time) FISA did not authorize physical searches of places. See Letter from Judge Kollar-Kotelly, *supra* note 2.

18. See 50 U.S.C. §§ 1806(f), 1825(g). Courts have the authority to disclose to the defendant the government's FISA application "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." *Id.* § 1806(f). There has been no reported case in which a court ever authorized such a disclosure of FISA material to a defendant.

19. See 18 U.S.C. § 2518(8)(d) (2000).

20. See *id.* § 2518(9). The Federal Wiretap Act is also referred to as Title III because it was enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968). In 1986, Congress amended federal wiretap law by passing the Electronic Communications Privacy Act (ECPA), which restructured Title III as Title I of ECPA. See DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 324 (2003).

Intelligence.²¹ But why? The FISA statute does not expressly authorize the publication of opinions by the FISA Court, much less require it.²² The court could have easily kept its opinion secret and *no one in the public would have known*.

The answer lies, I believe, in the concept of the public domain, a term that is more commonly used in the intellectual property context, but that is no less important to areas involving government secrecy. In both contexts, the concept of the public domain helps to establish a legal restraint against government overreaching by ensuring the public's access to materials that are essential for self-governance and a learned citizenry.

By publishing its opinion and releasing it into the public domain, the FISA Court must have been aware of the public scrutiny of the government's conduct that would necessarily follow, particularly in our post 9/11 world. But that undoubtedly must have been one of the court's reasons for publishing the opinion in the first place. It is not often that a court discovers that government agents may have been lying to it, and repeatedly. The government's more than one-year delay in proffering any explanation to the FISA Court to account for the government's misrepresentations must have only added to the court's consternation. Perhaps then it should be no surprise at all that the secret court published its opinion. Injecting information into the public domain is the perfect antidote to government abuses that are carried out by means of secrecy. The public domain counters secrecy with public scrutiny.

This Article develops a theory to explain the concept of the public domain, its various uses in intellectual property law and areas involving government secrecy. While there is a firestorm of debate about the public domain in intellectual property law, this concept has been scarcely discussed, much less understood, in areas outside of intellectual property law. Part of the problem with the current debate over the public domain is that it focuses almost exclusively on intellectual property law as the sole area in which the public domain matters. This is shortsighted. The concept of the public domain figures prominently in other areas of law, including First Amendment rights of access, government secrecy agreements, espionage law, laws regulating classified information and munitions lists, and the Freedom of Information Act—areas that I collectively call the “government secrecy cases.”²³

21. See Letter from Judge Kollar-Kotelly, *supra* note 2.

22. See 50 U.S.C. § 1803(a)–(b).

23. It goes beyond the scope of this article to analyze the concept of the public domain as it applies to public lands or the environment. Other scholars have suggested comparisons. See James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 33–34 (2003) [hereinafter *Enclosure*]. The connection between the public domain in IP and

These various uses of the public domain raise an important question that has been neither asked nor answered in legal scholarship: Why does the concept of the public domain recur in so many areas of law? Put differently, is there some common thread that ties together these various recurring uses of public domain that will help us better understand why the concept is recognized in the first place? To my knowledge, no court has ever considered these issues, at least not squarely in a published opinion. Even more surprisingly, nor has anyone in legal scholarship. Most legal scholarship about the public domain comes from the intellectual property circle, of which I must confess I am a part. The scholarship here has largely thrown blinders on to uses of the concept of the public domain in areas outside of intellectual property. This Article aims to correct this myopia.

My theory is elaborated in four parts. Part I examines the various uses of the public domain in intellectual property (IP) law. The focus of this Part is historical. I trace the origin of the term “public domain” and its development from the related concepts of *publici juris* (“of public right”) and public property. As originally understood, the public domain is the “domain of things public,” meaning the domain of all things belonging to the people as a matter of public right, a notion that traces back to the very concept of a republic (*res publicae*).

Part II examines the various uses of the public domain outside of IP, in the areas of law involving government secrecy. I show how these cases also recognize the public domain as a restraint on the government’s power to control public access.

Part III then provides a unified theory of the public domain. Using evolution theory as a framework, Part III explains how all of the uses of the public domain in IP and the government secrecy cases have a parallel origin, structure, and function. This doctrinal parallelism does not necessarily mean that the public domain in IP is exactly the same as the public domain in government secrecy cases. Instead, the doctrinal parallelism indicates the relatedness of the doctrines. In both areas the concept imposes a legal restraint on the government’s ability to restrict the free flow of information, ideas, or materials. It does so by a simple mechanism: according each person a right of unrestricted access to or common ownership of material in the public domain. In at least some instances, this restraint is constitutionally based. Properly understood, the public do-

the public domain in government secrecy cases, however, has largely gone unexamined—a fact that is surprising given the closer connection between the uses of the public domain in IP and government secrecy cases, which both deal with information and knowledge. The public goods nature of such informational goods is absent in the case of land. Unlike land, information is a resource that is difficult to exhaust through use among people and difficult to exclude people from using after its disclosure.

main is the *public's domain*, meaning that it is off-limits to government control.

Part IV applies my theory to practice. Drawing from both Bruce Ackerman's theory of "constitutional moments" and punctuated equilibrium theory from evolution, Part IV makes the case for why the public domain is now in threat of extinction. Just as in nature, where superior organisms that are best suited for the environment may become extinct in a catastrophic moment, so too in law catastrophes may cause the extinction of superior doctrines that are best suited for democratic governance. In either case, the cause of extinction is the same: the catastrophe imposes "different rules" that make it impossible for the organism's or doctrine's continued survival. Examining the government's recent expansions of copyright law, its greater use of government secrecy post-9/11, and its assertion of the extraordinary power to remove thousands of works from the public domain, this Article concludes by suggesting how "different rules" may be jeopardizing the continued viability of the doctrine of the public domain.

I. THE PUBLIC DOMAIN IN INTELLECTUAL PROPERTY LAW

The public domain is now the focus of an intense public debate, precipitated in large part by the *Eldred* case²⁴ and growing concerns over the scope of IP. No longer is the concept just for legal scholars to discuss; the public too has an interest. But much of the recent debate over the public domain has been waged without a firm understanding of the origin of the concept. There is a danger that the public domain may well become nothing more than an empty abstraction, debated but little understood.²⁵ This Part attempts to address this problem by tracing the development of the concept of the public domain in intellectual property law. Revealed is a conception of the public domain as a restraint against the government's power to grant monopolies that operated by a simple mechanism: what was considered off-limits to the government's power to grant intellectual

24. *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003) (holding that Copyright Term Extension Act's twenty-year term extension of subsisting copyrights is constitutional). See, e.g., Shannon McCaffrey, *Battle Over Public Domain*, THE MIAMI HERALD, Oct. 10, 2002, at 1; Warren Richey, *High Court Weighs Best Copyright Length: Constitutional Issue Is How Long Work Can Remain Outside Public Domain*, CHRISTIAN SCI. MONITOR, Oct. 9, 2002, at 2; Joan Biskupic, *Copyright Case to Determine Use of Classic Culture; Songs, Poems, and a Famous Cartoon Mouse Could Enter Public Domain*, USA TODAY, Oct. 9, 2002, at A5. I should note that I worked on behalf of Eldred in his unsuccessful challenge.

25. David Lange, one of the first legal scholars to analyze the public domain, recognized this danger. David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 177 (1981) ("[T]he public domain tends to appear amorphous and vague, with little more of substance in it than is invested in patriotic or religious slogans on paper currency.").

property rights was deemed public property, to be owned and enjoyed by all as a matter of public right.

A. THE CURRENT DEBATE OVER THE PUBLIC DOMAIN

The public domain is at the center of some of the most important intellectual property controversies of our digital age.²⁶ The discussion involves *Newsweek*,²⁷ *The New York Times*,²⁸ National Public Radio,²⁹ and other mainstream media. No longer is the concept a forgotten remnant in legal scholarship;³⁰ it is now the focus of symposia,³¹ articles,³² and even public interest centers.³³ Spurred on by the writings and work of Lawrence Lessig,³⁴ Yochai Benkler,³⁵ James Boyle,³⁶ and others, a grass-roots

26. Part of this (or a related) debate is sometimes waged in terms of the “commons.” Although the “commons” and the “public domain” are often used interchangeably, they are not necessarily identical. James Boyle, *Foreword: The Opposite of Property?*, 66 LAW & CONTEMP. PROBS. 1, 8 (2003) [hereinafter *Foreword*]. The word “commons” has particular prominence in the economic debate over whether a certain resource—such as land—will be overconsumed if the rights to it are held in common (i.e., the tragedy of the commons). There is a very rich social science literature exploring this debate, sparked in large part by Garret Hardin’s analysis in *The Tragedy of the Commons*, SCI., Dec. 13, 1968. See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); MARGARET MCKEAN, MAKING THE COMMONS WORK: THEORY, PRACTICE AND POLICY (David Bromley et al. eds., 1992); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). It goes beyond the scope of this Article to provide a full exegesis of the term “commons.” See generally Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 111, 115–18 (2003) (discussing various notions of “commons”). I focus on the public domain because I wish to analyze the legal term that courts have adopted. The public domain is an example of a commons, but other types of commons exist outside of the public domain. See, e.g., LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 20 (2001) (listing examples of different commons); Boyle, *Enclosure*, *supra* note 23, at 65 (discussing open source software as a commons for software).

27. E.g., Steven Levy, *Glitterati vs. Geeks*, NEWSWEEK, Oct. 14, 2002, at 40.

28. E.g., Amy Harmon, *Case Could Shift Balance in Debate on Public Domain*, N.Y. TIMES, Feb. 20, 2002, at C7.

29. The Connection, *The Public Domain on Stand*, available at <http://www.theconnection.org> (National Public Radio, Aug. 28, 2003).

30. As Lange noted in 1981, “[r]emarkably little direct attention has been paid to the public domain in recent years; there seems to have been no extended treatment of the subject on its own terms.” Lange, *supra* note 25, at 150 n.20.

31. Duke Law School, Conference on the Public Domain, at <http://www.law.duke.edu/pd>. Most of the articles presented at the conference were later published in *The Public Domain*, 66 LAW & CONTEMP. PROBS. 1 (2003), <http://www.law.duke.edu/pd/papers.html> (collecting articles).

32. See, e.g., Symposium, *The Public Domain*, 66 LAW & CONTEMP. PROBS. 1 (2003); Edward Samuels, *The Public Domain Revisited*, 36 LOY. L.A. L. REV. 389 (2002); R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995 (2003).

33. See Center for the Public Domain, at <http://www.centerforthepublicdomain.org>.

34. See LESSIG, *supra* note 26.

35. See Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173 (2003) [hereinafter *Looking Glass*]; Yochai

movement appears to be forming to help bring greater scrutiny to laws that effectuate an “enclosure” of the public domain. The movement has even led to the introduction of a bill in Congress entitled the Public Domain Enhancement Act that aims to allow many older copyrighted works that are no longer commercially valuable to fall into the public domain sooner than their lengthy term of copyright, so the public can benefit from these underutilized works.³⁷

But there is an equally, if not more, powerful counter-movement led by the movie and recording industries that contends that Congress can diminish the public domain without restraint through the grant or expansion of IP rights. To Jack Valenti, the president of the Motion Picture Association of America, the public domain contains old, neglected materials that people have no incentive to cultivate.³⁸

The government has taken a clear side in this debate, asserting in litigation that Congress has the power to remove material from the public domain through the grant of IP rights.³⁹ In the government's view, the fact that works have been in the public domain for many years has no constitutional significance at all; Congress is free to grant exclusive rights over these works thereby removing them from the public domain. This view is, I believe, untenable, based on the original understanding of the public domain.

Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999) [hereinafter *Free as the Air*].

36. See Boyle, *Enclosure*, *supra* note 23.

37. A copyrighted work would fall into the public domain if the copyright owner fails to pay a \$1 fee in the 50th year of the copyright term. Public Domain Enhancement Act, H.R. 2601, 108th Cong. (2003).

38. *All Things Considered* (National Public Radio, Jan. 15, 2003) (statement of Jack Valenti) (“Now if nobody owns it and anybody can use it, where is the incentive to keep that particular piece of film . . . in the best condition? The answer is, there's no incentive.”); Sabra Chartrand, *To Some, Globalization, Not Corporate Lobbying, Is the Real Reason Copyrights Are Growing in Power*, N.Y. TIMES, Feb. 25, 2002, at C6 (quoting Jack Valenti) (“I'm not saying the public domain is bad, [b]ut how does it benefit the consumer?”).

39. See Def. Mem. in Supp. of Def. Renewed Mot. to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, *Golan v. Ashcroft*, No. 01-B-1854, at 8–14, 25 (D. Colo. filed Apr. 30, 2003).

B. THE ORIGIN OF THE PUBLIC DOMAIN AS A LEGAL CONCEPT

What is missing from today's debate about the public domain is a clear understanding of its origin. Much of the legal scholarship about the public domain gives the misimpression that the concept is largely, if not entirely, a late twentieth-century creation. Starting with David Lange's influential work in 1981⁴⁰ and extending to recent scholarship,⁴¹ the focus has largely been on sources from the last half of the twentieth century. While several legal scholars have brought increased attention to the early development of the concept of the public domain,⁴² none thus far has traced its lineage in court cases in the United States.

This section attempts to fill the gap in legal scholarship by analyzing some of the leading cases in the early development of the concept of the public domain.⁴³ These cases show that the concept of the public domain establishes a limit on government power. As the concept was first recognized in the United States, the public domain embodied affirmative rights of the public to the unrestricted access and use of public domain material. These rights were encapsulated in the twin concepts of *publici juris* ("of public right") and public ownership (or public property), both of which eventually coalesced into the general rubric of the public domain, meaning the domain of things belonging to the public. Under this conception, the public domain embodies more than simply what is left unprotected by intellectual property law: it demarcates constitutional limits on the government's power to grant IP rights in terms of both (1) their duration and (2) their subject matter.

40. Lange expressly confined his research to "public domain-oriented writings back to 1964." Lange, *supra* note 25, at 151 n.20.

41. See, e.g., Wagner, *supra* note 32; Boyle, *Enclosure*, *supra* note 23.

42. Both Wendy Gordon and Malla Pollack have analyzed Lockean notions of property, particularly common property or the common, to explain the public domain. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1599-72 (1993); Malla Pollack, *The Owned Public Domain: The Constitutional Right Not to Be Excluded—Or the Supreme Court Chose the Right Breakfast Cereal* in Kellogg v. National Biscuit Co., 22 HASTINGS COMM. & ENT. L.J. 265 (2000). Mark Rose has analyzed the eighteenth-century development of the concept of the public domain stemming from the creation of copyright law in England. See Mark Rose, *Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain*, 66 LAW & CONTEMP. PROBS. 75 (2003) [hereinafter *Nine-Tenths*]. Carol Rose has discussed Roman concepts of public property in analyzing the public domain. See Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (2003) [hereinafter *Romans*].

43. There are far more cases recognizing the concepts of public property, *publici juris*, or the public domain in the context of intellectual property than I can possibly discuss here. In my selection, I have made judgment calls about the importance of the case based primarily on (1) whether it is the first-reported federal court decision recognizing the term, (2) the court deciding the case, and (3) the depth of the discussion.

I. *The Public Domain as a Limit to Intellectual Property's Duration*

The first limit established by the public domain occurs at the moment the intellectual property protection expires. For copyrights and patents, this occurs at the end of a specified term of protection set by Congress. For trademark, it comes when the trademark becomes generic, while for trade secrets when the secret becomes public. At each of these moments of expiration, the material that was once protected by intellectual property is said to "fall into" the public domain.⁴⁴ The public domain thus represents the final resting place for material whose IP protection has expired. Once material reaches the public domain through the expiry of IP protection, the public domain acts as a bar to prevent the government from continued application of IP protection to that material.

a. *The Webster's Dictionary Case: Recognizing Publici Juris and Public Property as a Limit*

The public domain's operation as a limit on government power was recognized in the Webster's Dictionary case, which raised the question whether the copyrighted work Webster's Dictionary could receive trademark protection even after the term of the copyright for the dictionary expired.⁴⁵ In practical terms, if trademark protection in "Webster's" survived the expired copyright, G. & C. Merriam Co., the owner of the expired copyright, could prevent others from copying its dictionary by the name by which the public had known it. Merriam had a huge financial interest in seeking to extend intellectual property protection for its dictionary as long as and in any way it could.

Justice Miller, who was one of the most influential early justices on copyright law,⁴⁶ rejected such an extension. Relying on the concept of

44. Determining when material has fallen into the public domain becomes more complicated if several forms of IP protection exist concurrently for the same material. For example, a person could conceivably get both patent and copyright protection for computer software, in which case the expiry of the shorter term of patent would not inject the material into the public domain while the copyright was still in effect. Because the Copyright Clause limits the duration of both patent and copyright, however, the eventual entry of the material into the public domain is assured. The more difficult scenario involves a patented invention or copyrighted work that also is trademarked in some respect. Because federal trademark law derives from Congress's power under the Commerce Clause, trademark law does not contain a "limited times" requirement. Thus, the question is whether the material whose patent or copyright expired could nevertheless claim trademark protection indefinitely to keep the material out of the public domain. As discussed below, such an extension of IP rights over material whose patent or copyright has already expired is impermissible, at least when it has the effect of denying the public the full enjoyment of the underlying material.

45. See *Merriam v. Holloway Publ'g Co.*, 43 F. 450, 450 (C.C.E.D. Mo. 1890).

46. Justice Miller was responsible for writing some of the Court's most important early copyright cases, which are still influential today. See *In re Trade-Mark Cases*, 100 U.S. 82 (1879); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

public property, Justice Miller recognized a limit to the government's power to grant IP rights:

[T]his proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book until it has expired, may continue that monopoly indefinitely, under the pretense that it is protected by a trade-mark or something of that sort. I do not believe in any such doctrine, nor do my associates. When a man takes out a copyright, for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, *such writings or works shall go to the public and become public property*. I may be the first to announce that doctrine, but I announce it without any hesitation. . . . The copyright law gives an author or proprietor a monopoly of the sale of his writings for a definite period, but the grant of a monopoly implies that, after the monopoly has expired, *the public shall be entitled ever afterwards to the unrestricted use of the book*.⁴⁷

What is striking about Justice Miller's opinion is its self-assurance and absoluteness. Justice Miller recognized "without any hesitation" (and without citing a single authority, albeit in a case of first impression) an absolutist conception of public property to limit the scope of intellectual property. Miller's holding was absolute in duration: once a work becomes public property, it must remain public property "ever afterwards." And it was absolute in scope: the expiration of the copyright to a work entitles the public to the "*unrestricted use*" of it.⁴⁸ Merriam, therefore, had no right to attempt to limit the public's enjoyment of the work to the contents without the title by which it was known to the public. The title, along with the work, had become the public's property and therefore could not be made for exclusive appropriation by another grant of IP.⁴⁹

Although Justice Miller's opinion does not speak in terms of the public domain, it provides the foundation for the doctrine. Before the public domain was expressly recognized as a concept in American intel-

47. *Merriam*, 43 F. at 451 (emphases added).

48. The result is the converse of an author's exclusive rights. The author has *exclusive* rights under copyright for a *limited time*. Once that ends, the public gains *non-exclusive* rights to enjoy the material *forever*.

49. One qualification recognized by Justice Miller was that other subsequent publishers of *Webster's Dictionary* could not attempt to deceive the public by claiming that Merriam had published their publication. *Merriam*, 43 F. at 451. Other courts reached similar results with respect to Webster's Dictionary. See, e.g., *Merriam v. Famous Shoe & Clothing Co.*, 47 F. 411, 413 (C.C.E.D. Mo. 1891) ("[A]s the copyright on that edition has expired, it has now become public property."); *Merriam v. Tex. Siftings Publ'g Co.*, 49 F. 944, 948 (C.C.S.D.N.Y. 1892); *G. & C. Merriam Co. v. Straus*, 136 F. 477, 478 (C.C.S.D.N.Y. 1904) (rejecting "attempt to protect literary property in the dictionaries which became *publici juris* upon the expiration of the copyrights"); *G. & C. Merriam Co. v. Syndicate Publ'g Co.*, 237 U.S. 618, 622 (1915).

lectual property law,⁵⁰ courts used the concepts of public ownership and *publici juris*⁵¹ to refer to the same basic idea now embodied in the concept of the public domain: the public gained affirmative rights of unrestricted access to and use of material once its IP protection had expired. Early courts recognized these affirmative rights of the public by either public property or the term *publici juris*, which means:

Of public right. The word "public" in this sense means pertaining to the people, or affecting the community at large; that which concerns a multitude of people; and the word "right," as so used, means a well-founded claim; an interest; concern; advantage; benefit. This term, as applied to a thing or right, means that it is open to or exercisable by all persons. It designates things which are owned by "the public"; that is, the entire state or community, and not by any private person. When a thing is common property, so that any one can make use of it who likes, it is said to be *publici juris*; as in the case of light, air, and public water.⁵²

The close connection between public rights and the public domain becomes even more apparent in the next case, which marks the first time the Supreme Court recognized the public domain in IP law.

b. *The Singer case: Recognizing the Domain of Things Public as a Limit*

In *Singer Mfg. Co. v. June Mfg. Co.*,⁵³ the Court faced the same question as presented by the Webster's Dictionary case, but this time in the patent context. Singer Manufacturing asserted a trademark claim for its mark "Singer" even after the patents for its sewing machines had expired.⁵⁴ Singer was attempting to do what Merriam had tried in the copyright context: extend its expired grant of monopoly over its product through trademark law.⁵⁵

50. The use of notions of public property and public rights to limit intellectual property has roots dating back to the Enlightenment period in England. See Mark Rose, *Nine-Tenths*, *supra* note 42, at 76–86.

51. In a related case, a circuit court rejected a similar attempt by Merriam, although this time with express reference to the concept of *publici juris*: it was impermissible "to protect the literary property in the dictionaries which became *publici juris* upon the expiration of the copyrights." *Straus*, 136 F. at 478.

52. BLACK'S LAW DICTIONARY 1229 (6th ed. 1990) (emphasis added). Ownership is inherent in the historical notion of "public." See THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) (defining "publicness" as the "[s]tate of belonging to the community; openness, state of being generally known or public").

53. 163 U.S. 169 (1896).

54. *Id.* at 183.

55. The Court recognized this danger. *Id.* at 185–86 ("[T]hat the patentee or manufacturer could take the benefit and advantage of the patent upon condition that at its termination the monopoly should cease, and yet, when the end was reached, disregard the public dedication and practically perpetuate indefinitely an exclusive right.").

In a unanimous opinion, however, the Supreme Court rejected Singer's argument.⁵⁶ Additionally, for the very first time, the Court formally recognized the concept of the public domain in IP law by explicitly tying the notions of *publici juris* and public property to the concept of the public domain. As the Court explained:

It is *self-evident* that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes *public property*. It is upon this condition that the patent is granted. It follows, *as a matter of course*, that on this termination of the patent there passes to *the public the right* to make the machine in the form in which it was constructed during the patent. . . . It equally follows from the cessation of the monopoly and the falling of the patented device *into the domain of things public* that along with the *public ownership* of the device there *must also necessarily* pass to the public the generic designation of the thing which has arisen during the monopoly in consequence of the designation having been acquiesced in by the owner, either tacitly, by accepting the benefits of the monopoly, or expressly by his having so connected the name with the machine as to lend countenance to the resulting dedication.⁵⁷

In this remarkable passage, the Supreme Court introduces the concept of the public domain, "the domain of things public," into American intellectual property law.

The Court's particular phraseology, "the domain of things public," deserves special attention. The word order, which inverts the more typical "public domain," in fact parallels the French term, *domaine public*, which both Jessica Litman and James Boyle attribute as the source for greater usage of the term after its inclusion in the Berne Convention, a leading international agreement governing copyright law.⁵⁸ The Court's later quotation of four French authorities on patent law that specifically refer to the public domain is further evidence of the French influence in the Court's derivation of the term.⁵⁹

56. Although Singer was not entitled to prevent other manufacturers from using "Singer" to identify the sewing machines no longer under patent, the Court did recognize that other manufacturers making "Singer" sewing machines could be required to include a label indicating themselves, not Singer, as the manufacturer. *Id.* at 187.

57. *Id.* (emphases added).

58. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975 n.60 (1990); Boyle, *Enclosure*, *supra* note 23, at 58 n.99. As Boyle notes, this lineage to the French *domaine public* is "somewhat ironic," given that French law "is in many ways among the least solicitous and protective of the public domain." *Id.*

59. See *Singer*, 163 U.S. at 186 ("Abandonment in industrial property is an act by which the *public domain* originally enters or reenters into the possession of the thing (commercial name, mark or sign) by the will of the legitimate owner.") (quoting DE MARAGY, INTERNATIONAL DICTIONARY OF INDUSTRIAL PROPERTY) (emphasis added); *id.* at 196 ("But at the expiration of the patent, does the designation fall into the *public domain* with the patented invention?") (quoting BRAUN, MARQUES DE FABRIQUE, p. 232, § 68) (emphasis added); *id.* at 197 ("That the denomination under which a patented article is des-

Although the Court's phraseology parallels the French term, the content is not exactly the same. The key difference is that the Court specifies what this domain contains—things public. The connection to *publici juris* and public property should be apparent. "Public things" are things owned by the people, to which they have unrestricted rights. Once something falls into the public domain (i.e., the "domain of things public"), it is a "public thing" no longer subject to exclusive appropriation. The Court makes this connection explicit by repeatedly recognizing the public's rights over public property throughout the opinion.⁶⁰ The Court quotes at length Justice Miller's opinion in the *Webster's Dictionary* case for its discussion of public property,⁶¹ as well as an English decision holding that "an invention [whose patent has expired] becomes . . . entirely *publici juris*" and "open to all the world to manufacture."⁶² The *Singer* decision unites these three concepts into a single doctrine, the public domain, that limits the duration of IP rights.⁶³

Like Justice Miller's opinion in *Merriam*, *Singer* is striking in its self-assurance. Although the Court had ample supportive authorities that it later cited and discussed, the key part of the Court's opinion rests on a principle that the Court considered to be "self-evident," along with several corollaries that follow "necessarily" or "as a matter of course."⁶⁴ It was self-evident to the Court that once a patent expires, "the right to make the thing formerly covered by the patent becomes public property." And one *necessary* consequence of the invention becoming public property was that the public also must be able to use the name that was used to identify the invention. The Court embraced the absolutist under-

ignated by the inventor falls into *the public domain* at the same time as the invention, at least when this denomination has been drawn from common language, and does not reproduce the name of the inventor himself.") (quoting *POUILLET, BREVETS D'INVENTION*, Nos. 327, 328, at 278-79) (emphasis added); *id.* at 199 ("Whereas, without doubt, that methods of manufacture of a patented product fall into *the public domain* after the expiration of the patent, but it is otherwise as to the name of the inventor.") (quoting *I DICTIONARY OF DE MARAFY II*) (emphasis added).

60. *See, e.g., id.* at 185 ("[T]he right to make the thing formerly covered by the patent becomes public property."); *id.* ("there passes to the public the right to make the machine in the form in which it was constructed during the patent"); *id.* ("[F]rom the cessation of the monopoly and the falling of the patented device into the domain of things public that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing."); *id.* at 186 ("[t]he public having the right, on the expiration of the patent, to make the patented article"); *id.* ("this right may become public property").

61. *Id.* at 191.

62. *Id.* at 194.

63. Another interesting feature of "things public" is its similarity to the Roman concept of *res publicae* (public things). Under Roman law, *res publicae* belonged to the public and were open to all—things such as "roads, harbors, ports, bridges, rivers that flowed year-round, and lands immediately adjacent thereto." Carol M. Rose, *Romans*, *supra* note 42, at 96.

64. *Singer*, 163 U.S. at 194.

standing of public property and *publici juris* articulated by *Merriam*: once something enters the public domain, it must remain there for the public's unrestricted use.⁶⁵ This was "essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly."⁶⁶

Some may dispute whether these restraints are constitutionally based. *Singer* and the *Webster's Dictionary* case did not specifically refer to the Constitution in reaching their decisions.⁶⁷ It is possible to characterize the decisions as pure statutory interpretation of the federal copyright and patent acts.

However, such a reading is less convincing. None of the statutes involved contains any text that even intimates the kind of robust limitation that *Singer* and the *Webster's Dictionary* case recognize. The Copyright Clause *does* contain such text in the requirement that exclusive rights last only for "limited Times" and in order to "promote Progress."⁶⁸ What clearly animates these decisions is the courts' fear of an extension of exclusive rights for material whose "limited" term of copyright or patent had already expired.⁶⁹ The courts fashioned a doctrine in the public domain that would preclude this evasion of the Copyright Clause's limitation, which carries an understanding that the public must have *unrestricted* rights to a work following the expiry of the "limited" term of copyright or patent.⁷⁰ As shown below, the Court has used the term "public domain" in other cases to indicate a *constitutional* restraint on the government's power to grant exclusive rights. If the restraint recognized in *Singer* and the *Webster's Dictionary* case were only statutory, it would be hard to square with the absolutist description of the public's rights contained in the opinions and the notion that the public has unrestricted

65. *Id.* at 203 (Because "the word 'Singer' . . . had become public property . . . it could not be taken by the Singer Company out of the public domain by the mere fact of using that name as one of the constituent elements of a trademark.").

66. *Id.* at 185.

67. Twice recently the Supreme Court has chosen to decide on statutory grounds limits to trademark law for material subject to copyright and patent, while avoiding discussion of possible constitutional limitations. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2048 (2003) (Lanham Act does not require attribution of the author of work in the public domain after copyright expired); *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 35 (2001) (expired utility patents for signs provided strong evidence signs were functional and not eligible for trade dress protection and declining to discuss constitutional question).

68. U.S. CONST. art I, § 8, cl. 8.

69. See *Merriam v. Holloway Publ'g Co.*, 43 F. 450, 451 (C.C.E.D. Mo. 1890); *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 185-86 (1896).

70. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 558, at 402 (Ronald D. Rotunda & John E. Nowak eds., 1987) (Copyright Clause is intended to "admit the people at large, after a short interval, to the full possession and enjoyment of all writings . . . without restraint.").

rights to public domain material “ever afterwards.” Were the public’s rights to the public domain only statutory, there would be no basis for such an unqualified description of the public’s rights to the public domain.⁷¹

c. *The Public Domain as a Limit to Trademarks and Trade Secrets*

In contrast with copyrights and patents, which the Copyright and Patent Clause requires to be for “limited Times,”⁷² trademarks and trade secrets do not have defined terms and can conceivably be perpetual in duration. Yet, just as with copyrights and patents, the public domain operates as a limit on the life of a trademark and trade secret. Indeed, with these latter two forms of intellectual property, it may be even more apparent that the public domain acts as a trump against IP rights, since here the public’s conduct itself can terminate the life of the IP right.

In trademark law, a mark expires when it becomes generic, such as the words “shredded wheat,” “yo-yo,” “thermos,” and “nylon.” This means that the public has given the mark, which once had a distinctive secondary meaning to identify the trademark holder’s goods or services, a common usage to refer to the entire type of product, regardless of its maker.⁷³ The public’s common usage of the mark as a generic term trumps the trademark holder’s exclusive right to use the mark only on its products. Just as in the case of both copyright and patent law, early courts used the concept of *publici juris* to indicate this ultimate limit in trademark law.⁷⁴

The public’s claim on a trade secret is even more direct and immediate. While a trademark may take years to become generic, a trade secret expires as soon as it is made public. In order to constitute a trade secret, “[t]he subject of a trade secret must be secret, and must not be of public knowledge . . . in the trade or business.”⁷⁵ Trade secrets lose their protec-

71. To the extent that the cases are characterized as statutory interpretation, they would at least involve the doctrine of constitutional avoidance—with the courts avoiding the adoption of an interpretation that might run afoul of the Copyright Clause and instead interpreting the patent or copyright statute to give effect to the Clause’s directives.

72. U.S. CONST. art. I, § 8, cl. 8.

73. See *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 404 (6th Cir. 2002).

74. See, e.g., *Star Brewery Co. v. Val. Blatz Brewing Co.*, 36 App. D.C. 534, 537 (D.C. Ct. App. 1911) (“[A] word which was originally a trademark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris*. . . . If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader . . . the right to the trademark must be gone.”); *Barber v. Conn. Mutual Life Ins. Co.*, 15 F. 312, 318 (C.C.S.D.N.Y. 1883) (“Where the name, trade-mark, or symbols are words *publici juris*, that is, words which the public have a right to use, their use will not be enjoined.”).

75. *Kewanee Oil Co. v. Bicron Co.*, 416 U.S. 470, 475 (1974).

tion if they are disclosed or made accessible to the public through lawful means.⁷⁶ The public domain acts as a limit on the life of any trade secret.⁷⁷

The public domain's limits on trademark and trade secret law are constitutionally based. If trademark law were interpreted to protect generic words, or trade secret law to protect public information, such an interpretation would most likely result in a restriction of speech that violates the First Amendment. The First Amendment protects the public's right to use generic words and publicly available information that is not protected by copyright.⁷⁸

2. *The Public Domain as a Limit to the Subject Matter of Intellectual Property*

The second important limit established by the public domain is on the subject matter of IP. This limit bars the government from granting exclusive rights to certain subject matter deemed to be ineligible for exclusive rights, and thus within the public domain. Unlike the limit established on the duration of IP rights, the public domain here establishes a limit that precludes the grant of IP to the material in the first instance—public domain material is off-limits to exclusive appropriation.⁷⁹

a. *Graham*

Courts have used the term “public domain” to demarcate a constitutional limit that indicates what subject matter or material cannot be made the subject of Congress's grant of exclusive rights. In *Graham*, the Court recognized:

The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, ad-

76. *Id.* at 476.

77. *Id.* at 484 (“By definition a trade secret has not been placed in the public domain.”).

78. See *Girl Scouts of the United States v. Bantam Doubleday Dell Publ'g Group*, 808 F. Supp. 1112, 1118–19 (S.D.N.Y. 1992) (recognizing First Amendment limits to trademark protection for marks where there is no likelihood of confusion), *aff'd*, 996 F.2d 1477 (2d Cir. 1993); Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131, 136 (1989) (a rule against “plucking generic words out of the public domain and granting an individual the exclusive right to use them prevents trademark law from severely intruding on others' freedom of expression”); Pamela Samuelson, *Resolving Conflicts Between Trade Secrets and the First Amendment* 5 (unpublished manuscript) (on file with author) (describing First Amendment limit to applying trade secret to information in the public domain); see also Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 219–24, 230–31 & n.370 (discussing First Amendment limits to trademark and trade secret law).

79. The public domain's limit on the duration of IP could be characterized as a limit on subject matter as well, in that material whose IP protection has expired can be described as a class of works that has become ineligible for continued IP protection. I treat the duration cases as a separate category because they involve material that did obtain IP protection at one time. The cases that I treat as subject matter cases do not involve works that received IP protection before entering the public domain.

vancement or social benefit gained thereby. Moreover, *Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.* Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must “promote the Progress of . . . useful Arts.” This is the standard expressed in the Constitution and it may not be ignored.⁸⁰

In this pivotal passage, *Graham* gives the public domain *constitutional* significance: Congress may not remove knowledge from the public domain, or restrict the public’s free access to materials already available in the public domain.⁸¹ Congress’s ability to alter the public domain is thus limited by the very grant of power under the Copyright and Patent Clause. Implicit in the Copyright Clause is a bar against the government attempting to restrict, by the grant of intellectual property rights, the public’s ability to freely access materials already in the public’s possession.

As the Court recognized, the Copyright Clause is “both a grant of power and a limitation”⁸² that was drafted in response to the rampant abuses of the British Crown in granting monopolies to goods that the public had long enjoyed.⁸³ Elizabeth I granted monopolies for such common goods as “vinegar, bottles, brushes, starch, cards, dice, paper, [and] salt-petre.”⁸⁴ These monopolies were granted not out of a concern for spurring innovation, but simply to court favorites for the Crown.⁸⁵

Fear of these kinds of abuses informed the Framers’ drafting of the Copyright Clause.⁸⁶ The Framers did not establish a grant of unlimited power to Congress to grant patents or copyrights; instead, they limited the power “to promote the Progress of Science and useful Arts, by securing for limited Times the exclusive Right to Authors and Inventors to their respective Writings and Discoveries.”⁸⁷ Ultimately, the Clause is

80. *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966) (emphasis added).

81. *Id.* See Boyle, *Enclosure*, *supra* note 23, at 59 (*Graham* “makes it unconstitutional under the patent clause for Congress to privatize any portion of . . . [the public] domain.”); see also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 153 (1989) (To forbid copyright would “interfere[] with the federal policy, found in Art. I, § 8, cl. 8 of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”) (quoting *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964)).

82. *Graham*, 383 U.S. at 5.

83. *Id.*

84. Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public’s Control of Government*, 30 Sw. U. L. REV. 1, 45 (2000).

85. *Graham*, 383 U.S. at 5–6.

86. *Id.*

87. U.S. CONST. art. I, § 8, cl. 8.

meant to serve the public⁸⁸ and to ensure that the public enjoys unrestricted access to sources of learning—the foundation for “progress.”⁸⁹ To that end, the Clause forbids the removal of material from the public domain through the grant of copyrights or patents.

The principles enunciated in *Graham* have roots tracing back to one of the earliest federal court opinions to interpret the Clause. In 1826, in *Thompson v. Haight*,⁹⁰ the Circuit Court of the Southern District of New York held that the patent for an “improved” process of manufacturing carpeting was invalid because the invention was not novel. Under the Patent Code in force at the time, patents were issued without any examination,⁹¹ which not surprisingly led to a proliferation of patents, many obtained for the same or similar inventions,⁹² as was the case with the old invention in *Thompson*.⁹³

As the *Graham* Court would 140 years later, the circuit court in *Thompson* did not rest its opinion solely on a statutory basis. The court felt obliged to explain why the Copyright Clause would not permit the grant of a patent to inventions lacking in novelty or already enjoyed by the public.⁹⁴ Like *Graham*, the *Thompson* decision turns to the patent abuses in England for its understanding of the Framers’ intent. The Statute of Monopolies provided a model for the Framers in the United States,⁹⁵ as it was enacted to curb the excesses of the British monarchy in granting monopolies over common goods.⁹⁶ The *Thompson* court also foreshadowed the *Graham* Court’s admonition that Congress may not “remove existent knowledge from the public domain, or . . . restrict free access to materials already available.”⁹⁷ But the slight variant in *Thompson* is the court’s reliance on *publici juris* and public property, instead of the public domain.⁹⁸ The following passage is, I believe, the first time that

88. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

89. STORY, *supra* note 70, at 402–03 (Copyright Clause is intended to “admit the people at large, after a short interval, to the full possession and enjoyment of all writings . . . without restraint.”).

90. 23 F. Cas. 1040 (C.C.S.D.N.Y. 1826) (No. 13,957).

91. *Id.* at 1042. See Act of Feb. 21, 1793, ch. 11, 1 Stat. 318.

92. *Thompson*, 23 F. Cas. at 1040.

93. *Id.*

94. *Id.* at 1045.

95. *Id.* at 1042.

96. *Id.* at 1043 (“[T]he king had immemorially exercised a supreme and unlimited control over both the foreign and domestic trade of the nation; and on that foundation rested the whole multitude of exclusive privileges which had been granted to powerful associations or mercenary individuals.”) (emphasis added).

97. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966).

98. *Thompson*, 23 F. Cas. at 1045 (This action would be “subversive of great public rights, which congress has no authority under the constitution, to abridge.”).

publici juris is recognized as a part of a constitutional limit on Congress's power under the Copyright Clause:

And, I maintain, with confidence, the broad principle that the congress had no authority to grant a monopoly of a thing which is known, and in common use. It is, then, *publici juris*, and the enjoyment of it can never again be made exclusive, in the hands of an individual. . . . For, whether the inventor gratuitously throws open his invention to the public, or whether it becomes known by other means; whether the patent expires by its own limitation, or is declared void by judgment of law, is perfectly immaterial. In either case, no second patent can issue. *The invention is then the property of the public, and of that the legislature cannot grant a monopoly. . . . [T]he legislature has no right to give to him what has become the property of others. It cannot deprive the public of what it possesses, to give it to an individual. It cannot prohibit the people from the use and application of their own knowledge to any beneficial purpose, or from the practice of any art, useful to themselves, and not injurious to the state.* Knowledge, diffused, is as common to the use and enjoyment of mankind as the atmosphere in which we live and move.⁹⁹

The above passage is striking in several respects. “[W]ith confidence,” the court ties the notion of *publici juris* not only to the notion of public property, but also to a *constitutional* limitation on Congress's power under the Copyright and Patent Clause, a limitation that is again recognized by the Supreme Court in *Graham*. Also striking is the *Thompson* court's recognition that once “knowledge” becomes “diffused,” it is as “common to the use and enjoyment of mankind as the atmosphere in which we live and move.”¹⁰⁰ The analogy to air is particularly apt, given that air itself was thought to be *publici juris*.¹⁰¹ Finally, *Thompson* is consistent with the absolutist conception of the public domain: once something falls into the public domain (or becomes *publici juris*) “it can never again be made exclusive in the hands of an individual.”¹⁰² The reason is that the material is now the public's property, and “of that the legislature cannot grant a monopoly” or “deprive the public of what it possesses, to give it to an individual.”¹⁰³

99. *Id.* at 1047–48 (emphasis added).

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

101. See BLACK'S LAW DICTIONARY 1229 (6th ed. 1990).

102. 23 F. Cas. at 1047.

103. *Id.* Although the issue was not before it, the *Thompson* court suggested in its reasoning that it would find unconstitutional under the Copyright Clause Congress's grant of an extended patent to Oliver Evans for his invention four years after the original patent had expired. *Id.* Although the extended patent was challenged based on the Contracts and Ex Post Facto Clauses, apparently no challenge was made that Evans's patent violated the Copyright Clause's bar against removing material from the public domain. See *Evans v. Eaton*, 8 F. Cas. 846 (C.C.D. Pa. 1816) (No. 4,559), *rev'd*, 16 U.S. (3 Wheat.) 454 (1818) (rejecting Contracts Clause challenge); *Evans v. Jordan*, 8 F. Cas. 872, 874 (C.C.D. Va. 1813) (No. 4,564), *aff'd*, 13 U.S. (9 Cranch) 199 (1815) (rejecting Ex Post Facto Clause challenge). To the extent that the *Evans* cases could be read to uphold against a Copyright Clause

b. Feist

The analogue to *Graham* in the copyright context is *Feist*, in which the Supreme Court held that originality is a constitutional requirement under the Copyright Clause, implied in part by the words “Authors” and “their Writings.”¹⁰⁴ Originality requires that a work (1) be independently created by the author, and (2) possess a minimal degree of creativity in order to qualify for a copyright.¹⁰⁵

Just as with the durational requirement of “limited Times,” the constitutional requirement of originality protects the public domain.¹⁰⁶ The public domain helps to define in copyright law what is *not* original and therefore not copyrightable.¹⁰⁷ Like facts and ideas, materials in the public domain are, by definition, not original and beyond the scope of copyright.¹⁰⁸

Like *Graham*, *Feist* recognizes the policy against removing material from the public domain. The central dispute in *Feist* was whether a copyright could be granted to a telephone directory on the sheer basis that the compiler of the directory had labored to collect the data. This “sweat of the brow” theory¹⁰⁹ had drawn a fair amount of support in the case law and commentary.¹¹⁰ The Supreme Court, however, rejected this ap-

challenge the removal of material from the public domain, the cases would be at odds with Court’s modern view of the public domain in *Graham*. See *Eldred v. Ashcroft*, 123 S. Ct. 769, 796–97 (2003) (Stevens, J., dissenting) (concluding that Evans’s patent violates *Graham*’s restriction against the removal of material from the public domain).

104. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

105. *Id.*

106. Originality, however, does not require a “novel” creation as patent law does for inventions. As Learned Hand explained: “Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an ‘author’; but if by some magic a man who had never known it were to compose anew Keats’s Ode on a Grecian Urn, he would be an ‘author,’ and if he copyrighted it, others might not copy that poem, though they might of course copy Keats’s.” *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936). Although this teaching has assumed the status of black-letter law, if it actually ever occurred this situation might present perplexing difficulties in distinguishing copying of the public domain version and copyrighted version. *Cf. Gracen v. Bradford Exch.*, 698 F.2d 300, 304 (7th Cir. 1983) (Posner, J.) (discussing hypothetical problem).

107. Litman, *supra* note 58, at 998.

108. *Feist*, 499 U.S. at 350 (“Copyright does not prevent subsequent users from copying from a prior author’s work those constituent elements *that are not original*—for example . . . facts, or *materials in the public domain*.”) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547–48 (1985)) (emphasis added).

109. *Id.* at 359.

110. The Second Circuit, for example, adopted the “sweat of the brow” theory: “The right to copyright a book . . . does *not* depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill *or originality*, either in thought or in language, or anything more than industrious collection.” *Id.* at 352–53 (emphasis added) (quoting *Jeweler’s Circular Publ’g Co. v. Keystone Publ’g Co.*, 281 F. 83, 88 (2d Cir. 1922)).

proach. Facts are “*publici juris*”¹¹¹ and a “part of the public domain available to every person,”¹¹² the Court explained, and therefore cannot be copyrighted. Some originality in the selection, arrangement, or coordination of facts in a compilation is necessary in order for the work to qualify for copyright. Even then, the scope of copyright for the compilation would be exceedingly thin and apply only to that particular arrangement, but the copyright could not remove the underlying facts from the public domain.¹¹³

While *Feist* speaks most directly against the removal of facts from the public domain, its logic could apply to material in the public domain in general. Like facts, materials in the public domain provide the “constituent elements” for authors to draw upon.¹¹⁴ Accordingly, such constituent elements are essential for all to copy as a matter of public right.¹¹⁵

The bar against removing material from the public domain carries out the Framers’ intent to preclude the kind of abuses of the Crown in granting monopolies. Just as in the case of old inventions, the British Crown granted monopolies to old books.¹¹⁶ One source of monopolies for books was the Stationers’ Company,¹¹⁷ which had control over virtually all printing in England.¹¹⁸ To publish a work, a printer or publisher had to register the work on the Stationers’ registry, thereby entitling the publisher to the copyright for the work.¹¹⁹ The only other means to publish a book was to obtain letters patent, or a printing patent, from the Crown. A consequence of this system of control was that all works, no matter how old, were essentially fair game for monopoly grants. The Crown granted printing patents to classical works from long ago.¹²⁰ And, because the stationer’s copyright was perpetual in duration, the Stationers had “the power to control in perpetuity the publication of such works as those of Shakespeare, Milton, and Dryden,” works first published in the

111. *Id.* at 354 (quoting *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918)).

112. *Id.* at 348.

113. *Id.* at 350–51.

114. *Id.* at 350.

115. As the D.C. Circuit has recognized, the principle set forth in *Graham* “would indeed preclude Congress from authorizing under [the Copyright] Clause a copyright to a work already in the public domain.” *Eldred v. Reno*, 239 F.3d 372, 377 (D.C. Cir. 2001), *aff’d sub nom.*, *Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). See *Eldred*, 123 S. Ct. at 799–800 (Stevens, J., dissenting) (“[N]o one seriously contends that the Copyright/Patent Clause would authorize the grant of monopoly privileges for works already in the public domain.”).

116. L. RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 91–92 (1968).

117. *Id.*

118. *Id.* at 32.

119. *Id.* at 38.

120. *Id.* at 91.

1600s (in Shakespeare's case, posthumously).¹²¹ Under this regime, the Crown always had the power to restrict the public's access to works, no matter how ancient, by concentrating the power of publication of the works in a select few.¹²²

Written against this backdrop, the Copyright Clause is intended to provide a safeguard for the public's right of unrestricted access to works that have fallen into the public domain.¹²³ The public domain gives the public the assurance that it can freely enjoy all works contained therein without the fear that one day its enjoyment of those works can be taken away (as it could under the British Crown). Delineating a clear line beyond which the government's intellectual property power cannot trespass, the public domain serves a fundamental goal of the Copyright Clause in clearly defining what is owned by rights holders, and, just as importantly, what is owned by the public.¹²⁴ Material in the public domain is not eligible subject matter for intellectual property rights; it is material owned by the public.¹²⁵

C. SYNTHESIS: THE PUBLIC DOMAIN AS A RESTRAINT ON GOVERNMENT POWER

In tracing the development of the concept of the public domain, I have returned to first principles in IP cases in order to give a deeper understanding of the concept of the public domain than the more common, impressionistic descriptions of the concept today. Although *publici juris* and public property have receded from legal discourse in favor of the public domain, they do resurface now and then, as in *Feist*. The Supreme

121. *Id.* at 92.

122. This regime ended in 1710 when Parliament enacted the Statute of Anne, the first copyright act, which limited the duration of copyrights to a set term. By subjecting all works, both existing and future, to its limited statutory term, the Statute of Anne ensured that copyrights for all works would expire, thereby guaranteeing that the works would eventually fall into the public domain. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). The book publishers, however, did not go quietly. They lobbied Parliament to amend the Statute of Anne to extend the term of their copyrights. When that failed, they pursued litigation to have courts recognize a natural, common law right of perpetual copyright. They were successful in persuading one court to adopt that view in *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769). But the House of Lords overruled that decision in the famous case of *Donaldson v. Becket*, 98 Eng. Rep. 257 (H.L. 1774), which established that the Statute of Anne divested the author of any common law copyright upon publication of the work. See Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 101 INTELL. PROP. L. 319, 325 (2003) ("Thereafter ancient books were in the public domain and could be printed by anyone.").

123. See PATTERSON, *supra* note 116, at 190-91.

124. See *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730-31 (2002) ("[T]he monopoly is a property right; and like any property right, its boundaries should be clear. This clarity is essential to promote progress, because it enables efficient investment in innovation.").

125. The public domain's limit on the duration of trade secrets and trademarks functions in the same way as its limit on the subject matter of trade secrets and trademarks. Publicly available information cannot be the subject of a trade secret, while a generic mark cannot be the subject of a trademark.

Court has consistently made clear that the Copyright Clause protects the *rights of the public* in accessing and using public domain materials without restraint,¹²⁶ rights that are also discussed in legal commentary.¹²⁷ Likewise, public ownership remains a recurring theme in legal commentary¹²⁸ and judicial opinions involving the public domain.¹²⁹ This conception of the public domain has a robust theory setting forth (1) the function of the public domain as a restraint on government power and abuses, and (2) the mechanism by which this restraint operates.

1. *Function: Restraint on Government Power and Abuses*

The primary function of the public domain is to delineate restraints on the government's power to grant monopolies in the form of intellectual property. These restraints are considered necessary to guard against the huge potential for abuse created when government has unlimited power to grant exclusive rights, a pervasive problem under the British Crown before the Framing. As the cases describe, the history of abuses of the British Crown in granting monopolies without restriction, such as for things already enjoyed by the public, in order to give special rewards to favorites of the Crown, to censor speech and control the flow of information, or to concentrate power in a privileged few,¹³⁰ was anathema to the Framers.

Yet, except for the restriction that any grant of exclusive rights be for "limited Times," the words the Framers chose in drafting the Copyright and Patent Clause left much unspecified in terms of restraints. The concept of the public domain, first encapsulated by *publici juris* and public property, was instrumental in delineating what precisely some of those limits are.

Courts invoked the public domain to demarcate constitutional restraints on the government's power to grant intellectual property rights

126. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 153 (1989) (recognizing "the federal policy, found in Art. I, § 8, cl. 8, of the Constitution . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain") (quoting *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964)); *Compco*, 376 U.S. at 238 (Anything "in the public domain . . . can be copied in every detail by whoever pleases[.]"); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964) ("[W]hen the patent expires the monopoly created by it expires, too, and the right to make it in precisely the shape it carried when patented—passes to the public[.]") (emphases added); *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 122 (1938) ("Sharing in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all.") (emphasis added).

127. See, e.g., *Lange*, *supra* note 25, at 1.

128. See, e.g., *Pollack*, *supra* note 42, at 265.

129. See, e.g., *Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 293 F.3d 791, 799 (5th Cir. 2002) (en banc) ("[P]ublic ownership of the law means precisely that 'the law' is in the 'public domain' for whatever use the citizens choose to make of it[.]"); *Comedy III Prod., Inc. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000) (When a work falls into the public domain, then "[w]e all own it[.]").

130. See generally *PATTERSON*, *supra* note 116, at 5–7.

at two key points: (1) at the moment when the grant was to be made, by making certain subject matter ineligible for any exclusive appropriation because it was already in the public domain; and (2) at the expiration of the grant of intellectual property rights, by guaranteeing the public's right of unrestricted access to the underlying material, which had now fallen into the public domain. The effect of (1) and (2) is the same: the government cannot grant exclusive rights over something that is public property and free for all to enjoy as a matter of public right.¹³¹ Once something enters the public domain (or becomes *publici juris* or public property), it does so completely, meaning that "the public shall be entitled *ever afterwards* to the *unrestricted use*"¹³² of the material, and "the enjoyment of it can *never* again be made exclusive, in the hands of an individual."¹³³ It has, in short, become the public's property.

2. *Mechanism: Dispersing Power through Public Rights and Public Ownership*

The original understanding of the public domain specifies a particular mechanism by which it operates. The public domain protects against government abuses in granting monopolies by dispersing the power to control public domain material among the public at large. In particular, the public domain accords everyone equal ownership rights over material in the public domain, meaning "public rights" of unrestricted access to and use of the material. Although the government can grant exclusive rights over a wide variety of materials, its power is circumscribed by the public's superior rights in the public domain.

By using the concept of public property to limit the government's ability to create intellectual property rights, courts recognized an ingenious mechanism to guard against the potential abuses of the government in granting exclusive rights. No longer can the government grant monopolies for common things already enjoyed by the public, or grant exclusive rights over information and inventions without restraint, as the public domain establishes an ultimate restraint on the government's power. Whatever is in the public domain, whether due to the expiry of IP protection, or because of ineligibility of subject matter for such protection, is completely off limits to government or private control. These materials are now public property, to be enjoyed freely by all.

This use of the concept of "public property" as a restraint in IP law is consistent with nineteenth century application of the term in other areas

131. See *Sears*, 376 U.S. at 231 ("An unpatentable article, like an article on which the patent has expired, is in the public domain and may be . . . sold by whoever chooses to do so.")

132. *Merriam v. Holloway Publ'g Co.*, 43 F. 450, 450 (C.C.E.D. Mo. 1890) (emphasis added).

133. *Thompson v. Haight*, 23 F. Cas. 1040, 1047 (C.C.S.D.N.Y. 1826) (No. 13,957) (emphasis added).

of law. Carol Rose has shown the important function that “public property” served in the development of different doctrines to ensure that the public has access to roads and waterways.¹³⁴ Even further, this understanding of public property can be traced back to notions of property in Roman law.¹³⁵ The Romans treated certain property, “roads, harbors, ports, bridges, rivers that flowed year-round, and lands immediately adjacent thereto,” as *res publicae*, or things belonging to the public.¹³⁶ Citizens were ensured that the outlets of transportation, communication, and commerce were open for public access by the same mechanism: those outlets were treated as inherently public property, to which all were guaranteed access.¹³⁷

The public domain thus delineates an important sphere in which the people have equal rights, and ultimate power, over information, ideas, and knowledge. When the *Singer* Court first articulated the doctrine of the “domain of things public,” it set forth a vision of the public domain quite consistent with our republican form of government. Indeed, our concept of a “republic” derives from this notion of *res publicae*, or “public things.” In a republic, ultimately the power of governance lies in the hands of the people. By treating the fruits of intellectual production as eventually redounding to the benefit and ownership of the people, the public domain helps to foster a learned citizenry and to fulfill the goal of self-governance.

Part III will expand on this theory of the public domain. For now, it is sufficient to understand that the public domain originated as a concept to set a restraint against potential government abuse in the exercise of its intellectual property power. As we will see in the next Part, the public domain functions in a like manner in the government secrecy cases.

II. THE PUBLIC DOMAIN IN GOVERNMENT SECRECY CASES

Perhaps it should come as no surprise that the current debate over the public domain in intellectual property law has ignored the many uses of the concept in areas outside of intellectual property. After all, intellectual property is a highly specialized field, in which both scholars and practitioners often specialize in one form of intellectual property. More surprising, however, is the fact that legal scholarship dealing specifically with issues of government secrecy has ignored the concept as well.¹³⁸

134. Rose, *supra* note 26, at 711.

135. *Id.* at 713.

136. Carol M. Rose, *Romans*, *supra* note 42, at 96–97.

137. *Id.* at 98–99.

138. Often, the concept of the public domain is not even mentioned. See, e.g., Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889 (1986). When it is mentioned, it usually is

This Part examines the use of the concept of the public domain in several different areas of law that involve issues of government secrecy. These government secrecy cases utilize the concept of the public domain in a manner remarkably similar to its use in IP law: courts invoke the public domain in order to establish a legal restraint against potential government abuse by according the public rights of unrestricted access to certain information, material, or proceedings. By showing this parallel, I have dual aims: to deepen our understanding of the public domain as it bears on intellectual property *and* issues involving government secrecy.

A. THE CURRENT DEBATE OVER GOVERNMENT SECRECY

The tragedy of September 11 has had an enduring effect on our country and government. Americans will forever remember the over 3,000 people who lost their lives due to the events on that day. The tremendous loss of life underscored the very stark reality that mainland United States is not invulnerable to foreign or terrorist attack.

The government's responses to the terrorist attacks have been manifold. One set of responses is primarily military and involves the war against the Al Qaeda network and search for Osama bin Laden. The other set of responses, however, is primarily domestic and involves enhancing the ability of law enforcement and government to prevent terrorism. Chief among these measures are the enactment of the Patriot Act, which provides a battery of measures to law enforcement to fight terrorism,¹³⁹ and the establishment of a new cabinet-level agency,¹⁴⁰ the Department of Homeland Security.

Another significant development is the government's increased use of secrecy over its own conduct. In the name of fighting terrorism, the government has denied public access to certain proceedings in which the liberty of individuals is withheld: the government (1) has deported peo-

invoked without elaboration. See, e.g., Patrick E. Cole, *The Freedom of Information Act and the Central Intelligence Agency's Paper Chase: A Need for Congressional Action to Maintain Essential Secrecy for Intelligence Files While Preserving the Public's Right to Know*, 58 NOTRE DAME L. REV. 350, 374-76 (1982); Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 368 (1986); James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, 34 B.C. L. REV. 451, 488 n.211 (1993); Jonathan C. Medow, *The First Amendment and the Secrecy State: Snapp v. United States*, 130 U. PA. L. REV. 775, 785, 802 (1982); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1138 (2002); Laurence H. Tribe, *Public Rights, Private Rites*, 6 GREEN BAG 2d 289, 290 (2003).

139. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

140. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

ple at hearings that are held in secret;¹⁴¹ (2) has detained, as “enemy combatants,” American citizens (and non-citizens¹⁴²) indefinitely without public access or right to counsel;¹⁴³ and (3) has resurrected the possibility of using closed military tribunals against non-citizens.¹⁴⁴ Under the Patriot Act, the government also has (4) more expansive powers to conduct FISA searches and surveillance of individuals in the United States, which are authorized and executed in secret.¹⁴⁵ Other areas of enhanced secrecy involve denying the public access to information: the government has (5) ordered agencies and libraries to remove from government Web sites information that was once publicly available,¹⁴⁶ (6) instructed government employees to scrutinize Freedom of Information Act requests with greater stringency, abandoning the prior Administration’s presumption of openness,¹⁴⁷ and (7) asked researchers and scientists not to publish

141. A circuit split has arisen over the constitutionality of closed deportation hearings. Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (unconstitutional), with *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (constitutional). See Sadiq Reza, *Privacy and the Post-September 11 Immigration Detainees: The Wrong Way to a Right (and Other Wrongs)*, 34 CONN. L. REV. 1169 (2002).

142. See *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff’d sub nom.* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3171 (U.S. Sept. 2, 2003) (No. 03-334).

143. Yaser Hamdi and Jose Padilla are the two known U.S. citizens who are currently being detained as enemy combatants. See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); see also Neal R. Sonnett et al., A.B.A. ASS’N TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, PRELIMINARY REPORT 3 (Aug. 8, 2002), available at http://www.abanet.org/leadership/enemy_combatants.pdf; Philip Heymann, *The Power to Imprison*, WASH. POST, July 7, 2002, at B7.

144. Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* § 1(e), 66 Fed. Reg. 57,833 (Nov. 16, 2001); Department of Defense, Military Commission Order No. 1, *Procedures for Trials by Military Commissioners of Certain Non-United States Citizens in the War Against Terrorism* (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>. For critiques of the use of military tribunals, see Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Harold Koh, *The Case Against Military Commissions*, 96 AM. J. INT’L L. 337 (2002); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL’Y 635 (2002).

145. See *infra* notes 559–80 and accompanying text.

146. Thousands of public documents have apparently been removed from public access. See Ariana Eunjung Cha, *Risks Prompt U.S. to Limit Access to Data*, WASH. POST, Feb. 24, 2002, at A1; Rachel Kipp, *Researchers Barred from U.S. Papers*, AP ONLINE, Oct. 14, 2002, <http://www.cqservices.com>; OMB Watch, *Access to Government Information Post September 11th*, at <http://www.ombwatch.org> (listing some of the removed material).

147. See Memorandum from John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies: *The Freedom of Information Act* (Oct. 12, 2001), <http://www.usdoj.gov/04foia/011012.htm>; Press Release, New Attorney General FOIA Memorandum Issued (Oct. 15, 2001), <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

findings that might possibly be used by terrorists in an attack against the United States,¹⁴⁸ a request acceded to by the top scientific journals.¹⁴⁹

Although each of these enhanced secrecy measures involves distinct issues, they all raise a common question: is there any legal restraint on the government's ability to keep information, proceedings, or materials secret? The question of government secrecy may well be as old as our Republic,¹⁵⁰ yet only sporadically—typically, during times of war or government scandal—has it been a matter of pressing public concern. The last great controversy over government secrecy occurred at the end of the Vietnam War with the publication of the Pentagon Papers.¹⁵¹ In a terse per curiam opinion, a highly fractured Court upheld the denial of the government's request to enjoin *The New York Times* and *The Washington Post* from publishing a classified study on the U.S. decision-making process in the Vietnam War, which the newspapers had obtained without authorization.¹⁵² Although the decision confirms that the First Amendment limits the government's ability to keep material secret by enjoining the press, it offered no doctrinal analysis to support its result or provide guidance for future cases. A few years later, the Watergate scandal would further highlight the need for limits on the Executive's ability to keep materials secret, but this was in the exceptional case where prosecutors sought confidential materials from the Executive in a criminal investigation of wrongdoing by Executive officials.¹⁵³

Today, the Vietnam War and Watergate may seem like a distant memory. Fighting a "new kind of war," the Bush Administration has made extensive use of secrecy in everyday government operation. The speed by which the Executive has implemented these measures (within less than a year and a half) has greatly outpaced the ability of the public to evaluate their validity. Indeed, many of these measures have resulted from Executive order or policy,¹⁵⁴ without the opportunity for public de-

148. See *Top Scientists Call for Balancing Security with Openness*, AP ONLINE, Oct. 18, 2002, <http://www.louisville.edu/~rmatla01/press/10-18-02Associated2.html>. See generally J. WIGGINS, FREEDOM OR SECRECY 109–12 (1964) (discussing tradeoff between secrecy and innovation).

149. See Joseph B. Verrengia, *Science Journal Cutting Bioterror Data*, WASH. POST, Feb. 16, 2003, at A9.

150. It is curious to note that the Framers kept their debate secret. See Sunstein, *supra* note 138, at 889.

151. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

152. *Id.*

153. *United States v. Nixon*, 418 U.S. 683 (1974).

154. Of the seven examples of enhanced secrecy I have listed, only the Patriot Act's expansion of the government's FISA powers occurred by an act of Congress.

bate before their adoption. Legal scholars have only begun to evaluate these secrecy measures.¹⁵⁵

B. THE PUBLIC DOMAIN IN GOVERNMENT SECRECY CASES

Courts have long recognized the concept of the public domain as a restraint on the government's power to use secrecy.¹⁵⁶ As I explain below, these cases show that: (1) information falls into the public domain when it becomes available to the public (without IP protection¹⁵⁷); and (2) the First Amendment protects the public's ability to access and further disseminate information already in the public domain.

I. First Amendment Rights of Access

Just as in IP law, the public domain has been used in the First Amendment context to define the public's rights of access to material. If information is in the public domain, people have a First Amendment right to access it.

Criminal proceedings have provided the clearest enunciation of this First Amendment principle. In *Cox Broadcasting Corp. v. Cohn*,¹⁵⁸ the Court held that the First Amendment forbids the imposition of civil liability based on a reporter's publication of the name of a deceased rape victim that was revealed in open court and in public records (i.e., the indictment).¹⁵⁹ Expressly invoking the public domain, the Court emphasized the importance of the ability of citizens to scrutinize government by obtaining information in the public domain:

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the media. The freedom of press to publish information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less

155. See, e.g., Marc Rotenberg, *Privacy and Secrecy after September 11*, 86 MINN. L. REV. 1115 (2002); Paul M. Schoenhard, Note, *Disclosure of Government Information Online: A New Approach from an Existing Framework*, 15 HARV. J.L. & TECH. 497 (2002).

156. This Article does not attempt to address each of the government's expanded uses of secrecy, much less argue that the concept of the public domain provides a definitive answer to whether each use is valid. Such an undertaking goes well beyond the scope of this Article. I will, however, discuss and evaluate some of the examples in Part IV.

157. I will explain the relationship between secrecy and intellectual property in Part III. I do not argue that the public domain in government secrecy cases is necessarily identical to the public domain in IP law. My claim, developed in Part III, is that the concepts are related in origin, structure, and function.

158. 420 U.S. 469 (1975).

159. *Id.* at 491.

than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.¹⁶⁰

“What transpires in the court room[,]” the Court further explained, “is public property.”¹⁶¹

Subsequent cases have built on the principle of *Cox*, recognizing that once information is publicly revealed in open court, it is in the public domain and beyond government restriction. The Court has held that a court order forbidding the press from reporting confessions or admissions made by a defendant to law enforcement before trial is an unconstitutional prior restraint.¹⁶² Significantly, the information in question was submitted as evidence in a preliminary hearing that was open to the public and press.¹⁶³ Likewise, the Court has held that a district court could not prohibit the publication of information that was disseminated at a juvenile hearing at which “members of the press were in fact present with the full knowledge of the presiding judge.”¹⁶⁴ Even though a state statute made the juvenile hearings closed, the Court emphasized that the trial court knowingly permitted the press to attend the hearing.¹⁶⁵ For the purposes of the First Amendment, the key was that the information was “publicly revealed” in open court and thus “placed in the public domain.”¹⁶⁶ “[O]nce the truthful information was ‘publicly revealed’ or ‘in the public domain’ the court could not constitutionally restrain its dissemination.”¹⁶⁷

The *Cox* line of cases establishes a fairly bright-line rule of First Amendment protection for information that is revealed in open court. The categorical approach is consistent with the cases recognizing the public domain in intellectual property. Once material enters the public domain, the government is not free to restrain its dissemination, whether through intellectual property law or government secrecy.

What is distinctive about the public domain here is that it coincides with a *physical or geographical location* where the information originates—open court proceedings. This makes it much easier to identify public domain information in this area of law than in IP law, where the public domain does not correlate to a physical location. The locator here is the courtroom. Criminal trials and most court proceedings in this coun-

160. *Id.* at 495–96.

161. *Id.* at 492 (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)).

162. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568–69 (1976).

163. *Id.* at 568.

164. *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308, 311 (1977).

165. *Id.*

166. *Id.*

167. *Smith v. Daily Mail Publ'g, Co.*, 443 U.S. 97, 103 (1979).

try are open to the public. The public nature of proceedings helps to ensure fairness in and to allow for public scrutiny of the proceedings.¹⁶⁸ A requisite of the “public” aspect of court proceedings is that any member of the public who attends such proceedings can further disseminate what information was revealed in open court.

Although *Cox* involved information revealed in court proceedings, the public domain principle has a more general application. Lawful public disclosures of information not subject to IP protection, by the government or third parties, causes the entry of the material into the public domain. This can be seen in the *Daily Mail* case in which the Court dealt with a state statute that made it a crime for a newspaper to publish the name of a youth charged as a juvenile offender absent the written approval of the juvenile court. In the case, two newspapers had obtained the information about the youth by monitoring police band radio frequency, dispatching reporters and photographers to the scene of the shooting, and interviewing the police, witnesses, and an assistant prosecutor.¹⁶⁹ All of these techniques were lawful; all occurred outside the courtroom. The Court held that the statute violated the First Amendment insofar as it prohibited the dissemination of information that was lawfully obtained.¹⁷⁰

For unauthorized or illegal disclosures of information to the public, the public domain analysis is more difficult. Do disclosures of information that is unlawfully obtained, too, inject the information into the public domain? Here, the Court has been more equivocal. In the *Pentagon Papers* case, the result seemed to allow the entry of stolen material into the public domain, but it is not easy to divine much from the per curiam decision.¹⁷¹ Recently, in *Bartnicki v. Vopper*,¹⁷² the Court considered an illegal intercept of a cellular call and whether it was constitutional to hold liable someone who did not participate in the illegal intercept but who later published that call in violation of federal wiretap laws.¹⁷³ The Court held that the First Amendment bars the imposition of such liability, be-

168. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

169. *Daily Mail Publ'g, Co.*, 443 U.S. at 99.

170. *Id.* In certain cases, the First Amendment may even allow the public to reveal information divulged at *confidential* proceedings, such as a judicial commission's review of alleged judicial misconduct of a particular judge. *Landmark Comms., Inc. v. Commonwealth*, 435 U.S. 829 (1978).

171. *New York Times Co. v. United States*, 403 U.S. 713, 754 (1971) (Harlan, J., dissenting) (noting the newspaper had obtained the *Pentagon Papers* from a source who had stolen it); see *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989) (Prior cases left open “whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may even punish not only the lawful acquisition, but the ensuing publication as well[.]”).

172. 532 U.S. 514 (2001).

173. *Id.* at 518–19.

cause it threatened to “impose sanctions on the publication of truthful information of public concern.”¹⁷⁴

To analogize the *Cox* line of cases to the intellectual property cases we have discussed, one might view the First Amendment cases as examples of the public domain setting a limit on the *duration* of government secrecy. The government has the power to keep much information secret,¹⁷⁵ but the secrecy *ends* when the information enters the public domain (by becoming publicly available). Once the information is in the public domain, the people have unrestricted rights of access to it. The government’s interest in secrecy is outweighed by the free dissemination of the information once it is made public.

The public domain in the First Amendment context also provides a limit to the *subject matter* of the government’s secrecy in the first instance. Criminal trials, for example, are presumptively open to the public, with the First Amendment guaranteeing the public a right of access.¹⁷⁶ As *Cox* itself suggests, a criminal trial is public property, a proceeding that belongs to the public. Just as in the intellectual property context, the domain of “things public” in the First Amendment context contains certain subject matter that is beyond the government’s power of restriction.¹⁷⁷

2. Secrecy Agreements for Government Employees

The First Amendment also establishes a limit on the government’s ability to prevent government employees from discussing information that is already in the public domain. Government employees who handle classified information typically are asked to sign secrecy agreements as a

174. *Id.* at 534.

175. Thus, the government might seek the sealing of certain information *before* it becomes public. *Cox*, 420 U.S. at 496.

176. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 577 (1980) (“The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press.”) (opinion of Burger, C.J.). The Court has also recognized that “the presumption [of open criminal trials] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984); *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8 (1986).

177. The baseline test for duration cases is that the government’s claim to secrecy ends once the material becomes public. It is much more difficult to provide a general test to determine what subject matter involves a “public thing” that must be in the public domain. Are there some classes of subject matter that must be public like criminal trials? Cf. Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 709 (2003) (arguing for public ownership over presidential papers). It goes beyond the scope of this Article to formulate such a test. The *Richmond Newspapers* “experience and logic” test provides a good starting point for determining what proceedings must be open to the public. See *infra* note 501.

part of their employment. In these secrecy agreements, employees agree to maintain, essentially forever, the secrecy of any classified information they examine during the course of their employment and to seek prepublication review of any material they intend to publish that may contain such classified information.¹⁷⁸ However, the public domain operates as a limit on the government's power to enforce secrecy agreements in the name of national security. Although the government can prevent the publication of classified information, the First Amendment prohibits the government from preventing the publication of material already in the public domain.¹⁷⁹

The leading case that recognizes this First Amendment doctrine is *United States v. Marchetti*.¹⁸⁰ The case involved a former CIA employee who intended to publish a book about his intelligence experiences.¹⁸¹ The government sued to enforce the secrecy agreement that the defendant had signed, requesting an injunction ordering Marchetti to submit his work to the government for prepublication review.¹⁸² The government was successful in obtaining a preliminary injunction, which the Fourth Circuit upheld on appeal. Recognizing the government's "right and duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with national interest," the Fourth Circuit had little difficulty in finding justification in the secrecy agreement's use of a prior restraint on speech,¹⁸³ a rare circumstance in which a prior restraint is upheld.¹⁸⁴

But the court went on to recognize that the defendant had a First Amendment right to publish information "already in the public do-

178. See, e.g., Robert C. Lind & Alan D. Ullberg, *Institutional Regulation of Employee Expression: Writing as a Conflict of Interest Within Museums and Related Nonprofit Institutions*, 32 SANTA CLARA L. REV. 427, 493 (1992); Lewis Chimes, *National Security and the First Amendment: The Proposed Use of Government Secrecy Agreements Under National Security Directive 84*, 19 COLUM. J.L. & SOC. PROBS. 209 (1985); Michael L. Charlson, Comment, *The Constitutionality of Expanding Prepublication Review of Government Employees' Speech*, 72 CAL. L. REV. 962 (1984); Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Government Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690 (1984); James Peter Rau, Note, *Government Secrecy Agreements and the First Amendment*, 28 AM. U. L. REV. 395 (1979).

179. *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972).

180. *Id.*

181. *Id.* at 1313. Even before the case, Marchetti had in fact published a novel and a nonfiction article that may have been inspired by his CIA experience, although neither was the subject of the government's request for injunction. *Id.*

182. *Id.* at 1311-12.

183. *Id.* at 1316-17 ("[T]he Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment.").

184. Cf. *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961) (upholding prepublication review of movies).

main”¹⁸⁵ and “the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may.”¹⁸⁶ The court recognized that even if the government classified the information, it “may have been publicly disclosed.”¹⁸⁷ And, if there was such a public disclosure, then Marchetti had a First Amendment right to republish the information.¹⁸⁸ Since the secrecy agreement did not purport to affect this First Amendment right, the court deemed it to be enforceable.¹⁸⁹

Importantly, the court also held that Marchetti was entitled to judicial review of the government’s decision denying publication of passages of Marchetti’s book.¹⁹⁰ On review, a court is to examine “whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain.”¹⁹¹ If the information had already entered the public domain, the government cannot bar its publication.¹⁹²

Thus, in *Cox* and *Marchetti* courts recognized that the First Amendment protects the ability of people to freely access and disseminate information in the public domain. The government may not prevent publication (whether by statute or contract), or impose liability for publication, of information that is already available to the public. Where in-

185. *United States v. Marchetti*, 466 F.2d 1309, 1317 (4th Cir. 1972).

186. *Id.*

187. *Id.* at 1318.

188. *Id.*

189. *Id.* (secrecy agreement enforceable but only insofar as government “withholds approval of publication only of information which is classified and which has not been placed in the public domain by prior disclosure”). See *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367 (4th Cir. 1972) (“These plaintiffs [subject to secrecy agreements] should not be denied the right to publish information which any citizen could compel the CIA to produce and, after publication, could publish. We thus move to the conclusion that the deletion items should be suppressed only if they are found both to be classified and classifiable under the Executive Order.”); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (same).

190. *Marchetti*, 466 F.2d at 1317.

191. *Id.*

192. In *Snepp v. United States*, 444 U.S. 507 (1980), the Supreme Court upheld, in a per curiam decision, the constitutionality of a similar secrecy agreement imposed on an ex-CIA agent who published a book criticizing the Vietnam War in violation of his fiduciary obligation to submit the book to the government for prepublication review. *Id.* at 510. The government conceded, however, that “as a general principle” the defendant had a “right to publish unclassified information.” *Id.* at 511; see also *id.* at 521 n.11 (Stevens, J., dissenting) (“[T]he Court does not disagree with the Fourth Circuit’s view in *Marchetti*, reiterated in *Snepp*, that a CIA employee has a First Amendment right to publish unclassified information.”). For a critique of the Court’s upholding of a prior restraint, see Medow, *supra* note 138. But see John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983) (supporting *Snepp* decision). Subsequent courts have continued to recognize the public domain limitation to secrecy agreements following *Snepp*. See *McGehee*, 718 F.2d at 1141 (government may not censor unclassified materials or information in the public domain); see also *id.* (“[I]f in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned[.]”).

formation is in the public domain, the First Amendment protects the public's right to access and discuss it.

3. *Espionage Law*

Other government secrecy cases recognize the public domain without expressly invoking the First Amendment. One such area is espionage law, which is designed to protect sensitive information that our government possesses. It is a crime to obtain, copy, or transmit "information relating to the national defense"¹⁹³ without proper authorization and with the requisite criminal intent. Obviously, our espionage laws serve a vital government interest: national security. The government must be able to keep certain information, such as military strategy, battle plans, and launch codes, out of the hands of foreign adversaries. Espionage laws enable the government to keep such information secret and confined to the few individuals who "need to know" such information.

There is a tension, however, with maintaining a strong regime of government secrecy in a free and open society. If the government were given *carte blanche* to decide what constitutes "information relating to the national defense," it might have a natural proclivity to make more and more things secret, perhaps simply out of an abundance of caution.¹⁹⁴ From the government's view, it would be far better to err on the side of over-inclusion (or overclassification) when it comes to protecting national security. Yet, from the public's view, there must be some limit to what constitutes acceptable over-inclusion. It would be unimaginable, for example, to treat the Constitution as secret and off-limits to the public, even though it does bear on our national defense, in some passages, expressly.¹⁹⁵ This tension becomes greatest when some or all of the information that the government contends relates to the national defense is already available to the public. It is a defense to a charge of espionage and other related offenses for the defendant to establish that all or nearly all of the information at issue was in the public domain. For example, in the recent case involving Wen Ho Lee, the defense offered the testimony of several scientists from Lee's lab who estimated that ninety percent of the restricted information at the lab was in the public domain and could have easily been obtained by China or others from public domain sources, instead of Lee.¹⁹⁶

193. 18 U.S.C. § 794(a) (2000).

194. See Edgar & Schmidt, *supra* note 138, at 354 ("[T]he Executive is inherently self-interested in expanding the scope of matters deemed 'secret'; the more that is secret, the more that falls under executive control.").

195. See, e.g., U.S. CONST. art. I, § 8, cl. 11-16; *id.* art. II, § 2; *id.* art. III, § 3.

196. Bob Dowling, *The Making of a Scapegoat*, BUS. WK., Feb. 4, 2002, at 17. No factual resolution was made of the defense theory. Although Lee eventually agreed to a plea bargain admitting to only 1

The development of this “public domain” defense owes its lineage to Judge Learned Hand in *United States v. Heine*, a case involving a German American defendant convicted of espionage during World War II.¹⁹⁷ The central issue on appeal was whether an individual can be convicted of espionage for giving a foreign entity information that was lawfully accessible to the public. Hand answered no.

Starting in May 1940 through approximately August 1941 (“though not after December 7, 1941”), the defendant, Edmund Carl Heine, had passed back reports he made about the U.S. aviation industry to a German car manufacturer.¹⁹⁸ The reports were based on information Heine collected from numerous publicly available sources, including:

ordinary magazines, books and newspapers; technical catalogues, handbooks and journals; correspondence with airplane manufacturers; consultation with one, Aldrich, who was already familiar with the industry; talks with one or two employees in airplane factories; exhibits, and talks with attendants, at the World’s Fair in New York in the summer of 1940.¹⁹⁹

Heine used the information to prepare a report analyzing the specific capabilities and production numbers of the U.S. airplane industry, both military and commercial.²⁰⁰ Heine sent the reports to an intermediary in New York and Peru, so that they could be forwarded to Germany.²⁰¹ Although Heine’s activity occurred before the United States joined World War II, it is not difficult to see why his conduct might seem suspicious, if not illegal. Heine was sending detailed reports to a German corporation analyzing the capabilities of U.S. manufacturing of airplanes, including military planes. At the direction of the German company, he sent the reports in a roundabout manner, possibly to escape detection. There was even evidence that Heine had obtained some of the information from the people he interviewed using false pretenses or deception.²⁰²

On appeal, the Second Circuit upheld Heine’s conviction for the offense of failing to register as a foreign agent, holding that the evidence presented at trial was sufficient to support a finding that Heine was

of the 59 counts (none espionage), the government’s case unraveled completely, earning a strong rebuke from the judge, who also apologized to Lee for the treatment he received. See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 6 (2002).

197. 151 F.2d 813 (2d Cir. 1945).

198. *Id.*

199. *Id.* at 815.

200. *Id.*

201. *Id.*

202. *Id.* at 816.

working as an agent for the Third Reich.²⁰³ But the Second Circuit reversed Heine's conviction for the more serious offense of espionage. Writing for the court, Judge Hand held that Heine could not be convicted for compiling and processing information that was lawfully available to the public in the United States, even if he collected such information "so that the Reich should be advised of our defense in the event of war."²⁰⁴ It did not matter if Heine misled the sources from whom he obtained information, or if he took the information and processed it in a more convenient form for the Germans.²⁰⁵ In the end, "[a]ll of this information came from sources that were lawfully accessible to anyone who was willing to take pains to find, sift and collate it."²⁰⁶ "Certainly it cannot be unlawful to spread such information within the United States," the court concluded.²⁰⁷ Although the Second Circuit's decision did not explicitly use the term "public domain," subsequent courts and commentators have done so in explaining this limitation on espionage law.²⁰⁸

Although *Heine* rests on statutory interpretation, it is not absent of constitutional concerns.²⁰⁹ Clearly, Judge Hand was concerned about the First Amendment and any interpretation of the espionage law that would result in "so drastic a repression of free exchange of information."²¹⁰ Hand recognized the danger to a free society if "information relating to the national defense" were given a broad interpretation: "every part in short of the national economy and everything tending to disclose the national mind are important in a time of war, and will then 'relate to the national defense.'"²¹¹ Under such a broad interpretation, the government could criminalize the mere sending "to a citizen of France a railway map, a list of merchant ships, a description of automobile assembly technique, an account of the latest discoveries in antiseptis, or in plant or animal

203. *Id.* at 817 ("Nobody but a simpleton could fail to detect the hall-marks of the principal in whose interest the whole web of chicane and evasion had been woven.").

204. *Id.* at 815-16.

205. *Id.* at 816.

206. *Id.* at 815.

207. *Id.*

208. See, e.g., *United States v. Truong*, 629 F.2d 908, 918 n.9 (4th Cir. 1980) ("[T]he defendants would not be guilty of transmitting national defense information if the information were available in the public domain."); *Slack v. United States*, 203 F.2d 152, 156 (6th Cir. 1953) (distinguishing *Heine* because information was "secret information not obtained from public domain of knowledge"); *Meadow*, *supra* note 138, at 775 ("Together, *Gorin* and *Heine* thus removed from the purview of section 794(a) all disclosures of information that had previously entered the public domain.").

209. *Heine* is similar to *Daily Mail*. In both cases, the court's opinion turned on the fact that the information had been lawfully accessible to the public. Because the information in question was publicly available, the government could not later criminally punish an individual or entity for disseminating it. See *supra* notes 169-70 and accompanying text.

210. *United States v. Heine*, 151 F.2d 813, 815 (2d Cir. 1945).

211. *Id.*

breeding, or even a work upon modern physics."²¹² That result, according to Hand, was "intolerable."²¹³

Solicitous of "the spread of information" that was lawfully available to the public, Judge Hand settled upon a simple rule to protect it: "whatever it was lawful to broadcast throughout the country it was lawful to prepare and publish domestically all that Heine put in his reports."²¹⁴ Thus, "when the information has once been made public, and has thus become available in one way or another," an individual cannot be convicted of espionage for disseminating that publicly available information to others.²¹⁵

The outcome reached in *Heine* was by no means a foregone conclusion, particularly in time of war.²¹⁶ The only decision cited by the Second Circuit was *Gorin v. United States*.²¹⁷ In *Gorin*, the Court made no mention of a public domain limitation, at least not in the context of defining "information relating to the national defense." In fact, the Supreme Court gave a very broad definition to "information relating to the national defense," describing it as "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."²¹⁸ In dicta, the Court did suggest a limitation to the intent requirement of proving that the defendant intended to give advantage to a foreign government: "Where there is no occasion for secrecy, as with reports relating to the national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government."²¹⁹

The Second Circuit essentially shifted the Supreme Court's concern about publicly available information from the intent requirement to the definition of information relating to the national defense. Part of the reason undoubtedly must have been that the evidence in *Heine* suggested, perhaps strongly, that the defendant hoped to help the German government with his reports. The dictum from *Gorin*, if applied to Heine's in-

212. *Id.* at 816.

213. *Id.* at 815.

214. *Id.* at 816.

215. *Id.* at 817.

216. Apparently, other countries have attempted to prosecute under espionage law individuals who merely collected data from publicly available sources. See SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 284-85 (1982) (bringing criminal charges against "peace researchers [in Norway and Sweden] . . . for assembling information from openly available sources that the authorities judged dangerous for military security").

217. 312 U.S. 19 (1941).

218. *Id.* at 28.

219. *Id.*

tent, might not save him from conviction. In this respect, the *Heine* decision is a broader ruling than *Gorin*. Intent is a subjective inquiry that must be made on a case-by-case basis. It is conceivable, as the facts in *Heine* show, that one could intend to advantage a foreign government with reports based on publicly available information. By contrast, information relating to the national defense is a more objective inquiry. Under *Heine*, publicly available information is *not* information relating to the national defense, regardless of the defendant's motives. Put more starkly, it is not espionage to pass information that already is in the public domain to a foreign government, even if your intentions are to harm the United States.²²⁰

4. *Classified Information and Regulations of Munitions List Information*

A corollary to the public domain's limitation on espionage law is its limitation on the government's ability to classify information. Although the government has considerable power in regulating what information enters the public domain by classifying information and keeping it secret, the *Marchetti* line of cases shows that there are limits to what the government can properly classify.²²¹ Just as the public availability of information precludes an espionage conviction, the government may not restrict the public from disseminating information that is entirely in the public domain (at least if there by lawful means).

220. While purporting to apply *Heine*, the Fourth Circuit appears to have qualified the public domain defense in that circuit. *United States v. Squillacote*, 221 F.3d 542, 577 (4th Cir. 2000). The Fourth Circuit upheld the use of jury instructions that defined "information that relates to the national defense" in a way that may allow the conviction of a person for transmitting publicly available information that was also contained in a classified government document that the government did not itself disclose. *Id.* at 576. Adopting the government's reasoning, the court explained that a government disclosure of information is more "official" than finding the same information in the public domain through other sources, and that "official" quality made the government's disclosure of the information more crucial than disclosures of the same information in public sources for the purposes of espionage law. *Id.* at 578. The court's reasoning is open to question. Although facts about the U.S. government or information related to and produced by the U.S. government might bear greater "officialness" from government sources, the argument for "officialness" has much less, if any, force when applied to general facts about and disclosed by other entities. *Cf. Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1144 (5th Cir. 1992) (government's claim to "officialness" of publicly available information has a "troubling sweep"). To draw upon Hand's example, the U.S. government could hardly argue that a city's publicly available railway map was information relating to the national defense just because the U.S. government had classified it as its own "official" version of the rail system. The *Heine* case rejects the argument that an "official" government report of factual information is somehow different from the same factual information reported by the participant in the fact itself. 151 F.2d at 816 ("There can, for example, be no rational difference between information about a factory which is turning out bombers, and to which the army allows access to all comers, and information about the same bombers, contained in an official report, or procured by a magazine through interviews with officers.").

221. See *supra* notes 179-83 and accompanying text.

The government's regulations for classifying information embrace a public domain limitation, but without establishing a *per se* rule. For information to be properly classified, a determination must be made that "the unauthorized disclosure of the information, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security."²²² But once information is generally available to the public, further disclosure of the information would not likely "advantage" a foreign government.²²³ The regulations governing classified information "require[] consideration of the information available from intelligence sources concerning the extent to which the same or similar information is known or is available to others."²²⁴ The classifying agent should "consider whether it is known, publicly or internationally, that the United States has the information or even is interested in the subject matter."²²⁵

Even after a government document has been properly classified, eventual public disclosures of the information through lawful sources may necessitate its declassification.²²⁶ Although unauthorized disclosures do not necessarily require declassification under the regulations,²²⁷ "such disclosures require . . . reevaluation of the information to determine whether the publication has so compromised the information that downgrading or declassification is warranted."²²⁸

Because the current regulations do not contain a *per se* rule exempting public domain information from classification, it might be conceivable for the government to classify information that was entirely in the public domain. But even if that were the government's position, the enforcement of that classification would be highly vulnerable to legal challenge. Moreover, apart from the question of propriety of the government's *classification* of the information, *Heine* and *Marchetti* suggest that any attempt to restrain the public's further *dissemination* of the information, whether through espionage law, government secrecy

222. Dep't of Def. Administrative Instruction 26, § 2-202 (Apr. 11, 1987), at <http://www.dtic.mil/whs/directives/current.htm>. These provisions are comparable to those previously contained in 32 C.F.R. pt. 159a (2001). After 9/11, however, the Department of Defense removed part 159a from the Code of Federal Regulations. Dep't of Defense Removal of Regulatory Parts, 66 Fed. Reg. 53957 (Oct. 25, 2001).

223. See *Gorin v. United States*, 312 U.S. 19, 28 (1941).

224. Dep't of Defense Administrative Instruction 26, § 2-208.

225. *Id.*

226. *Id.* § 2-209.

227. *Id.* In such cases, the regulations state that "[a]pppearance in the public domain of information currently classified or being considered for classification does not preclude initial or continued classification." *Id.*

228. *Id.*

agreements, or other means, would almost certainly run afoul of the First Amendment.

The public domain also plays a significant role in laws prohibiting the export of defense related information on the United States Munitions List under the Arms Export Control Act²²⁹ and implementing regulations.²³⁰ These laws regulate the transmission of defense articles (including weapons and technical data) to foreign countries,²³¹ in order to prevent them from developing greater arms and weapons capabilities. But one important limitation on this prohibition is provided by the public domain. Information that is already available in the public domain is expressly exempted from the statutory prohibition, meaning that it is not a crime to transmit such information abroad.²³² The parallel to *Heine* is unmistakable.²³³

What is particularly noteworthy about the public domain limitation here is that the regulations provide a definition of the public domain. To my knowledge, this is the *only* instance a federal statute or regulation attempts to define the public domain. It states in part: "Public domain means information which is published and which is generally accessible or available to the public" by one of several listed means.²³⁴ Section 120.11's definition of the public domain builds on the general principles that we have already discussed. Entry into the public domain hinges on dissemination and accessibility of material to the public. The regulations specify the particular means by which the material can be made publicly available, although the list is fairly expansive. Again, the public domain serves to limit the power of the government to control the dissemination of public domain information.

229. See Arms Export Control Act, 22 U.S.C. §§ 2751-96 (2000). By contrast, the former Comprehensive Anti-Apartheid Act, 22 U.S.C. § 5067, which was repealed in 1992 (Pub. L. No. 103-149, § 4(a)(1)), did not contain a public domain limitation on export of material to South Africa. See *United States v. Posey*, 864 F.2d 1487, 1492 (9th Cir. 1989).

230. International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120-30 (2003).

231. 22 U.S.C. § 2778 (2000).

232. See 22 C.F.R. § 125.1 (2003) ("Information which is in the 'public domain' is not subject to the controls in this subchapter."); see also *id.* § 120.10 ("Technical data . . . does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or *information in the public domain* as defined by § 120.11.") (emphasis added).

233. The public domain limitation here is qualified in two respects. First, the determination of what information is subject to restriction under the munitions list is not subject to judicial review. See *Karn v. U.S. Dep't of State*, 925 F. Supp. 1, 5-6 (D.D.C. 1996). A First Amendment challenge, however, may be reviewable. *Id.* at 10-13. Second, the public domain limitation applies to technical data, not to items such as firearms or weapons on the Munitions List. Even though these items might be publicly available in the U.S., the public availability of the item would not preclude the government from regulating the export of the weapons or technology.

234. 22 C.F.R. § 120.11.

5. *Freedom of Information Act*

The public domain also plays a role in the Freedom of Information Act ("FOIA"), a statute that gives the public statutory rights of access to broad categories of government information unless it falls within an exemption.²³⁵ Exemptions 1 and 3 are often invoked to exempt information that is properly classified and relates to national defense.²³⁶ In interpreting FOIA, the D.C. Circuit has recognized a "public domain doctrine" that limits the government's ability to assert an exemption from disclosure.²³⁷

Under the public domain doctrine, "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record."²³⁸ As the D.C. Circuit explained, "'the logic of FOIA' mandates that where information requested 'is truly public, then enforcement of an exemption cannot fulfill its purposes.'"²³⁹ The party invoking the public domain doctrine has the burden of presenting "specific information in the public domain that appears to duplicate that being withheld" by the government.²⁴⁰ The paradigmatic example of public domain material that falls within this doctrine is information revealed in open court or as a part of judicial proceedings. This includes the evidence admitted at trial, the trial transcripts, the parties' briefs, and the court's orders and opinions.²⁴¹ The *public* nature of the information establishes a right of the public to access and disseminate such information—a clear parallel to *Cox*.²⁴²

C. SYNTHESIS: THE PUBLIC DOMAIN AS A RESTRAINT ON GOVERNMENT POWER

Although the government secrecy cases typically invoke the public domain without much explanation (and therefore lack the richness of discussion present in the IP cases we examined), I believe it should be readily apparent how the public domain operates in these cases. In each

235. 5 U.S.C. § 552(a)(3)(A), (b) (2000).

236. *Id.* § 552(b)(1), (b)(3).

237. *See Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) (collecting cases).

238. *Id.*

239. *Id.*

240. *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

241. *Cottone*, 193 F.3d at 554.

242. The public domain doctrine in the FOIA context is qualified to official public disclosures. *See Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). This qualification does not necessarily diminish the robustness of the public domain principle under the First Amendment. The qualification allows the government to withhold certain information from production by the government, even though the information was available in public (though unofficial) sources. But the government's power would not extend to removal or restriction of the information that was already publicly available. Such a restriction would most likely violate the First Amendment.

of the five areas of law discussed above, the government seeks to restrict the ability of some member of the public from either accessing or further disseminating information that is already in the public domain (because publicly available). And, in each area, the public domain prohibits the government from doing so by recognizing public rights of unrestricted access to the public domain under the First Amendment or by statute.

I. Function: Restraint Against Government Power and Abuses

Just as in the IP context, the function of the public domain in these cases is to act as a restraint on government power, here, the power to use secrecy.²⁴³ Courts recognized the concept of the public domain to limit the government's ability to keep information or proceedings secret. Without such a limitation, the government would have the ability to use secrecy in an ever-expanding way, even on information that is already available to the public. Under espionage law, to borrow Hand's admonition, "every part in short of the national economy and everything tending to disclose the national mind are important in time of war, and will then" be the basis for criminal prosecution.²⁴⁴ Likewise, in classifying information or prohibiting the export of technical information, the government would have every incentive to err on the side of overclassification—in the interest of "national security."²⁴⁵ Indeed, without a public domain, the government could make secret everything it wanted, no matter if the information was already publicly available.

None of this is to suggest, however, that the government necessarily acts nefariously when utilizing secrecy; rather, secrecy is an essential part of any government. However, public disclosure "is of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business."²⁴⁶ The public domain in the government secrecy cases is rooted in the First Amendment and protects what Learned Hand called the "spread of information." In these cases, there is a danger that the government may prevent members of the public from using information already in the public domain, whether it be information related to national security, information revealed in open court or related to criminal or governmental proceedings, information subject to classification, or information sought under FOIA. But, in each of these

243. It is conceivable that, in a certain set of facts, the government might attempt to justify the restriction of public domain information as satisfying strict scrutiny under the First Amendment. The burden on the government, though, would be very high. In most cases the government could not restrict the further dissemination of the public domain material.

244. *United States v. Heine*, 151 F.2d 813, 815 (2d Cir. 1945).

245. See *United States v. Hoffman*, 10 F.3d 808, 1993 WL 468713, at *7 (9th Cir. Nov. 12, 1993) (unpublished table decision) ("[T]he public domain exclusion ensures that the government cannot place anything it wants on the Munitions List.").

246. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

areas, the public domain acts as a restraint against the government's attempts to restrict the flow or use of information already available to the public. The cases recognize that, while the government has an interest in maintaining secrecy, the interest is generally outweighed by the public's interest in the spread of the information once it is already available to the public. Paralleling the Copyright Clause's bar against removing material from the public domain through the grant of IP, the First Amendment prohibits the government from removing material from the public domain through secrecy.

2. *Mechanism: Dispersing Power Through Public Rights of Access*

The mechanism by which the public domain operates as a restraint on government secrecy is analogous to how the public domain operates in intellectual property. As *Cox* recognized, the public domain accords each member of the public a right of access to public information. Once information becomes publicly available, the government's claim to secrecy over the information is forever lost. It could not be invoked against *Cox Broadcasting*, *Heine*, or others who wanted to disseminate information already in the public domain, as the First Amendment protects the free flow of information in the public domain.

III. TOWARD A UNIFIED THEORY OF THE PUBLIC DOMAIN:
THE RESTRAINT AGAINST GOVERNMENT CONTROL

Part I made the case that the public domain is used within the various forms of IP (1) to define what is not appropriate subject matter of IP; and (2) to mark the termination of IP rights, in both cases by according the public full rights of unrestricted access to the underlying material.²⁴⁷ Part II made a similar case for the various uses of the public domain within the government secrecy cases: the public domain (1) defines what is not appropriate subject matter of government secrecy and (2) marks the termination of government secrecy by according the public full rights of unrestricted access to the underlying material.²⁴⁸ This Part ties the two strands together and shows how the uses of the public domain in IP *parallel* its uses in the government secrecy cases based on origin, structure, and function. Under my unified theory, the public domain acts as a restraint on the government's power to control the public's access to culture, information, and know-how in a free and open society.

247. See *supra* notes 40–137 and accompanying text.

248. See *supra* notes 156–246 and accompanying text.

A. THE PUBLIC DOMAIN: ONE OR MANY?

In a recent article Boyle asks whether there is one public domain or many?²⁴⁹ Good question. To borrow Pamela Samuelson's evocative imagery,²⁵⁰ if we were to "map" the public domain, would it consist of one large territory involving different areas of law, or would it instead consist of several discrete territories that may or may not be connected in any way? Based on his analysis of intellectual property law, Boyle concludes the latter: "Just as there are many 'properties,' so too there are many 'public domains[,]'"²⁵¹ and many theories of them.²⁵² Litman's theory about the role of the public domain in underwriting copyright's concept of originality is one theory²⁵³; Lessig's focus on the public domain's role in spurring innovation and creation is another theory.²⁵⁴ To this, we might add Boyle's own theory, which espouses a pluralist understanding of the public domain—having many theories of the public domain "is all to the good."²⁵⁵ Boyle's pluralist account still leaves room for developing greater coherence among the various uses of the public domain.²⁵⁶ My theory of the public domain attempts to "unify" the uses of the public domain in IP with its uses in government secrecy cases without necessarily foreclosing other views of the public domain. I make no claim that the different invocations of the public domain that I discuss necessarily refer to a single, unitary concept of the public domain.²⁵⁷ My unified theory of the public domain should not be mistaken for a unitary theory of the public domain that posits that IP law and government secrecy cases recognize the same concept that is identical in all respects. Rather, my thesis is that the various uses of the public domain in IP law and in the government secrecy cases are *related* in several important respects.

249. Boyle, *Enclosure*, *supra* note 23, at 38.

250. See Pamela Samuelson, *Mapping the Digital Public Domain*, 66 LAW & CONTEMP. PROBS. 147, 148 (2003).

251. Boyle, *Enclosure*, *supra* note 23, at 36.

252. *Id.* at 38.

253. See Litman, *supra* note 58, at 1013–14.

254. See LESSIG, *supra* note 26, at 19–25.

255. Boyle, *Foreword*, *supra* note 26, at 29.

256. In political theory, John Rawls's *A Theory of Justice* is a paragon example of an attempt to develop general principles of political ordering within a pluralist framework. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

257. The several uses of the public domain may be viewed as deriving from one common body that has been subdivided by artificial distinctions, as may be argued in the case of the several oceans constituting one body of water. I, however, stop short of arguing that the various uses of the public domain refer to the exact same thing in every respect. It is interesting to note, though, that Samuelson's map of the public domain appears to place government secrecy (classified information) and intellectual property in the same general region (or perhaps continent). Samuelson, *supra* note 250, at 151 (fig. 1).

First, they are related by *origin*, in that: (1) at least some of the uses of the public domain originate directly from the Constitution—specifically, the First Amendment and the Copyright Clause, which together aim to foster and protect sources of learning for the public; (2) all of the uses of the public domain originate from the common norm of protecting the free flow of ideas, knowledge, and materials in our democratic society; and (3) all of the uses of the public domain respond to pressures created when the government exercises power to control the public's access to materials, whether through secrecy or the grant of IP rights. Second, all of the uses of the public domain are related in *structure* and *function*, in that each (4) functions as a restraint on government power and potential abuses by (5) the structural mechanism of according the public rights of unrestricted access to materials in the public domain.

B. THE THEORY OF DOCTRINAL PARALLELISM

My theory rests on the view that the law sometimes develops in two or more different areas in parallel fashion.²⁵⁸ By *doctrinal parallelism* I mean to describe situations in the law when a doctrine or rule originates, develops, or functions in a manner that is parallel, meaning at least similar or analogous, if not completely identical, to another doctrine or rule. Doctrinal parallelism encompasses a range of different phenomena showing that two or more different laws have some similarity, whether it be in (1) origin, (2) structure, or (3) function. A simple example of doctrinal parallelism can be found in the doctrines of patent misuse²⁵⁹ and copyright misuse.²⁶⁰ Both operate to prevent efforts of the IP rights holder to extend its grant of exclusive rights to restrain competition beyond the scope of the grant. The doctrine of misuse was first adopted in the context of patents. In *Morton Salt*, the Supreme Court held that a patentee cannot recover for infringement during any period in which the patentee misused its patent.²⁶¹ Although the Patent Code does not contain a defense of misuse, the Court fashioned the doctrine based on principles of equity and the policy inherent in the Copyright Clause.²⁶² Patent

258. By origin, I mean the thing (principle, norm, source of law, etc.) that first animated the particular law. By structure, I mean the requirements, tests, or elements of the law, the components that make it operate. By function, I mean the purpose or operation of the law, what the law seeks to do. The terms should become more apparent as I apply them below.

259. See, e.g., *Morton Salt Co. v. G.S. Suppiger*, 314 U.S. 488 (1942).

260. *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990). See generally Scott A. Miskimon, Note, *Divorcing Public Policy from Economic Reality: The Fourth Circuit's Copyright Misuse Doctrine in Lasercomb America, Inc. v. Reynolds*, 69 N.C. L. REV. 1672 (1991) (tracing "the development of equitable defenses . . . from the origin of the 'unclean hands' doctrine through the parallel evolutions of patent and copyright misuse").

261. *Morton Salt*, 314 U.S. at 490-92.

262. *Id.* at 492.

misuse *functions* in a way that is *parallel* or analogous to the doctrine of unclean hands to invalidate the legal claims of parties who acted *improperly* in the events underlying the basis of their claims.²⁶³

A second instance of doctrinal parallelism can be found in the courts' eventual adoption of the misuse doctrine in copyright law. The Fourth Circuit was the first federal circuit to recognize misuse in copyright law, albeit over forty years after its adoption in patent law.²⁶⁴ The application of the misuse doctrine to copyright was all but compelled by virtue of the common goals that animate copyright and patent law.²⁶⁵ After all, copyrights and patents are both grants of "exclusive rights" authorized by Congress pursuant to its power under the Copyright and Patent Clause.²⁶⁶ The parallel concerns of the two IP systems compel similar legal treatment of the same type of bad behavior of the IP rights holder. As the Fourth Circuit explained:

[S]ince copyright and patent law serve *parallel* public interests, a "misuse" defense should apply to infringement actions brought to vindicate either right. . . . [T]he similarity of the policies underlying patent and copyright is great and historically has been consistently recognized. Both patent law and copyright law seek to increase the store of human knowledge and arts by rewarding inventors and authors with the exclusive rights to their works for a limited time. At the same time, the granted monopoly does not extend to property not covered by the patent or copyright.²⁶⁷

Here we see parallelism not just in function, but also in origin and structure. First, as to origin, the Fourth Circuit explicitly notes the "parallel" policies of patent and copyright law in drawing upon patent misuse doctrine to adopt a similar doctrine for copyright.²⁶⁸ The two doctrines are also nearly identical in structure: they are defenses that require the defendant to prove that the plaintiff has used its copyright or patent "in a manner violative of the public policy embodied in the grant."²⁶⁹ If misuse is proven, the IP rights holder cannot recover for infringement during any period of misuse.

But what is the significance of doctrinal parallelism? Is it anything more than a fancy name for drawing an analogy between different rules,

263. See *United States Gypsum Co. v. National Gypsum Co.*, 352 U.S. 457, 465 (1956).

264. *Lasercomb*, 911 F.2d at 976.

265. See *Miskimon*, *supra* note 260, at 1689.

266. U.S. CONST. art. I, § 8, cl. 8.

267. *Lasercomb*, 911 F.2d at 976 (emphasis added).

268. Another example of this kind of doctrinal parallelism can be found in *Sony*, in which the Court drew upon the staple article of commerce provision of the Patent Code and applied it in limiting contributory infringement under copyright law. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 440-41 (1983).

269. *Lasercomb*, 911 F.2d at 976.

or using analogical reasoning in the law? *This is like that, and therefore we should treat that like this.* While it's true that analogy is commonplace in the law,²⁷⁰ doctrinal parallelism is meant to encompass more than analogy. Analogy in the law tends to involve direct or express comparisons made by courts. By contrast, doctrinal parallelism need not involve any conscious or intentional comparison at all; the points of parallelism between doctrines may be latent or even unintended. And, although doctrinal parallelism does rely upon analogical reasoning to draw comparisons, it attempts to do more: to examine systematically the evolution of the law in order to discern common patterns in the origin, structure, and function of different doctrines and rules. While analogical reasoning need not include anything more than a *factual* comparison of two cases applying *one* doctrine (say, the minimum contacts test for personal jurisdiction²⁷¹), the study of doctrinal parallelism focuses on *two or more doctrines* as they developed over time, in the hopes of finding *interrelationships* among the doctrines that may not have been apparent before.

By identifying these common patterns in the law, we may better understand legal doctrines or rules through enhanced comprehension of their origin, structure, and function. Sometimes, of course, these interrelationships will be obvious, as it is for the misuse doctrines in copyright and patent law, which courts recognized by express analogy. Other times, however, the interrelationships will be less apparent, as I believe is the case with the various uses of the public domain, which often developed without any express analogy to each other. In these sorts of cases, where the relevant doctrines or rules are underdeveloped, unsettled, or not often associated with each other, the study of doctrinal parallelism may have its greatest reward.

Evolution theory provides a helpful comparison to understand the possible benefits the study of doctrinal parallelism may have for the law.²⁷² Part of the genius of Darwin's theory of evolution is that it re-

270. See Emily Sherwin, *A Defense of Analogical Reasoning*, 66 U. CHI. L. REV. 1179 (1999); Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

271. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

272. There is a fair body of legal scholarship that has drawn upon or discussed the theory of evolution in the context of the law. See, e.g., PETER STEIN, *LEGAL EVOLUTION: THE STORY OF AN IDEA* 69-98 (1980); Robert Clark, *The Interdisciplinary Study of Legal Evolution*, 91 YALE L.J. 1238 (1991); E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985); Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS J. 291 (1999); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985); Oliver A. Houck, *Of Bats, Birds and B-A-T: The Convergent Evolution of Environmental Law*, 63 MISS. L.J. 403 (1994); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996); M.B.W. Sinclair, *Evolution in Law: Second Thoughts*, 71 U. DET. MERCY L. REV. 31 (1993).

vealed possible interrelationships among different organisms that may have appeared, on the surface, to have no connection whatsoever to each other.²⁷³ Under divergent evolution theory, different organisms may have structures—a human arm, a bat's wings, a whale's flippers, a cat's forelimbs—that appear quite different on the surface.²⁷⁴ But, in fact, these *homologous structures* are quite similar when they first develop in the embryo.²⁷⁵ Although the structures may look different and may eventually perform somewhat different functions for each organism, the structures develop in a quite similar manner among the group.²⁷⁶ Under evolution theory, this common ancestry shows the relatedness of different organisms.

By contrast, under convergent evolution theory,²⁷⁷ different organisms may have similar structures—the wings in birds, insects, bats, and reptiles—that have virtually the same function. But these *analogous structures* are not thought to have developed from a common ancestor, but instead, from different ancestors that evolved through adaptations better suited to the pressures placed on them by a similar environment.²⁷⁸ According to convergent evolution theory, different organisms may develop similar features through adaptations when faced with similar environments or architectural demands.²⁷⁹

273. See CHARLES DARWIN, *THE ORIGIN OF SPECIES AND THE DESCENT OF MAN* 99 (1960) (elaborating theory of natural selection to support view “that all animals and all plants throughout all time and space should be related to each other in groups, subordinate to groups, in the manner which we everywhere behold—namely, varieties of the same species most closely related, species of the same genus less closely and unequally related, forming sections and sub-genera, species of distinct genera much less closely related, and genera related in different degrees, forming sub-families, families, orders, sub-classes, and classes”); ERNEST MAYR, *THE GROWTH OF BIOLOGICAL THOUGHT: DIVERSITY, EVOLUTION, AND INHERITANCE* 507 (1982) (“Darwin . . . was the first author to postulate that all organisms have descended from common ancestors by a continuous process of branching.”).

274. For a general discussion of divergent evolution, see 3 *MAGILL'S SURVEY OF SCIENCE: LIFE SCIENCES SERIES* 911–12 (Frank N. Magill ed., 1991).

275. DOUGLAS J. FUTUYAMA, *EVOLUTIONARY BIOLOGY* 109 (3d ed. 1998) (“[O]rgans of two organisms are homologous if they have been inherited (and perhaps modified) from an equivalent organ in a common ancestor.”).

276. See *id.* at 109–10; see also SCOTT FREEMAN & JON C. HERRON, *EVOLUTIONARY ANALYSIS* 22–23 (2d ed. 2001) (discussing homology and common ancestry).

277. For a general discussion of convergent evolution, see FUTUYAMA, *supra* note 275, at 110; *MAGILL, supra* note 274, at 913–14; JOHN A. ENDLER, *NATURAL SELECTION IN THE WILD* 62–64 (1986).

278. See STEPHEN J. GOULD, *THE STRUCTURE OF EVOLUTION* 1077 (2002) (The “similarity [is] due to common pressures of natural selection upon backgrounds of no common descent[.]”).

279. See *MAGILL, supra* note 274, at 913 (“[T]he forms of their bodies [under convergent evolution] came to follow the functions dictated by their environment—sometimes termed their environmental constraints.”).

A third form of evolution is parallel evolution.²⁸⁰ This type of evolution is a slight variation of divergent evolution, in that both forms of evolution are predicated on the development of organisms from a common ancestor. Here, however, the organisms develop with even greater similarities than they do under divergent evolution, so that the physical resemblance between the organisms may be even more apparent.

I am not schooled enough in evolutionary biology to defend the validity of evolution as a scientific theory. I do have the assurances of a close biologist friend, however, that “just about every biologist (except maybe a Raelian) believes in Darwin’s theory in principle.”²⁸¹ The reason I draw this analogy is not to show that evolution is necessarily right, but rather to sketch out a particular model or framework by which doctrinal developments may be more systematically analyzed in the law.

At the risk of causing some confusion with parallel evolution, I will use the term “doctrinal parallelism” as an umbrella term to encompass any instance of similarity among doctrines in terms of origin, structure, or function. Thus, when I speak of doctrinal parallelism, I intend to include what might be likened to not only parallel evolution, but also divergent and convergent evolution. All three forms of evolution indicate some similarity—or what I will characterize as a point of “parallelism”—among different things. My theory is that we should think of the law as sometimes evolving in ways analogous to the evolution of organisms. But let me be clear: my view is *not* that all law can be explained by what I call doctrinal parallelism, or that all law is subject to evolution or a kind of natural legal selection. My argument is more modest; *sometimes* the law may evolve in a way that mimics evolution theory.²⁸²

For example, a common norm or principle may give rise to different doctrines or rules that develop structurally or functionally in a parallel manner, much akin to *parallel or divergent evolution (common origin)*. The doctrines of patent and copyright misuse provide one example: their common source is the public policy inherent in the Copyright and Patent Clause, and their structure and function is virtually the same, i.e., to prevent IP rights holders from misusing their IP rights to restrain competition beyond the proper scope of the rights. Another example can be

280. For a general discussion of parallel evolution and homology, see ENDLER, *supra* note 277, at 59–60; FUTUYAMA, *supra* note 275, at 110 (“Parallel evolution is thought to involve similar developmental modifications that evolve independently (often in closely related organisms, because they are likely to have similar developmental mechanisms to begin with).”).

281. Interview with Robert Jeng, Ph.D., Dept. of Molecular and Cell Biology, University of Cal. at Berkeley in Berkeley, Cal. (Jan. 16, 2003). See also MAGILL, *supra* note 274, at 626 (“It is perhaps fair to state at the outset that no well-informed biologist doubts evolution any longer.”).

282. How much and to what extent I leave for future inquiry.

found in the renewal right under the 1909 Copyright Act²⁸³ and the termination right under the 1976 Copyright Act.²⁸⁴ On the surface, they are two distinct animals. And, in fact, some works are eligible for both renewal *and* a termination right. But both emanate from the same common norm. Congress specifically crafted the termination right to provide a “second chance” opportunity comparable to the renewal right that would give authors the chance to recoup value from their copyrights by allowing them to invalidate existing licenses. Although the features of renewal and termination are somewhat different,²⁸⁵ they function in a parallel manner to allow authors a “second chance.”

Other times, different areas of law may embrace doctrines that serve the same or similar function, without necessarily originating from the same source or a single animating principle. The doctrines develop in similar fashion in response to a similar environmental or architectural demand, much akin to *convergent evolution (common adaptation)*. For example, the doctrines of misuse in patent and copyright law share a *similar function* to the doctrine of “unclean hands,” even though they all do not originate from the exact same source: although misuse derives from equity, unlike the doctrine of unclean hands it derives more specifically from the policy inherent in the Copyright Clause.

Another example of convergent evolution in the law can be found in the non-discrimination principle embodied in the Equal Protection Clause and in the principle of national treatment in intellectual property law. The Equal Protection Clause protects people from discrimination

283. Under the 1909 Copyright Act, the renewal term gave authors the ability to exploit their copyrights free and clear of any prior licenses from the initial term. Renewal gave authors a “second chance” to recoup value from their copyrights, based somewhat on the paternalistic notion that authors might foolishly bargain away their exclusive rights without full appreciation of the value of their works. Renewal occurred upon the expiration of the 28th year of the initial term of copyright, but authors had to file an application in the 28th year of copyright in order to obtain a renewal term. Copyright Act of 1909, ch. 320, §§ 23–24, 35 Stat. 1075, 1080–81. Because the copyrights to some works published before the 1976 Act are still subsisting, current copyright law still uses the concept of renewal for those works. See 17 U.S.C. § 304 (2000).

284. Congress abandoned the system of renewal for future works when it enacted the 1976 Copyright Act. In place of renewal, Congress gave authors a termination right, which functions in a manner similar to renewal. An author may now terminate past licenses during a five-year period beginning at the end of thirty-five years after the assignment. See 17 U.S.C. §§ 203, 304(c). As with the renewal term, the termination right affords authors a “second chance” to gain value from their copyrights by releasing them from their licenses of their works.

285. The main structural difference is that renewal operated at once (end of the 28th year) to clear possibly all past licenses granted by the author, whereas the termination right operates at separate times for each license granted by the author.

based on certain suspect classes, including national origin and alienage.²⁸⁶ Governmental discrimination based on national origin and alienage must survive strict scrutiny.²⁸⁷ It may perhaps be somewhat surprising to learn that intellectual property law recognizes a comparable principle of non-discrimination for foreign nationals as well. All of the major international agreements dealing with intellectual property—TRIPs,²⁸⁸ the Berne Convention,²⁸⁹ the Paris Convention,²⁹⁰ and the Rome Convention²⁹¹—are founded on the principle of national treatment. Under this principle, a country must extend to foreign nationals legal rights (here, with respect to IP) that are at least as favorable as those enjoyed by its own nationals.²⁹² This principle is not an exact equivalent of equal protection, because it allows a country to treat foreign nationals *better* than its own nationals. And the principle may have developed more out of an economic concern (to enable international sale of intellectual property goods) than out of recognition that discrimination against foreign nationals is invidious from a moral point of view. But, at the same time, the principle of national treatment does function as a restraint against discrimination in a manner that is analogous to the Equal Protection Clause: the government may not discriminate against foreign nationals in according intellectual property rights.

The study of doctrinal parallelism can help to correct the inclination of taking an insular view of the law, which may be more prevalent in today's environment of specialization. Much of this specialization in the law is for the good, but there is a danger that each of us can see only a glimpse of the proverbial elephant in our respective fields. Recognition of doctrinal parallelism, however, can reveal patterns or developments across different areas of law that were completely ignored in the past. *Pattern recognition* is a common subject of study in other fields, such as artificial intelligence, bioinformatics, engineering, statistics, and neural

286. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that discrimination based on national origin is given the "most exacting scrutiny"); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage [are] inherently suspect and subject to close judicial scrutiny.").

287. See *supra* note 286.

288. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 3.

289. Berne Convention for the Protection of Literary and Artistic Works, art. 3 (1971 Paris text).

290. Paris Convention for the Protection of Industrial Property, art. 2 (1967 Stockholm text).

291. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, arts. 4–6 ("Rome Convention") (1961).

292. See generally PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY 20 (2001) ("The national treatment principle, embodied in all the major intellectual property conventions as well as the TRIPs Agreement, is a rule of nondiscrimination, promising foreign intellectual property owners that they will enjoy in a protecting country at least the same treatment as the protecting country gives to its own nationals.").

networks.²⁹³ Although these fields may differ in their focus, they all recognize that the ability to recognize patterns in data is an important form of learning. I'd like to draw upon this basic insight by more formally studying the existence of patterns in the law.

To some extent, the law has always operated by pattern recognition through the process of categorization and analogical reasoning. Legal scholarship is not barren of attempts to draw connections among different doctrines or rules;²⁹⁴ indeed, this is a stock-and-trade of legal synthesis (although typically within the same area of law). What I propose to do, however, is to make the study of the existence of patterns in the law more formal, not only by giving it a name (doctrinal parallelism), but also, and more importantly, by providing a framework drawn from evolution theory by which we may analyze parallelism in the law, particularly across different areas of law whose connection may seem remote or even nonexistent. The underlying premise on which my theory rests is that parallel doctrines are usually parallel for some reason. Discerning that reason is the desideratum of the theory of doctrinal parallelism.

293. See, e.g., K.S. FU, APPLICATIONS OF PATTERN RECOGNITION (1982) (remote sensing, seismic wave interpretation, system reliability, medical data analysis, speech recognition); HOWARD MARGOLIS, PATTERNS, THINKING AND COGNITION (1987) (human cognition); WILLIAM S. MEISEL, COMPUTER-ORIENTED APPROACHES TO PATTERN RECOGNITION (1972) (mathematics and statistics); YOH-HAN PAO, ADAPTIVE PATTERN RECOGNITION AND NEURAL NETWORKS (1989) (neural networks); B.D. RIPLEY, PATTERN RECOGNITION AND NEURAL NETWORKS (1996) (same); J.M. Spectar, *The Fruit of the Human Genome Tree: Cautionary Tales about Technology, Investment, and the Heritage of Humankind*, 23 LOY. L.A. INT'L & COMP. L. REV. 1, 6 (2001) (mapping the human genome).

294. For elegant examples of pattern recognition in constitutional law, see Charles Fried, *Types*, 14 CONST. COMMENT. 55 (1997); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994).

C. DOCTRINAL PARALLELISM IN THE USES OF THE PUBLIC DOMAIN IN INTELLECTUAL PROPERTY AND GOVERNMENT SECRECY CASES

This section explains how the various uses of the public domain are parallel in origin, structure, and function.

I. Parallel Origins of the Public Domain

The first point of parallelism between the use of the public domain in intellectual property law and its use in government secrecy cases is *origin*. At least some of these uses originate directly from the same source, the Constitution, while all can be described as originating from the same common norm of protecting the free flow of culture, information, and know-how in a free and open society. Alternatively, all of the uses can be viewed as parallel developments or adaptations in response to the same potential for abuse in the government's power to control the public's access to sources of learning.

a. Common Origin 1: The First Amendment and the Copyright Clause

Although the Supreme Court has long recognized the concept of the public domain in interpreting both the Copyright Clause and the First Amendment,²⁹⁵ it has stopped short of explaining the precise relationship between the public domain from these two constitutional provisions. The connection is not difficult to draw, however. One of the goals of both the Copyright Clause and the First Amendment is to ensure that the public has a wide availability of works and information from which to draw.²⁹⁶ The public domain under the Copyright Clause²⁹⁷ and the public domain under the First Amendment²⁹⁸ are both designed to protect the public's right of free access to important sources of learning—works of art, litera-

295. See *supra* notes 53–71, 79–125, 156–77 and accompanying text.

296. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (under the Copyright Clause “private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts”); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782–83 (1978) (First Amendment has a “role in affording the public access to discussion, debate, and the dissemination of information and ideas.”); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”).

297. See *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (The Copyright Clause bars “restrict[ing] free access” to materials in public domain.); *Bonito Boats, Inc. v. Thundercraft Boats, Inc.*, 489 U.S. 141, 153 (1989) (recognizing policy in Copyright Clause “of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”).

298. See *Bellotti*, 435 U.S. at 783 (First Amendment “goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which the public may draw.”).

ture, know-how, information about government, etc.²⁹⁹ Such public access is critical to furthering the promotion of learning among the citizenry, a common goal of both the Copyright Clause³⁰⁰ and the First Amendment,³⁰¹ which in turn facilitates self-expression and self-governance.³⁰² However, the precise operation of the public domain in both contexts is slightly different. In the First Amendment context, once material is available to the public, it enters the public domain, establishing a First Amendment right of access among the public to the material. This understanding might be called the First Amendment baseline to the free flow of information in a democratic society:³⁰³ once information is available to the public it must be allowed to flow freely among the people. Diagram A depicts this model of the public domain.

299. This is not to suggest that all aspects of IP law work free of tension with the First Amendment. The Copyright Clause does permit restrictions on public access to works by allowing the grant of exclusive rights for limited times. There is an extensive debate in cases and legal scholarship concerning the extent to which copyright law (or other IP law) may cause the restriction of speech in tension with or actual violation of the First Amendment. See Samuelson, *supra* note 122, at 320–22 (summarizing the debate and scholarship). The Supreme Court has taken the view that copyright law serves as an “engine of free expression” by providing incentives for the creation of works. Undue restrictions of speech in copyright law are thought to be ameliorated by First Amendment “safety valves” in the fair use and idea/expression doctrines. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558–60 (1985). But, even with these safety valves, First Amendment concerns may still arise in copyright law if Congress alters the traditional contours of copyright protection. See *Eldred v. Ashcroft*, 123 S. Ct. 769, 789–90 (2003).

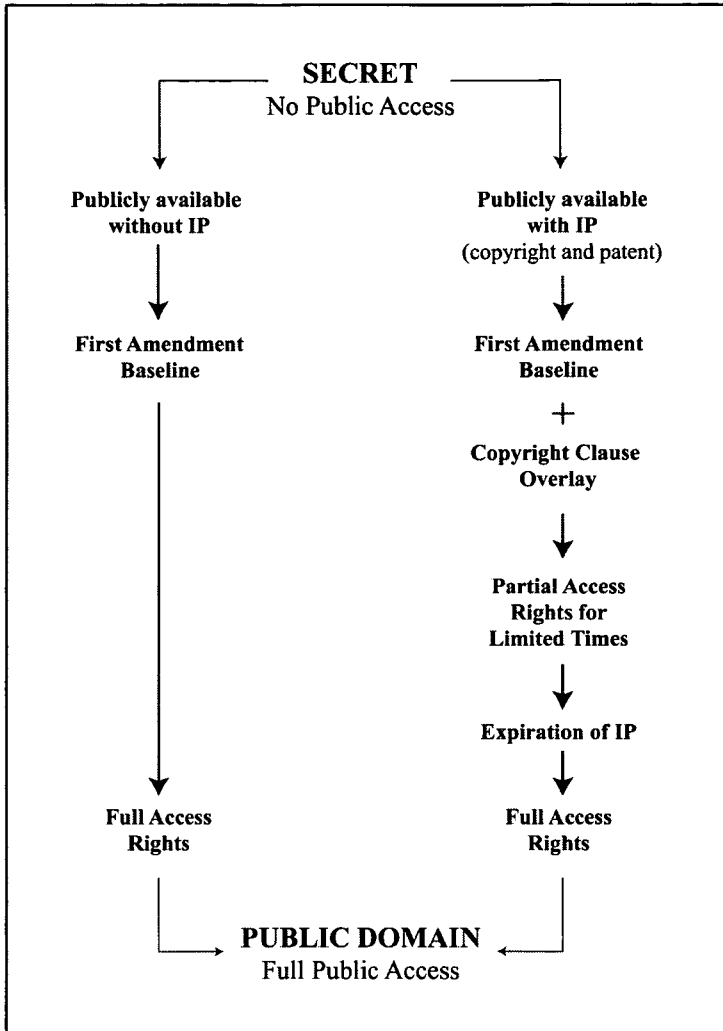
300. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (11th Cir. 2001).

301. See *Bellotti*, 435 U.S. at 783 (First Amendment protects access for “society’s edification.”); see also Samuelson, *supra* note 122, at 326 (arguing that “copyright clause . . . embodies First Amendment and anti-monopoly principles”).

302. The public domain helps to ensure the kind of democratic governance envisioned by Madison, who warned: “A popular Government, without popular information, or the means of acquiring it is but a Prologue to a Farce or a Tragedy; or perhaps both. . . . A people who mean to be their own Governors must arm themselves with the power which knowledge gives.” 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910) (Letter to W.T. Barry dated August 4, 1822).

303. See Benkler, *Free as the Air*, *supra* note 35, at 355; Boyle, *Foreword*, *supra* note 26, at 5.

DIAGRAM A
FLOW OF INFORMATION FROM SECRET TO PUBLIC DOMAIN



On the left-hand side of the diagram is the baseline understanding of the public domain governed by the First Amendment. Starting at the top of the diagram is the polar opposite of the public domain: the domain of secrecy, where the public has no right of access. This realm includes materials held in secret not only by the government, but also by private individuals (such as an author with an unpublished manuscript or an

inventor with an invention still in development). However, once the material becomes publicly available without IP protection, the baseline First Amendment approach accords full rights of access to the public to receive, copy, and further disseminate the material, which is deemed to have entered the public domain. Of course, the baseline approach may be departed from when the state can satisfy the relevant standard of First Amendment scrutiny for the regulation of speech.³⁰⁴ But, assuming the baseline approach applies, the First Amendment protects the ability of the public to freely access materials in the public domain. Importantly, the flow of information from top to bottom, from secret to the public domain, is unidirectional.³⁰⁵ This one-way flow helps to ensure that information and know-how that are already available to the public remain “free as the air to common use.”³⁰⁶

On the right-hand side of the diagram, the entry of material subject to IP protection into the public domain is slightly different. The First Amendment baseline has an important Copyright Clause overlay. The public availability of a writing or invention protected by IP does not activate the immediate entry of the material into the public domain.³⁰⁷ Instead, the Copyright Clause adds another layer to the flow of material from secret to the public domain. In order to give authors and inventors

304. For example, the government can proscribe publicly available child pornography, which is unprotected speech, consistent with the First Amendment. See *New York v. Ferber*, 458 U.S. 747 (1982). Under the First Amendment, the public domain has no legitimate claim to unprotected categories of speech.

305. As Justice Brandeis wrote, it is “[t]he general rule of law that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting); see Benkler, *Free as the Air*, *supra* note 35, at 355. Or, as Jefferson wrote, “ideas should freely spread from one another over the globe, for the moral and mutual instruction of man, . . . like the air in which we breathe, . . . incapable of confinement or exclusive appropriation.” Letter to Isaac McPherson, quoted in *Graham v. John Deere Co.*, 383 U.S. 1, 8 (1966).

306. Benkler, *Free as the Air*, *supra* note 35, at 355. The analogy to the air conveys the importance of the public domain to sustain democratic living: just as air is essential for existence, so too is the public domain. The former sustains our physical needs; the latter, our mental and intellectual needs. People could not breathe without air, nor think freely without information that is available to all. The analogy also illuminates the relationship between the public domain and the free flow of information. Information in the public domain is meant to spread like the atmosphere, to flow freely for all to enjoy. Finally, the analogy suggests the strength that courts attributed to the constitutional restraint against government incursions of the public domain. For government to deplete the public domain or prevent the public’s access to it would be akin to the government attempting to take away a person’s ability to breathe.

307. As explained above, the public availability of a trade secret would inject it into the public domain, so here the flow into the public domain coincides with the First Amendment baseline approach. Trademarks are somewhat different from the other forms of IP; entry of a trademark into the public domain hinges on whether the mark has become a generic term. Thus, one might describe this flow as a First Amendment baseline approach plus the additional factor of genericness (public availability of mark plus generic).

an incentive to create and disseminate their works and inventions to the public, the Copyright Clause authorizes the grant of exclusive rights to their creators for a limited time. This limited time is like limbo, but with an eventual and definite end. The limited grant of exclusive rights serves as an inducement or incentive for people “to create and disseminate ideas.”³⁰⁸ While the copyrights and patents are in effect, the public has *partial* access to the works or inventions. The partial access allows the public to have (1) unrestricted access to the unprotected elements in any work or invention it lawfully purchases, such as the facts or ideas in a copyrighted work, but only (2) restricted access to the protected elements in the work or invention, such as the expression in a copyrighted work.³⁰⁹ Once the copyright or patent expires, the underlying work or invention falls into the public domain, and the public gains *full*, unrestricted access rights to the entire work or invention.³¹⁰

One might question whether there is any real difference between (1) the public’s *full access* to material in the public domain and (2) the public’s *partial access* to material subject to IP. After all, the public has access to many copyrighted works through the library or bookstore. Although the public cannot make copies of copyrighted works or make other derivative works based on them without permission of the copyright holder, it can freely use the ideas and any facts contained therein. Polk Wagner suggests that materials subject to copyright or patents may provide the public with much “open information.”³¹¹ For example, some of the underlying material contained in a work or invention may be outside the scope of IP: the ideas in a book or general scientific principles utilized in a patented invention. In other cases, copyrighted or patented materials may *stimulate* greater discussion or research in an area: “Eminem’s music stimulates public discussion of spousal abuse,” Wagner suggests.³¹² Under a theory of incomplete capture, an IP “owner cannot possibly appropriate all of the information (and thus social value) gener-

308. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

309. The public has partial access because ultimately the IP rights holder may restrict copying of the material completely and limit other public uses of the material in a number of ways. See, e.g., Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 986 (1970) (describing how copyrights enable the restriction of public access to expression).

310. This is not to suggest that the First Amendment does not operate whenever Congress exercises its Copyright Clause power. Although the Court has recognized that fair use and the idea/expression dichotomy normally obviate First Amendment scrutiny of copyright law, such a “definitional balance” does not apply when Congress alters the traditional contours of copyright protection. See Eldred v. Ashcroft, 123 S. Ct. 769, 789–90 (2003); see also Pamela Samuelson, *The Constitutional Law of Intellectual Property After Eldred v. Ashcroft*, 50 J. COPYRIGHT & SOC’Y (forthcoming 2003).

311. See Wagner, *supra* note 32, at 1000.

312. *Id.* at 1007.

ated by her creation."³¹³ Thus, in Wagner's view, increased IP protection may grow the public domain by stimulating the creation of more works that are protected by IP, which in turn yields more "open" information.³¹⁴

Wagner's theory seems to assume, however, that "open" information that stems from IP protected material provides the same or equivalent benefit to society as if the material itself were in the public domain.³¹⁵ Accordingly, in Wagner's calculus, any positive increase of "open" information is accorded the same value as an increase to the public domain. I don't believe that's the case, however.

Even Wagner concedes that "open" information itself may be subject to IP rights.³¹⁶ Discussion generated by Eminem's music can itself be copyrighted. Such copyrighted material is clearly not in the public domain—not unless we simply redefine the term to drain it of its original meaning. We then could include every single patented invention and every single copyrighted work as being in the public domain. But that result would make the term meaningless.

However, some "open" information may itself be free of any IP protection—this is where Wagner's theory has its greatest promise. Such "open" information arguably adds to the public domain, even though the underlying material is still copyrighted or patented. But the key issue that Wagner does not address is whether this kind of "open" information is fungible with the underlying work that still remains protected by IP. If it were fungible, then Wagner's theory might support the grant of *perpetual* copyrights and patents (putting aside constitutional questions) because whatever might be lost by keeping forever the underlying work from the public domain could be compensated by the growth of "open" information that the copyrighted or patented work generated.

Thus, in order to assess properly whether the public domain has "grown" as Wagner argues, we need to compare the *net* effect on the public domain of (1) increasing "open" information in the sense that Wagner imagines by increasing IP rights, versus (2) not increasing IP rights but allowing the actual work or invention itself (as opposed to merely the "open" discussion it generates) to fall into the public domain after a limited time. If the net growth of the public domain in (1) is *less than* the growth in (2), either qualitatively or quantitatively, then serious problems arise with an IP system that depends on "open" information as

313. *Id.* at 1002.

314. *Id.*

315. *Id.* at 998 ("[T]he control-critics emphasize the existence of the 'public domain' or 'open' information—(information that is not subject to proprietary rights, offering anyone access, anytime, for low or no cost).").

316. *Id.* at 1005 n.34.

a primary means of growth of the public domain. Although more empirical study is needed, let me suggest why I believe there is really no comparison. A key problem with the “open” information that Wagner imagines is that it always comes with conditions that must occur before the IP protected work can even generate “open” information. This makes the “growth” of the public domain under Wagner’s theory always contingent.

The first condition of Wagner’s “open” information is that the IP rights holder agrees to sell its work. Of course, there is an economic incentive to do so in the typical case, but sometimes people have other purposes (such as, in the patent context, to preemptively block others from making a technology). And sometimes incentives may spur the IP rights holder to limit greatly the distribution of the work. For example, the copyright holders to sheet music for orchestral works typically rent copies of their works for a single performance, usually at high prices, and then demand the copies back.

The second condition is payment to the rights holder for the public to access the underlying work that contains or stimulates the “open” information. To take one of Wagner’s examples, people are paying to buy Eminem’s music: it’s not coming for free (even if over the radio³¹⁷). Some of the discussion that Eminem’s music generates may well be in the form of copyrighted articles, which, too, are subject to all these same conditions. The cost of copyrighted works limits the total number of works that most individuals can afford to purchase. A hundred books in the public domain could be obtained for the mere cost of printing them from the Internet, whereas a hundred books still under copyright might cost several thousand dollars.

The third condition concerns the public’s ability to actually find “open” information contained in an IP protected work. People have to be able to *identify* the permissible scope of “open” information if they are to use it. But the problem is that there is no easy way to do so, except for maybe in identifying facts described in copyrighted material. Wagner, for example, discusses how “the fundamental breakthroughs inherent in the invention of nylon opened up the possibility of further developments in synthetic polymers.”³¹⁸ But how could the subsequent inventors of synthetic polymers be 100% certain *ex ante* that their inventions would not infringe the patent for nylon? A typical patent has at least one claim that is worded quite broadly. Given this practice, it often is not clear what

317. Radio stations pay for broadcasts of musical works, typically, through a blanket license.

318. Wagner, *supra* note 32, at 1006.

part of a patent is “open” information that can be used without the patentee’s consent.

The same problem exists for copyright. Two of Wagner’s three examples involve cases in which the copyright holder actually sued someone for infringement based on using what Wagner would describe as “open” information.³¹⁹ It is cold comfort to the public if, in order to use “open” information, it has to be willing to stand and defend against a lawsuit to prove the information is “open.” But that is exactly what may happen because the standards for determining what is infringement, a “fair use,” or an unprotected “idea” are notoriously fact specific.³²⁰

Contrast this now with the public domain: there are no restrictions whatsoever. The public’s enjoyment of things in the public domain does not depend on (1) the IP rights holder’s consent or distribution, (2) payment to the IP owner, or (3) potential exposure to an infringement suit. Enjoyment of the public domain is unconditional and much more easily identifiable, since the entire work itself is in the public domain. The only contingency is the initial grant of IP rights for limited times. Once that time expires, entry of the material into the public domain is guaranteed and the public then has a right of free access to the material, end of story.

Even more fundamentally, “open” information fails to capture the full level of public uses as a work in the public domain. Adding “open” information to the public domain is an inadequate substitute for adding entire works and inventions into the public domain after a limited term of IP. It would make no difference to musicians that they can talk “openly” about Shostakovich’s works. Their learning is in playing the music, and for that they need the sheet music. But because Shostakovich’s works were removed from the public domain and granted “restored” copyrights, many orchestras have had to forgo learning or playing these and other works altogether because the now copyrighted sheet music is simply too expensive to rent.³²¹ And even for things for which “open” discussion serves a role, open discussion may not be an adequate substitute for the underlying material itself because people often need to go straight to the source. For an informed discussion of Eminem’s music, it would be helpful to have copies of the song or the lyrics to analyze; free copying of either, however, is not permitted by copyright. And just imagine if the Pentagon Papers, judicial opinions, and other government works were copyrighted and *not* in the public do-

319. *Id.* nn.43–44 (citing *Baker v. Selden*, 101 U.S. 99 (1879) and *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001)).

320. See Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1325–26 nn.223–25 (2002).

321. Complaint at ¶¶ 54–55, *Golan v. Ashcroft*, No. 01-B-1854 (D. Colo. filed Sept. 19, 2001).

main.³²² Any “discussion” of these government works would depend on satisfaction of the conditions above. In the Pentagon Papers case, the government could then have potentially obtained an injunction against *The New York Times* because copyright law gives the copyright holder that power to control the distribution of a copyrighted work.

While Wagner stresses the *incomplete* nature of IP control, there is simply no getting around the basic fact that IP rights enable *control*. Wagner’s encapsulating maxim that information “wants to be free” obscures the dynamics of information flow in a society.³²³ Information is neutral and inanimate; it wants nothing. How free or open information is in a particular society ultimately depends on how the government and laws regulate or control its flow. Intellectual property laws enable the restriction of public’s use and access to information and know-how by giving exclusive rights over the material. Even if this is not perfect control over the material, it is control nonetheless. “Open” information does not come close to capturing the full benefit of material in the public domain, which is free of all government or private control.

b. *Common Origin 2: Protecting the Free Flow of Information and Sources of Learning*

Thus far, I have described the common origin of only two sets of cases: (1) copyright and patent cases interpreting the Copyright Clause, and (2) the First Amendment cases dealing with government secrecy. I limited my analysis to these cases because they most directly involve interpretation of the Constitution. Yet it is not difficult to see how the same constitutional value of protecting the flow of information, ideas, and materials in our society may animate the other uses of the public domain, even though they may more directly rest on statutory interpretation, common law doctrine, or regulations. For example, in interpreting the espionage statute in *United States v. Heine*, Learned Hand recognized a public domain limitation to espionage law in order to protect the spread of information that was lawfully accessible to anyone.³²⁴ Hand feared the government’s attempt to convict people for simply disseminating information that was already available to the public, opining that such a result would constitute “so drastic a repression of free exchange of information.”³²⁵

322. Cf. *Veeck v. S. Bldg. Code Congress Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc) (holding that municipal codes are in the public domain and not copyrightable, even though based on uniform code drafted by private entity).

323. Wagner, *supra* note 32, at 999 n.14, 1003.

324. 151 F.2d 813, 815–16 (2d Cir. 1945).

325. *Id.* at 815.

The public domain operates in the same way to limit trade secrets. Perhaps nowhere is the connection between IP and government secrecy more clear. Trade secret law is a form of espionage law for businesses, as evidenced by the federal Economic Espionage Act.³²⁶ Like information relating to the national defense, a trade secret must be secret;³²⁷ once the secret becomes public through lawful means, it loses its protection.³²⁸ Just as the public domain forbids the government from prohibiting the use of public information under state secrets, so too the public domain prevents private entities that attempt to do the same under trade secrets. In either case, the public domain sets a clear line between what is proper subject matter of exclusive rights and what is not.

Similar stories can be told for the remaining uses of the public domain. In trademark law, no one can remove a generic word from the public domain by asserting a trademark to it.³²⁹ The public has rights to continue to use the word freely in discourse as it has done in the past. Nor can the government restrict the flow of information that is already enjoyed by the public, through classification, defense regulations, or denial of FOIA requests. A free and open society is premised on the flow of information and materials that are in the public domain. All of the uses of the public domain in IP and government secrecy cases originate from this common value.

326. 18 U.S.C. § 1832 (2000).

327. *Kewanee Oil Corp. v. Bicron Corp.*, 416 U.S. 470, 475 (1974).

328. *Id.* at 476.

329. See *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 808 (2d Cir. 1999) (holding that Harley Davidson could not trademark "hog" because the term had become generic, so Harley could not remove "this use of the word from the public domain"); *First Bank v. First Bank Sys., Inc.*, 84 F.3d 1040, 1045 (8th Cir. 1996) ("Generic terms are not entitled to protection under trademark law because such words are in the public domain and available for all to use.") (citation omitted); *Loglan Institute, Inc. v. Logical Language Group, Inc.*, 962 F.2d 1038, 1042 (Fed. Cir. 1992) ("[T]he term Loglan has never been a trademark, but rather entered the public domain as a generic name from the time of its inception.").

c. *Common Adaptation to the Government's Power to Control Public Access*

An alternative way to explain the origin of the public domain is by convergent evolution. This theory allows for the assumption that some or all of the various uses of the public domain cannot be traced back to a common norm or principle of law. Instead of common origin from the same ancestor, convergent evolution involves common developments or adaptations among different organisms in response to similar environmental or selective pressures.

The selective pressure in IP and government secrecy cases is nearly identical: government control (secrecy) or government-sponsored control (IP) over the public's access to sources of learning.³³⁰ Both secrecy and IP operate to restrict the free flow of information, ideas, and materials. To effectuate either, an exclusive right over the underlying material must be recognized. Although secrecy and IP are both considered essential, the danger in both is that the government's ability to control the public's access to materials may be abused. English history under the Crown revealed to the Framers that a government that can exercise complete control over the public's access to materials *often does*, whether to grant exclusive rights to favorites of the Crown for things long enjoyed by the public, to censor speech deemed offensive or heretical,³³¹ or to carry out judicial proceedings and mete out punishment in secret.³³²

A more modern example of abuse is provided by the former Soviet Union. Since its inception in 1917, the Soviet government instituted an elaborate regime of censorship and state control over the flow of, and access to, information and government proceedings. Within days of assuming power, Lenin issued a decree to suppress all non-Bolshevik publications.³³³ A few years later, the Glavlit was established to oversee the public censoring of works.³³⁴ During Stalin's reign, the censorship became more severe and more secret. The Stalinist period marked the anti-public domain at its greatest power. Under Stalin's regime, vast amounts of information never saw the light of day. Stalin closed down many learned journals, and forbade the publication of "most economic, social, and demographic statistics."³³⁵ Basic reports about the government itself,

330. Of course, IP involves government grants of property to *private* entities. Unlike the government secrecy context, the government's restriction of the public's access to works protected by IP involves a decision by a private actor to obtain and enforce exclusive rights.

331. See PATTERSON, *supra* note 116, at 20-40.

332. See *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (discussing the Star Chamber).

333. PARTY, CITIZEN, AND STATE IN THE SOVIET UNION xviii (Mervyn Matthews ed., 1989).

334. *Id.* at xxv.

335. *Id.*

such as activities of the ruling party and state bodies, were even greatly restricted.³³⁶ Throughout its reign, the Soviet government proscribed the dissemination of views that were considered to be counter to or critical of the Soviet ideals or government.³³⁷

Neither 17th century England nor the former Soviet Union recognized a concept of the public domain. Their governments exercised an unfettered power to control and deny the people's access to materials. That power was so complete that the respective governments could even forbid the dissemination of material that the public had long enjoyed. Nothing was off-limits from government control.

The dangers of government control over the public's access to material are not absent in a democracy. Because we recognize a legitimate use for both government secrecy (national security) and exclusive rights under the Copyright Clause (spurring creation), both are a necessary part of our political and social ordering. And, for the most part, we entrust the government with the power to decide what is the right level of secrecy or IP protection. But, as courts have recognized in both contexts, there must be a limit to the government's power to control the public's access to materials. Without a public domain to curtail IP, there is nothing to distinguish our understanding of intellectual property from the British Crown's unfettered understanding. Without a public domain to curtail government secrecy, there is nothing to distinguish a putative "open" society from a closed society such as under the Stalinist regime. Without a public domain, the public's access to materials is always at the discretion of the government and always susceptible to restriction.

Thus, the recognition of the public domain in IP and government secrecy cases can be explained as common responses to the same selective pressure. Different courts operating within the same "environment" of our democratic society responded similarly when confronting the same selective pressure, i.e., the possibility that the government could restrict or forbid the public's access to material without any limit. One response to this selective pressure could have been simply to recognize no limit at all. But that response did not "fit" with our constitutional form of government.

I have tried to depict a comparison between a society with a public domain (Diagram C) and a society without (Diagram B). IP protection and secrecy are both forms of government control over the public's access to sources of learning. If nothing is beyond the government's control, then, as shown in Diagram B, there is no buffer between the

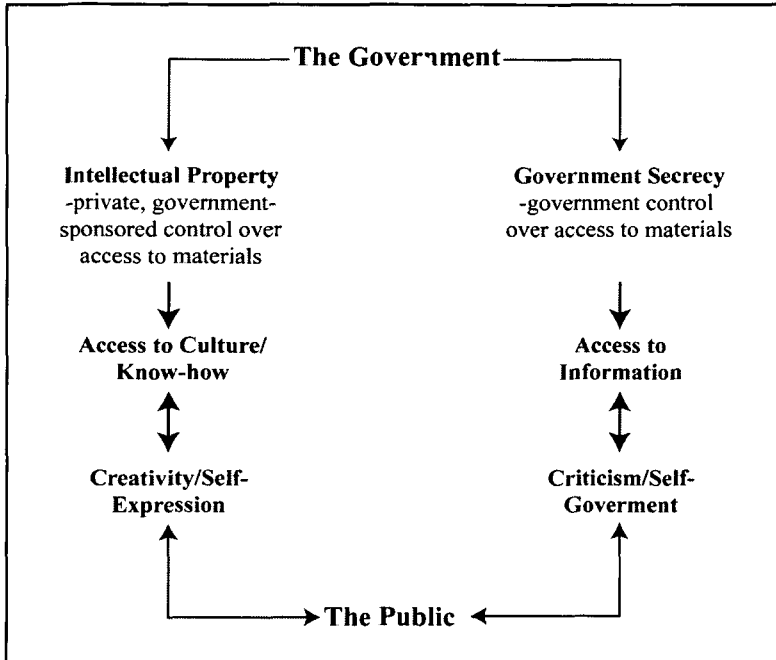
336. *Id.*

337. *See id.* at 89 (describing Article 70 which prohibits spreading ideas of an anti-Soviet nature).

government and the public's access to materials. The government can control (as depicted by the arrows) the public's access to culture, know-how, and information, as well as the fruits of such access: creativity, self-expression, criticism, and self-government. That was the unfortunate situation in 17th century England and the former Soviet Union.

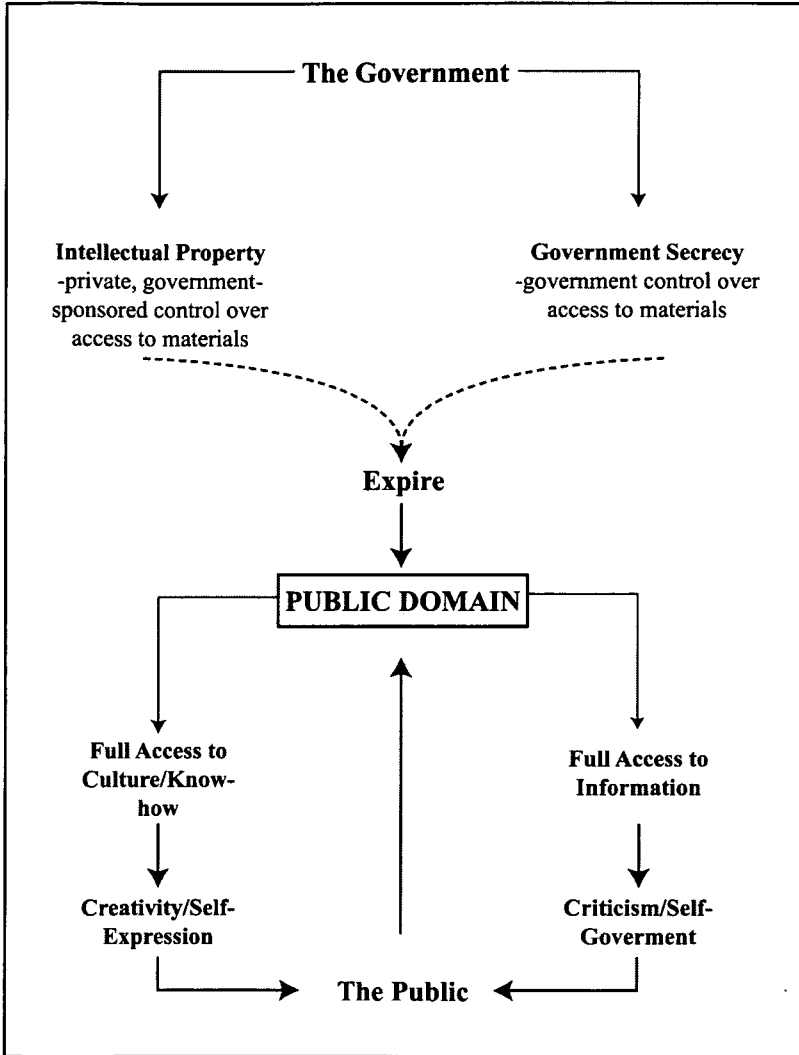
DIAGRAM B

SOCIETY WITH NO PUBLIC DOMAIN



By contrast, as shown in Diagram C, a society that recognizes a public domain has a restraint against the government's power to control the public's access to sources of learning. The public domain establishes a buffer between (a) what the government may restrict in terms of public access through IP or secrecy, and (b) what the government may not restrict at all. Whatever is in the public domain belongs to the public. The government has no power here; it must accede its power to control access once *expiry* of IP rights or secrecy occurs. With the public domain as a buffer, the public's access to culture, know-how, and information is not subject to the government control.

DIAGRAM C
SOCIETY WITH A PUBLIC DOMAIN



The public domain protects the flow of information, ideas, and materials, in order to serve higher ends. Within the intellectual property strand of cases, depicted on the left-hand side of the diagram, the public domain has (1) the immediate goal of ensuring access to culture and know-how, and (2) the ultimate goal of fostering self-expression and the

further creation of works through the ability to build on what has come before.

While much of the literature on the public domain focuses on its role in spurring creativity or innovation,³³⁸ an even more elemental role of the public domain is simply to ensure universal access to our common culture and knowledge. Thus, while most people in our country are probably not authors or inventors, everyone still enjoys this guaranteed right of access to material in the public domain. If this access is properly utilized, the most immediate benefit should be the promotion of learning in society. The realization of this goal should be achievement enough to justify the protection of the public domain.

But part of the beauty of the design of the public domain is that it aims at self-generation. The public's right of access helps to ensure that we all have a source of common knowledge and materials from which to create, innovate, and build upon. Disney has made films of numerous public domain stories. Shakespeare's works have inspired numerous productions as well as new creations. On a more practical level, the expiration of a patent for any drug, such as Prozac, allows other companies to make generic versions and to develop new, improved drugs based on the material now in the public domain.

An analogous story can be told for the government secrecy cases. As the right-hand side of Diagram C shows, the public domain has (1) the immediate goal of ensuring access to information, and (2) the ultimate goal of fostering self-governance and informed critique of government. Most people probably realize the immediate goal of accessing information in the public domain, but not everyone uses that information to achieve the ultimate goal of self-governance or critique of government. Just as in the case of the IP strand, however, the public's utilization of access to information should foster greater learning among society, an achievement that would alone justify the protection of the public domain.

As in the case of the IP strand, the right to access information in the government secrecy cases yields an additional benefit, that is, to foster informed critique of government and the aspiration of self-governance. As Neil Netanel has explained, democracy depends on the maintenance of a civil society, a "sphere of voluntary, nongovernmental association in which individuals determine their shared purposes and norms."³³⁹ In this civil society, "citizens develop the independent spirit, self-direction, social responsibility, discursive skill, political awareness, and mutual recog-

338. See, e.g., LESSIG, *supra* note 26, at 108.

339. Neil Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 342 (1996).

dition.”³⁴⁰ A civil society is not possible, however, without the education of its citizens, who must be able to evaluate and participate in their government.³⁴¹ Such participation requires “the widespread distribution of knowledge.”³⁴² “For citizens to articulate their interests, participate in civic association, and engage in reasoned deliberation on public issues, they must ‘have access to the rich store of the accumulated wealth of mankind in knowledge, ideas and purposes.’”³⁴³

The public domain thus operates in the IP strand of cases in a manner that is parallel to its operation in the government secrecy strand of cases. As depicted in Diagram C, on one strand, the public domain protects (i) access to culture and know-how, in part to promote (ii) creation and self-expression. On the other strand, the public domain protects (i) access to information, in part to promote (ii) criticism and self-governance. At bottom, both strands respond to the selective pressures of government control by establishing a restraint on the government’s power to deny the public’s access to culture, know-how, and information.

2. *Parallel Structures and Functions of the Public Domain*

The various uses of the public domain in IP and the government secrecy cases also share a parallel structure and function. They accord equal rights of access to members of the public to disperse the power to control information and ideas equally among the people.

a. *Parallel Structures: Rights of Access to Public Property*

When the public domain is recognized in IP or government secrecy cases, its basic structure is the accordance of rights of access and ownership in the public to use and enjoy the underlying material. The basic right of access to materials in the public domain is not predicated on any condition; it is a right that asks for nothing in return. To my knowledge, there is no other universal right to access and use tangible goods and material (in some cases cost-free) made by others that is recognized in the law. Unlike most things in our society, this is one domain in which we all are treated equally and share equally in a common enterprise and culture. The public domain ensures that everyone, not just the privileged or rich, can have access to our common culture and to information essential

340. *Id.* at 343.

341. *Id.* at 343-44.

342. *Id.* at 348.

343. *Id.* at 349. *See also* Benkler, *Looking Glass*, *supra* note 35, at 196 (“Article I and the First Amendment claim that both democracy and autonomy are better served by an information production and exchange system built around a robust public domain, rather than one built around extensive regulation of the use of information and cultural materials through the creation and enforcement of exclusive private rights.”).

for self-government. Few things in our society are as democratically dispersed.

b. *Parallel Functions: Restraining Government Control over the Public's Access to Information and Sources of Learning*

The uses of the public domain in the IP and government secrecy cases have a parallel function in serving as a structural restraint against government control over the public's access to materials. By dispersing property rights among all people, the public domain acts as a restraint against the kind of governmental abuses of the British Crown in censorship and concentrations of power in the production and dissemination of information and technology.³⁴⁴

The public domain also serves as a check on government abuse by limiting the extent to which the government can conceal its own conduct and insulate itself from criticism. Without a public domain, the government could operate shielded from public scrutiny, as Stalin did in the most repressive days of the Soviet Union. The public domain, however, limits the ability of government to shield itself from public scrutiny by guaranteeing the public access to "public things."

This important function of the public domain, as a structural restraint against government, is an example of the ingenious mechanism that the Framers devised in the Constitution to check governmental abuses that can occur with the concentration of power, such as with a federal government dominating over the states, a national church joined with the state, or one branch of the federal government dominating over the others.³⁴⁵ In drafting the Constitution, the Framers sought "to divide power, to demarcate its limits, and to establish mechanisms that would guard against the aggrandizement of power."³⁴⁶ The public domain does so in both IP and government secrecy cases by dispersing power to control information ultimately and equally among the people.

D. THE DIFFERENCE OF THE PUBLIC'S DOMAIN

A number of legal scholars have attempted to define more precisely the concept of public domain.³⁴⁷ In my view, the proper understanding of the public domain starts with the question of ownership—who has the power over the contents in the public domain. The "domain of things public" was originally recognized to indicate that the people owned certain "public things" that are essential for the knowledge of the citi-

344. Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS INTELL. PROP. FROM BENJAMIN N. CARDOZO SCH. L., YESHIVA U., at 9 (1999).

345. *Id.*

346. *Id.*

347. See Boyle, *Enclosure*, *supra* note 23, at 60–64 (disclosing various definitions).

zenry—the common culture, information, and know-how of society. Although notions of public ownership are more pervasive in the context of the public domain in IP law, they do appear in the First Amendment context.³⁴⁸ The “public things” might relate to works that were once protected by intellectual property, or to information concerning the administration of government. In either case, these “public things” are to be shared and controlled by the people as a matter of right.

When we speak about public rights, public property, or a domain of things belonging to the public, we prioritize the public's role in democratic governance. Although “public” has several meanings,³⁴⁹ a central meaning is the “state of belonging to the community.”³⁵⁰ In the public domain, it is the people, not the government or any single private entity, who are the ultimate keepers of the common culture and knowledge in our democracy. The public domain is, in other words, the public's domain, a zone that is off-limits to government interference.³⁵¹

Although I do not attempt to provide a general test for determining what constitutes a “public thing,” a basic defining feature of a “public thing” is its inherent value in providing some public benefit that is deemed essential for society. The whole point of the public domain is to benefit the public. In the IP context the public domain benefits the public in a number of ways. People have greater access to information or material when it enters the public domain, since the material can be copied freely and disseminated at lower cost. People can also freely use and build upon public domain material to create new works and innovations. In the secrecy context, the public domain benefits the public by providing information about the administration of government that is essential for a democracy. The overriding goal of the public domain is the crafting of a public space in our democratic society that guarantees the public full ac-

348. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (holding that a court proceeding is “public property”); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (“When government begins closing doors, it selectively controls information rightfully belonging to the people.”).

349. See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1229 n.1 (2003).

350. See THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789) (defining “publicness” as the “[s]tate of belonging to the community; openness, state of being generally known or public”); see also Mark H. Moore, Symposium, *Public Values in an Era of Privatization: Introduction*, 116 HARV. L. REV. 1212, 1213 (2003) (“public” indicates some notion of a collective enterprise comprised from or for the people at large).

351. Recognizing zones that are free from government interference (“government-free zones”) is essential to democratic governance. The right to privacy creates another important zone of non-interference, but discussion of its interplay with the public domain must await another day.

cess to and use of different sources of learning, unencumbered by any government control or restrictions.³⁵²

Considering the doctrinal parallelism between the public domain in IP and the public domain in government secrecy cases provides a much deeper understanding of the concept. Although there may be differences among the various uses, the similarities should not be overlooked. In evolutionary terms, the public domain in IP occupies the same genus as the public domain in government secrecy cases, but the two doctrines may in fact be different species. Understanding the parallel origin, structure, and function of these species of the public domain gives us greater insight for evaluating measures that affect the public domain more generally. Just as researchers study disease or changes to the environment by studying how they affect closely related organisms, so too policy makers should examine possible threats to the public domain by studying how they affect the public domain in different areas of law.

IV. DOCTRINAL EVOLUTION: CATASTROPHES, DIFFERENT RULES, AND THE EXTINCTION OF THE PUBLIC DOMAIN

For those who criticize legal scholarship for being too removed from practice, or, in Judge Harry Edwards's far less charitable words, for being just too "useless,"³⁵³ my previous discussion may seem like unwelcome reading. But I can assure you that my discussion has a purpose beyond academic exercise, and that the "theory" in the previous sections I will relate here to practice. Indeed, much of my understanding of the public domain has been greatly informed by my experience litigating cases in which that very concept was at issue. In this last Part, I would like to write about the growing number of ways in which the public domain lies in jeopardy. The predicament we now face is something of a paradox: just when technology has offered a revolutionary way to maximize the public's enjoyment of the public domain, the concept of the public domain in U.S. law may be most vulnerable to extinction. What is at stake today is whether the public domain truly belongs to the public, or, instead, is something ultimately under the control of the government.

352. This is not to say that IP and government secrecy do not provide public benefits; obviously, they do. But these benefits (in providing incentives for creation of works or protecting national security) are worthwhile in our democracy only with the greater benefits provided by the public's free access to the public domain.

353. Harry T. Edwards, *Reflections (On Law Review, Legal Education, Law Practice, and My Alma Mater)*, 100 MICH. L. REV. 1999, 2001 (2002).

A. THE INTERNET AND THE PROMISE OF THE PUBLIC DOMAIN

First, let me begin with the positive side, and the ways in which the promise of the public domain is becoming more realized. For most of its history, the public domain has been underutilized and under-appreciated. Although the public's right of free access to the public domain is one of the most democratic-enhancing rights that we all share, it has been easily taken for granted. When people talk about enjoying a right to public school education³⁵⁴ or debate the value of universal access to health care,³⁵⁵ it is easy to understand the value of those rights. People can visualize the school or health care provider from which they or their children may receive benefits: those benefits are concrete, immediate, and real. But if you wanted to enjoy the public domain, where would you go? Because people cannot find the public domain like a school or hospital, the benefits the public domain offered may have seemed slight, if not ethereal.

In the past few years, all of this has changed because of one single force: the growth of the Internet.³⁵⁶ The Internet has revolutionized the public domain by giving it, in essence, a home. Now if you want to enjoy the public domain, you can go on the Internet. Therein can be found a growing number of sites devoted to the sharing of thousands of works in the public domain. For example, Eric Eldred runs his own Web site to give the public free access to works that are in the public domain, such as the works of Nathaniel Hawthorne and Henry James.³⁵⁷ His project started out as a small way to enhance his children's education, but turned into something great that can be enjoyed by all. Teaming up with his counsel and Stanford Law School professor Lawrence Lessig and others, Eldred has started an even more ambitious project, the Creative Commons, which allows authors to grant permissible uses of their works through licenses (effectuated by software) or to donate entirely their works for free use in the public domain.³⁵⁸

The Internet has spawned numerous other sites devoted to the sharing of public domain works. Project Gutenberg is a notable example.³⁵⁹ Started in 1971 by Michael Hart before the advent of the Internet, Project Gutenberg is run by hundreds of volunteers who share the belief that

354. See Suzanne McAlpine, *Kadrmas v. Dickinson Public Schools: Will Education Ever Be Deemed a Fundamental Right?*, 10 U. BRIDGEPORT L. REV. 629 (1990).

355. See Note, *Universal Access to Health Care*, 108 HARV. L. REV. 1323 (1995).

356. See generally LESSIG, *supra* note 26, at 19–25; Samuelson, *supra* note 250, at 166–69.

357. See Eldritch Press, <http://eldritchpress.org> (“Here are free, accessible books. Read them and go in peace.”) (last visited Oct. 8, 2003).

358. See Creative Commons, <http://creativecommons.org> (last visited Oct. 8, 2003).

359. See Project Gutenberg, <http://promo.net/pg> (last visited Oct. 8, 2003).

it would be a “really good idea if lots of famous and important texts were freely available to everyone in the world.”³⁶⁰ As of 2002, Project Gutenberg had available 6,267 e-books of public domain works for free downloading,³⁶¹ including the works of Shakespeare, Dante, Edgar Allan Poe, Arthur Conan Doyle, Lewis Carroll, and many, many others.³⁶² Incredible as Project Gutenberg is, it is now only one of several Web sites devoted to providing an online library for public domain books.³⁶³ Brewster Kahle and Rick Prelinger have undertaken a similar operation with public domain films in their online project, the Internet Archive.³⁶⁴

Many other sites provide public information that bears directly on the administration of government. The government itself has added considerable material to the public domain, including judicial opinions and court rules,³⁶⁵ different agency rulings and regulations,³⁶⁶ and laws enacted by Congress.³⁶⁷ The Delaware Municipal Court in Ohio has even established online public access to its courtroom proceedings through real-time webcasts of the proceedings.³⁶⁸

Realizing the promise of the Internet appears just to be beginning. In December 2002, Congress passed the E-Government Act, which creates a new Office of Electronic Government that will be charged with the responsibility of coordinating and making more user-friendly the balkanized ways in which different federal agencies post material online.³⁶⁹ The Act now requires each federal agency within two years of the Act’s enactment to “establish a process for determining which Government information the agency intends to make available and accessible to the public on the Internet and by other means.”³⁷⁰ The Act also requires the creation of a federal Internet portal that will integrate agency Web sites,³⁷¹ and the establishment of a “public domain directory of public

360. *Id.*

361. *Id.*

362. *Id.*

363. See The Internet Archive, <http://www.archive.org> (coordinating archiving of works by Project Gutenberg, Million Book Project, Liber Liber, Arpanet, Open Source Books, Internet Bookmobile, and Internet Children’s Digital Library) (last visited Oct. 8, 2003).

364. See *id.*

365. See The Federal Judiciary, <http://www.uscourts.gov> (last visited Oct. 8, 2003).

366. See, e.g., Environmental Protection Agency, <http://www.epa.gov> (last visited Oct. 8, 2003).

367. See, e.g., United States H.R., 108th Cong., 1st Sess., <http://www.house.gov> (last visited Oct. 8, 2003).

368. See Delaware Municipal Court, <http://www.municipalcourt.org> (last visited Oct. 8, 2003).

369. See Rebecca Fairley Raney, *In the Next Year, the Federal Government Will Move to Give the Public Easier Online Access to Data and Services*, N.Y. TIMES, Dec. 23, 2002, at C4.

370. E-Government Act, Pub. L. No. 107-347, § 207(f)(2)(A)(iii), 2002 U.S.C.A.N. (116 Stat.) 2919.

371. *Id.* § 204.

Federal Government Web sites.³⁷² Each federal court is required to provide online access to all opinions.³⁷³ The Act, which was sponsored by Senators Lieberman and Burns,³⁷⁴ holds great promise for making government more accessible to the public.

These efforts to build an online space for the public domain offer perhaps the greatest step forward for attaining the public domain's full promise: the public's free access to vast amounts of sources of learning.³⁷⁵ It is only fitting that the Internet would provide the home to the public domain because the Internet itself was created by numerous programmers and engineers who developed and shared the protocols that govern the packet-switching technology that underlies the Internet.³⁷⁶ In theory, this technology could have been proprietary and subject to IP rights. But, instead (and thankfully), the programmers who developed these protocols allowed them to be freely used by all in common with an open architecture.³⁷⁷ This decentralized, nonproprietary form of creation led to perhaps the greatest source of innovation in the past fifty years, if not longer. With the Internet, the wealth of information available to the public is, as the Supreme Court in *Reno v. ACLU* recognized, "diverse as human thought."³⁷⁸ The Internet creates a "new marketplace of ideas" that greatly promotes "freedom of expression in a democratic society,"³⁷⁹ and it does so at every moment of every day.

At the same time, the Internet poses challenges to existing paradigms of law. Because the Internet facilitates virtually perfect copying and nearly instantaneous transmission of material around the world, infringement of copyrighted works (most notably through file-sharing of music) is extremely easy for anyone with broadband Internet access.³⁸⁰ Similarly, the Internet poses a greater threat to government secrecy inso-

372. *Id.* § 207(f)(3).

373. *Id.* § 205(a)(5).

374. See Raney, *supra* note 369.

375. In a recent study, eighty-four percent of all Americans said that they expect to find on the Internet information they seek about either government agencies, electronic commerce, news, or health care. PEW INTERNET & AMERICAN LIFE PROJECT, COUNTING ON THE INTERNET: MOST EXPECT TO FIND KEY INFORMATION ONLINE, MOST FIND THE INFORMATION THEY SEEK, MANY NOW TURN TO THE INTERNET FIRST 2 (Dec. 29, 2002), <http://www.pewinternet.org>.

376. See Barry M. Leiner et al., *A Brief History of the Internet*, at <http://www.isoc.org/internet/history/brief.shtml> (last visited Oct. 8, 2003).

377. Lessig has identified three types of commons created by the Internet: (1) the commons of "code" that created the Internet, (2) the commons of knowledge that the Internet enables through exchange of information, and (3) the commons of innovation that the Internet fosters through its open architecture that allows people to develop programs that enhance the network. LESSIG, *supra* note 26, at 49.

378. 521 U.S. 844, 852 (1997).

379. *Id.* at 885.

380. See Samuelson, *supra* note 122, at 327.

far as information that is posted online is at once publicly available to millions of people on the Net. Thus, the same features of the Internet that facilitate the growth of the public domain can also be used to weaken attempts to maintain strong IP rights or government secrecy.

B. PUNCTUATED EQUILIBRIA, CATASTROPHES, AND “DIFFERENT RULES” THEORY

For all of the promise the Internet holds in realizing the public domain’s full potential, the public domain itself faces even greater challenges that threaten its very survival as a legal concept. Before evaluating the current challenges and how they threaten the public domain, we first must discuss how doctrines die.

Following the Supreme Court’s decision in *Eldred*, which upheld Congress’s twenty-year extension of all copyright terms, *The New York Times* wrote an editorial predicting “the beginning of the end of the public domain and the birth of copyright perpetuity.”³⁸¹ Quite a prediction, but the end of the public domain? How can that be? When I first read the *Times* editorial, I found its prediction off-base. Although I was one of the counsel on the losing side in *Eldred* and welcomed the *Times*’s support, I found the editorial to be eloquent, but in the end, overblown. Notwithstanding the *Times*’s hyperbole, *Eldred* itself did not involve any works in the public domain. Although the effect of the law upheld in *Eldred* is to prevent any copyrighted work in the United States from entering the public domain (due to the expiry of the term) until the year 2019,³⁸² copyrighted works will presumably enter the public domain one day. And in the meanwhile people still have free access to works that are already in the public domain.³⁸³ As John Mark Ockerbloom put it, the *Times* editorial incorrectly “makes it sound like enjoying the public domain is like a nice privilege the government decided to try granting us for a while, rather than the general right of the public.”³⁸⁴

Now, I must confess, I am much less certain about the future of the public domain.³⁸⁵ The *Eldred* decision must be viewed against the back-

381. Editorial, *The Coming of Copyright Perpetuity*, N.Y. TIMES, Jan. 16, 2003, at A28.

382. Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 415 (2002).

383. If individuals purchase them, the public has partial access to the copyrighted works that CTEA does affect.

384. John Mark Ockerbloom, Reply Post to Lawrence Lessig blog, at <http://www.lessig.org/blog/archives/000876.shtml> (Jan. 17, 2003).

385. See generally Boyle, *Enclosure*, *supra* note 23, at 71 (“The fundamental tensions in the economic analysis of information issues, the source-blindness of an original author-centered model of property rights, and the political blindness to the importance of the public domain as a whole . . . all come together to make the public domain disappear, first as a concept and then, increasingly, as a reality.”).

drop of the other laws that have negatively affected the public domain, such as, in copyright law, Congress's removal of thousands of works from the public domain by the grant of "restored" copyrights³⁸⁶ and enactment of strong protection for access-control measures placed on copyrighted works under the Digital Millennium Copyright Act.³⁸⁷ And, in the area of secrecy, the government has not only pulled material from the public domain, it has shifted more and more of its conduct from the purview of the public domain.³⁸⁸ The government has effectively asserted plenary power over the public domain—the power to decide not only what goes in the public domain and when, but even the extraordinary power to decide what goes out—the complete power to deny the public's free access to things it had long enjoyed. If courts adopt the government's view, whither the public domain?

This brings us to the question of how different laws or doctrines die. Bruce Ackerman has offered what may be the most compelling contemporary theory of change in constitutional law.³⁸⁹ Under his theory,³⁹⁰ constitutional law is characterized by periods of relative equilibrium and continuity, which in rare "constitutional moments" are disrupted, resulting in upheaval and then a critical shift in our understanding of the Constitution and a rejection of the previously prevailing view.³⁹¹ Ackerman offers his theory to address the "countermajoritarian difficulty"³⁹² created by the Supreme Court's ability to strike down laws created by Congress. Although this difficulty suggests that what the Supreme Court does is anti-democratic, Ackerman's solution lies in recognizing "We the People's" role in "higher" constitutional lawmaking. In Ackerman's view, constitutional moments involve legitimate constitutional changes *because of* the mobilization of "We the People" on behalf of the change.³⁹³ Through these constitutional moments, the People may effectively amend the Constitution through democratic-enhancing means.³⁹⁴

Whether one agrees with Ackerman's theory of constitutional law or not, his general approach for analyzing the development of law has a lot

386. See *infra* notes 417–29 and accompanying text.

387. See *infra* notes 430–43 and accompanying text.

388. See *infra* notes 444–580 and accompanying text.

389. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter *TRANSFORMATIONS*]; BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter *FOUNDATIONS*]; Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1022 (1984) [hereinafter *Discovering*].

390. Ackerman's theory has sparked considerable discussion, which is too numerous to summarize. A Westlaw search I performed reveals that some 972 articles have cited to *We the People*.

391. See Ackerman, *Discovering*, *supra* note 389, at 1022–23.

392. ACKERMAN, *FOUNDATIONS*, *supra* note 389, at 8.

393. *Id.* at 57.

394. *Id.* at 43.

to commend. Ackerman's approach is pattern recognition: "to think beyond the particular case at hand and consider the *patterns* of constitutional law that emerge over decades and generations."³⁹⁵ More specifically, Ackerman's approach closely parallels a leading theory in evolution. As Walter Dean Burnham has shown, Ackerman's theory is a form of punctuated equilibrium theory for constitutional law.³⁹⁶ Punctuated equilibrium theory was first developed by Niles Eldredge and Stephen J. Gould, who posited that the evolution of organisms is carried out through (1) long periods of relative equilibrium (2) that are "punctuated" by catastrophic events that result in mass extinction of previously "superior" organisms.³⁹⁷ Today, punctuated equilibrium has crossed over into other sciences and disciplines,³⁹⁸ including political science and the law.³⁹⁹ Ackerman's theory is one such crossover theory. Under his theory, the development of constitutional law is carried out through (1) long periods of relative equilibrium (2) punctuated by "constitutional moments" resulting in upheaval and overturning of the previous understanding of some aspect of constitutional law.⁴⁰⁰

I would like to build on and expand Ackerman's general approach. For Ackerman's concerns, his theory is appropriately limited to a specific phylum of law (constitutional) and two genres (ordinary and higher lawmaking). But evolution theory suggests that Ackerman's theory is incomplete. Just as evolution theory examines all organisms for understanding development and interrelationships, I believe we should look more broadly to examine moments of upheaval across all areas of law. Instead of focusing solely on *constitutional* moments, we should look for moments in any kind of law. We may have a "moment"—or "catastrophe" in the biologist's parlance⁴⁰¹—without a de facto amendment to the Constitution in the Ackermanian sense. From a global perspective, it

395. *Id.* at 4 (emphasis added).

396. See Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People*, 108 *YALE L.J.* 2237 (1999).

397. Niles Eldredge & Stephen J. Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in *MODELS IN PALEOBIOLOGY* 82-115 (J.M. Schopf ed. 1972); see GOULD, *supra* note 278, at 1316.

398. See GOULD, *supra* note 278, at 922.

Many scholarly sources in the humanities and social sciences, with Thomas Kuhn's theory of scientific revolutions as the most overt and influential, have combined with the many realities of late 20th century life (from the juggernaut of the Internet's spread to the surprising, almost sudden collapse of communism in the Soviet Union, largely from within) to raise the general critique of gradualism, and the comprehensive acceptability of punctuational change, to a high level of awareness, if not quite to orthodoxy.

Id.

399. See Burnham, *supra* note 396, at 2250.

400. See ACKERMAN, *FOUNDATIONS*, *supra* note 389, at 19 ("American history has been punctuated by successful exercise in *revolutionary reform*.").

401. See GOULD, *supra* note 278, at 484.

matters not whether the extinction occurred in constitutional law or elsewhere.⁴⁰² Under my theory of doctrinal parallelism, all law is relevant for analyzing the development of doctrine.

Recognizing the susceptibility of any doctrine to extinction lays bare the importance of asking not only whether a new law or doctrine is constitutional, but also whether the new law or doctrine may cause the extinction of some prior law or doctrine. For before extinction does occur, we would want to examine whether the doctrine under threat of extinction is not, in fact, the superior or best-fitted doctrine for our system of governance. A “moment” need not necessarily rise to the level of a fundamental change in constitutional law to cause grave harm to either the fabric of law or the values that animate the Constitution.

I would also like to expand the concept of “moments” by removing the positive, progressive element that Ackerman imbues in “constitutional moments,” which he believes are accompanied by “a mobilized mass of American citizens expressing their assent through extraordinary institutional forms.”⁴⁰³ While the three “constitutional moments” Ackerman identifies may well have been accompanied by such mobilization,⁴⁰⁴ a “moment” of legal upheaval may occur for any number of reasons, good or bad. What evolution theory tells us is that the events that cause the moments of upheaval are unpredictable.⁴⁰⁵ Organisms become extinct during these moments not because they were inferior or weak, but because the catastrophes altered the environment enough to impose “different rules” on what is necessary for survival.⁴⁰⁶ Under the “different rules” theory of punctuated equilibrium, organisms may well have possessed the “best” or “superior” traits for the environment during a long period of equilibrium, only to have those very same traits result in the organisms’ demise under the “different rules” precipitated by a catastrophic event.⁴⁰⁷

Just as punctuated equilibrium in evolution may result from catastrophic events, the law, too, may face “catastrophes” that result in the ex-

402. The analogy to biology would be for researchers to focus only on the possible extinction of *homo sapiens*, when many plants and animals may be facing extinction around us.

403. Ackerman, *Discovering*, *supra* note 389, at 1022.

404. See ACKERMAN, *FOUNDATIONS*, *supra* note 389, at 19 (“[T]he original Constitution codified the Revolutionary generation’s defeat of monarchy on behalf of republican self-government; the Civil War amendments codified the struggle of an entire generation to repudiate slavery on behalf of a new constitutional ideal of equality; and so forth.”); Burnham, *supra* note 396, at 2246.

405. See GOULD, *supra* note 278, at 1316.

406. *Id.*

407. *Id.* Gould contends that “different rules” theory “represents the most interesting and far-reaching modification of Darwinian expectations unleashed by catastrophism’s renewed respectability.” *Id.* at 1317.

tion of previously superior doctrines that had survived for long periods of equilibrium.⁴⁰⁸ If we expand Ackerman's theory of "moments," we must take into account moments that prove to be non-salutary and lacking in support of "We the People." These "catastrophes" are no less important than "moments" for understanding the development of law.

Ackerman's theory does provide, however, a very useful alteration of punctuated equilibrium theory as applied to the law. While evolutionary biology makes no attempt to make any normative judgments about catastrophes or the extinction of species,⁴⁰⁹ Ackerman's theory obviously does make such judgments about the law. Ackerman's entire project is based on the primacy of We the People to democratic governance and our constitutional system.⁴¹⁰ To the extent that the People do mobilize and engage in higher lawmaking and to the extent that courts validate and codify the People's lawmaking, democracy and our constitutional system are served.⁴¹¹ Our government institutions should be designed to facilitate, not frustrate, higher lawmaking by the People.⁴¹²

Although my theory of doctrinal evolution has a wider focus than Ackerman's focus on constitutional law, I would like to adopt the normative line he draws in valorizing the involvement of We the People in the entire system of governance and lawmaking established by the Constitution.⁴¹³ To the extent we believe in democracy in which citizens may participate in self-governance, our laws should be designed so as not to substantially undermine the People's ability to engage in those democratic endeavors. The normative and constitutional judgments we make about the extinction of a particular doctrine must *always* bear this important principle in mind.

As a guide, I propose the following inquiry. When evaluating the desirability of the extinction of a particular doctrine, we should ask the following questions:

408. I use the term "catastrophe" broadly to describe any major sudden change to the environment. The change could be to the general background environment—for example, the events related to September 11 or the exponential growth of the Internet. It is possible, though, to have a dramatic change in the law that could constitute a "catastrophe" in itself without necessarily an (identifiable) accompanying major sudden change in the environment that precipitated the legal change.

409. Darwin did suggest that "progress" occurred over time as the naturally superior organisms survived, but even that suggestion has been weakened by subsequent punctuated equilibrium theory, which recognizes that random catastrophes may kill those superior organisms. See GOULD, *supra* note 278, at 476–77, 1316.

410. See ACKERMAN, *FOUNDATIONS*, *supra* note 389, at 6–7.

411. See *id.* at 266–67.

412. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 389, at 409.

413. See *id.*; see also Benkler, *Looking Glass*, *supra* note 35, at 188 ("[L]aw or policy that systematically and drastically reduces the information available to large numbers of, or defined classes of, individuals in a society undermines autonomy.").

- (1) Is the existing doctrine that is under threat of extinction a special *democratic-enhancing* doctrine, meaning that it has historically served an instrumental role in protecting the People from abuses or overreaching by government and in facilitating the People's ability to participate in democratic endeavors?
- (2) If not, the extinction would not be problematic under this metric.
- (3) But if the doctrine under extinction is democratic-enhancing, we must then ask whether the "different rule" that now threatens the extinction of the democratic-enhancing doctrine is itself somehow democratic-enhancing?

If the answer to question (3) is negative, and a special democratic-enhancing doctrine has been terminated by a *democratic-disabling* doctrine, then the adoption of the "different rule" is highly suspect. The danger in allowing "different rules" to displace democratic-enhancing rules should be obvious: democracy will die if no doctrines exist any longer to protect it.⁴¹⁴

C. THE THREAT OF EXTINCTION TO THE PUBLIC DOMAIN

Perhaps some will find my explanation for the extinction of doctrines a lot of hullabaloo for something pretty basic. After all, a first-year law student knows that courts and Congress can change existing laws (each in their own way), and that the Supreme Court can always overrule a prior interpretation of the Constitution, notwithstanding *stare decisis*. Congress can abrogate common law or even override Supreme Court doctrines that are not constitutionally based.⁴¹⁵ Any doctrine, constitutional or non-constitutional, can become extinct in a moment.

True enough, but, just as in nature, we should not let extinction occur without (1) recognizing *why* it is occurring, and (2) asking whether we *want* it to occur. We may decide it is necessary to intervene to stop the extinction. The concept of the public domain may become extinct in three different ways: (1) a "different rule" may terminate the public domain's *structure* by preventing the dispersion of power to the people through common access and property rights; (2) a "different rule" may

414. See ACKERMAN, *FOUNDATIONS*, *supra* note 389, at 291 ("[T]he American Republic is no more eternal than the Roman—and it will come to an end when American citizens betray their Constitution's fundamental ideals and aspirations so thoroughly that existing institutions merely parody the public meanings they formerly conveyed.")

415. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

terminate the public domain's *function* by circumventing its ability to act as a restraint on government abuses that may arise from the government's power to restrict or deny public access; and (3) perhaps the most catastrophic of all, the "different rule" may obliterate the public domain at its very *origin* by renouncing its protection under the First Amendment and Copyright Clause or spurning the democratic norm of ensuring the free flow of information, ideas, and materials.

Viewed in this light, the *Times's* prediction of the "end of the public domain" is not so fanciful after all. Today, "different rules" are affecting the public domain at each of these levels. The danger is not recognizing this before it is too late. Based on Ackerman's theory, a punctuated "moment" can occur within an average of six to eight years, although sometimes the period is longer.⁴¹⁶ By that indicator, what has been happening in the past few years is alarming.

I. *Catastrophe and Different Rules in Copyright Law*

a. *The Removal of Thousands of Works from the Public Domain by Copyright Restoration*

Imagine that Congress tomorrow enacted a law that granted "restored" copyrights to all of Shakespeare's works, and indeed to all foreign works ever created that never received a U.S. copyright (for much of its history U.S. copyright law did not give copyrights to foreign works). All of these thousands of works have been in the public domain under well-established and settled U.S. law, meaning that everyone was free to make copies of these works or to make new "derivative" works based on them. Today, many of these works may in fact be freely available on the Internet.

But just imagine in this new law Congress said: (1) all of Shakespeare's works and all of these thousands of other foreign works are no longer in the public domain, but now are subject to "restored" copyrights owned by the estate of the dead authors; (2) no one but the "restored" copyright holder has the right to publish, copy, or build on Shakespeare's works or other works subject to this law; and (3) people who already have copies of Shakespeare's works, or any of the other foreign works subject to this law, may not sell their copies (as they normally would under the first sale doctrine) to others after a one-year grace period. (4) Any of the hundreds, if not thousands, of people who made derivative works from Shakespeare's works or any of these other affected works may no longer sell their works unless they pay royalties to the restored copyright holder. Finally, (5) any online postings of Shakespeare's works or any other of the thousands of foreign works subject to this law must be

416. See Burnham, *supra* note 396, at 2255-56.

removed them from the Internet. Congress enacted this imagined law in order to get a reciprocal deal abroad for the heirs or estates of dead U.S. authors. The interests of these dead authors' estates in squeezing more money out of the authors' works were deemed compelling enough to justify the removal of works from the public domain.

This imagined copyright provision may seem far-fetched, but in fact Congress in 1994 enacted an amendment to the Copyright Act that purports to do something quite similar: to remove thousands of foreign works from the public domain.⁴¹⁷ The amendment followed the U.S.'s signing of the Agreement on Trade Related Aspects of Intellectual Property (TRIPs) and was enacted putatively to further the U.S.'s position within Berne Convention.⁴¹⁸ Section 104A of the Copyright Act grants a "restored" copyright to foreign works that were in the public domain in the United States⁴¹⁹ for one of three reasons: (1) the authors of those works failed to comply with prior U.S. formalities (such as copyright notice); (2) the authors were nationals of countries that did not have a copyright agreement with the United States when they first published their works abroad; or (3) the works were sound recordings fixed

417. It is difficult to determine the exact number of works that have been removed from the public domain, because "copyright restoration" occurs automatically under the statute. 17 U.S.C. § 104A (2000). Based on the number of putative restored copyright holders who filed optional Notices of Intent to Enforce restored copyrights for works in the public domain, the number is at least in the thousands. See Copyright Restoration of Works in Accordance with the Uruguay Round Agreements Act, 61 Fed. Reg. 19,372-388 (May 1, 1996); 61 Fed. Reg. 46,134-159 (Aug. 30, 1996); 61 Fed. Reg. 68,454-461 (Dec. 27, 1996); 62 Fed. Reg. 20,211-220 (Apr. 25, 1997); 62 Fed. Reg. 44,841-854 (Aug. 22, 1997); 62 Fed. Reg. 66,766-811 (Dec. 19, 1997); 63 Fed. Reg. 5,142-216 (Jan. 30, 1998); 63 Fed. Reg. 19,288-366 (Apr. 17, 1998); 63 Fed. Reg. 43,830-832 (Aug. 14, 1998).

418. From the outset, the U.S. government has maintained that copyright restoration was not mandated by any treaty or international agreement obligation of the United States under Berne or TRIPs. Although Article 18 of Berne, which is known as the Rule of Retroactivity, states that copyright protection under the Convention "shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through expiration of the term of protection." It also expressly leaves it to each country to decide "the conditions of application of this principle." Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 18 (Paris text). Significantly, after joining Berne and enacting the Berne Convention Implementation Act to comply with its obligations under Berne, the United States did *not* adopt a copyright restoration provision. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2857-58. And even after joining TRIPs (which incorporates part of the Berne Convention) and enacting copyright restoration, the United States took the position that copyright restoration was "*not* mandatory but, in USTR's opinion desirable and compelling." *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 Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 103d Cong., 2d Sess. 2 (1994) (statement of Rep. William Hughes, Chairman, Subcomm. on Intellectual Prop. and Judicial Admin.) (emphasis added).

419. 17 U.S.C. § 104A (2000).

before the date (February 15, 1972) when U.S. law first recognized copyright protection for sound recordings.⁴²⁰

In order for § 104A to operate, “different rules” must be substituted for well-established rules that have governed copyright. Section 104A retroactively undoes the effect of the 1909 Copyright Act, under which no copyright could ever extend to a work in the public domain.⁴²¹ Indeed, the 1909 Act expressly stated that “[n]o copyright shall subsist in the original text of any work which is in the public domain.”⁴²² If that provision were applied to all works affected by § 104A (because they were published during the effective period of the 1909 Act), § 104A could not operate. So to avoid this problem, § 104A simply establishes “different rules” that attempt to erase a century’s worth of settled law as if it never existed.⁴²³

The key difference between § 104A and my imaginary restoration law is that § 104A applies only to foreign works still under copyright in their source country.⁴²⁴ This difference, however, does not alter the fundamental issue raised by the whole notion of copyright “restoration”: can Congress remove thousands of works from the public domain, including the great works of Stravinsky, Shostakovich, Prokofiev, Alfred Hitchcock, Fritz Lang, and many others under the guise of “restored” copyrights and restrict the public’s free access to materials that had been available in the public domain for many years?

Because I am involved in litigation to challenge the constitutionality of this law, I do not feel this is the time or place for me to reargue the merits of this issue here.⁴²⁵ I would like to focus instead on the worst-case

420. *Id.* § 104A(h)(6).

421. *Id.*

422. Copyright Act of 1909, ch. 320, § 7, 35 Stat. 1075, 1077.

423. Section 104A has even had the effect of retroactively reversing, over thirty years later, a federal court judgment that a particular work (i.e., the now well-known troll doll) was in the public domain and free for all to copy. *See Dam Things from Denmark v. Russ Berrie & Co.*, 290 F.3d 548, 553 (3d Cir. 2002). Another “different rule” imposed by copyright restoration is its abrogation of the first-sale doctrine for works subject to copyright restoration. The Supreme Court recognized this doctrine in 1908 as a limitation to copyright. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908). Under the doctrine, once a copyright holder has sold a copy of his or her work to the public, the copyright holder cannot claim any further distribution right over that lawfully purchased copy in the stream of commerce. After a “first sale” of the copy, the lawful purchaser of the copy can freely dispose of it at will—for instance, by selling or renting it to others. Congress, however, abrogated the first-sale doctrine for all works subject to copyright restoration after a one-year grace period; owners who lawfully purchased copies of affected works before 1994 cannot freely sell their copies of the works. *See* 17 U.S.C. § 109(a).

424. *Id.* § 104A(h)(6).

425. I have participated as counsel in three cases challenging the copyright restoration provision. *See Golan v. Ashcroft*, No. 01-B-1854 (D. Colo.); *Luck’s Music Library v. Ashcroft*, No. 1:01CF02220 (D.D.C.); *Dam Things from Denmark v. Russ Berrie Co.*, No. 0164008 (D.N.J.). The lawyers challeng-

scenario for the public domain: § 104A is upheld, and courts adopt the government's view that it has the power to remove thousands of works from the public domain.

Under an evolutionary approach to the law, this result would be catastrophic for the concept of the public domain. To uphold the constitutionality of Congress's removal of thousands of works from the public domain would create a "different rule" that would obliterate the public domain's very structure, function, and origin. Under the original understanding of the public domain, as articulated by the *Singer* Court and other early courts, the public domain is off-limits to government control.⁴²⁶

But, if upheld, the "different rule" that § 104A imposes would destroy both the *structure* of the public domain in dispersing inalienable property rights among the people to access whatever lies therein and the overall *function* of the public domain in serving as an ultimate restraint on the government's power to control public access through the grant of intellectual property. One of the whole purposes of the doctrine is to put an end to the kind of abuses the British Crown inflicted on the public by granting exclusive rights over things that people had long enjoyed. Section 104A is, however, no different.

Finally, and most worrisome of all, a decision to uphold the constitutionality of § 104A would strike at the very *origin* of the public domain. It would be a renunciation of the original understanding courts had that material in the public domain could not be taken away from the public because it was already public property, *publici juris*, and in the public domain.⁴²⁷ It would be a rejection of the Supreme Court's prior teaching in *Graham* that the "constitutional command" in the Copyright Clause—"to promote the Progress of Science and useful Arts"—forbids Congress from "restrict[ing] free access to materials already available" in the public domain.⁴²⁸ Although the Supreme Court in *Graham* admonished that

ing this law have posted most of the briefs filed in *Golan v. Ashcroft*, No. 01-B-1854 (D. Colo. 2002), at <http://eol.law.harvard.edu/openlaw/golanvashcroft>.

426. See *supra* notes 45–133 and accompanying text.

427. See *id.*

428. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). See also *supra* notes 80–124 and accompanying text; Benkler, *Looking Glass*, *supra* note 35, at 177 ("This reading of the Clause—that it requires an exclusive right to encourage at least some information production and that it restrains such rights from removing or burdening free access to materials already in the public domain—is one that the Court has unanimously reaffirmed."); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1182–83 (2000) (concluding that URAA is unconstitutional in its removal of works from the public domain).

this constitutional command “may not be ignored,”⁴²⁹ § 104A does just that by creating a “different rule” that restricts the public’s free access to materials already in the public domain.

Scrutinized under the test for doctrinal extinction outlined above, this “different rule” is highly suspect. First, the public domain is a democratic-enhancing doctrine that has historically served an instrumental role in facilitating the People’s ability to engage in self-expression and to enjoy free access to culture and know-how. Second, the “different rule” created by § 104A is *democratic-disabling*: it purports to take away the rights of the People to works in the public domain, but without the substitution of any democratic-enhancing rights. The law appears to reflect naked rent-seeking by copyright holders, both here and abroad, attempting to secure more income for themselves at the People’s expense.

b. DMCA’s Anti-Circumvention Provisions

“Different rules” for copyright are also established by the Digital Millennium Copyright Act of 1998 (“DMCA”). In 1998, amidst concern that copyright holders might not sell their works on the Internet if their legal rights to prevent digital copying were not strengthened, Congress enacted the DMCA, which gives copyright holders strong statutory protection for the technological protections (such as encryption) they place on their copyrighted works.⁴³⁰ Under the DMCA, people are not allowed to “circumvent” these access-control technologies,⁴³¹ or develop technologies that are designed to circumvent them⁴³² even if only to make a fair (meaning completely legal) use of a copyrighted work, at least under the Second Circuit’s interpretation of the Act.⁴³³ The Second Circuit in *Universal City Studios v. Corley* upheld the movie industry’s DMCA claim against a person who posted software that could be used to decrypt the encryption on DVDs that helps to prevent the unlawful copying of movies.⁴³⁴

The Second Circuit’s interpretation of the DMCA threatens to undermine the fair use doctrine. Under the court’s ruling, the DMCA prohibits conduct that copyright law would expressly authorize as fair use, a result that is perplexing in that the DMCA was intended to serve the goals of copyright and expressly states that it does *not* affect fair use rights.⁴³⁵ Because copyright expressly permits all fair uses of copyrighted

429. *Graham*, 383 U.S. at 6.

430. 17 U.S.C. § 1201 (2000).

431. *Id.* § 1201(a)(1).

432. *Id.* § 1201(a)(2), (b).

433. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001).

434. *Id.* at 60.

435. 17 U.S.C. § 1201(c).

works, the DMCA should too if it is to effectuate the goals of copyright and if, as the DMCA expressly states, it does not affect fair use.

But, under the Second Circuit's interpretation, the DMCA need not allow all fair uses, particularly not in the format preferred by the user.⁴³⁶ The court supported its conclusion with the almost laughable suggestion that a person who wanted to copy a clip of a DVD for a perfectly legitimate fair use should be required instead to "record[] portions of the video images and sounds on film or tape by pointing a camera, a camcorder, or a microphone at a monitor as it displays the DVD movie."⁴³⁷ In the more than 200 years of our copyright law's existence, no court has ever restricted the *formats* of a permissible fair use. Fair use has always operated as an equitable doctrine to allow a flexible "safety valve" in copyright law providing great freedom to users to make "fair" uses depending on the particular facts and circumstances.⁴³⁸ But, in a moment, the Second Circuit appears to have ruled that some fair uses are no longer permissible.

The DMCA also threatens the public domain. Because the DMCA does not contain an express durational limit on the term of its protection, it is unclear whether the anti-circumvention provision would apply to encryption on works whose copyrights have expired.⁴³⁹ While the anti-circumvention provision of the DMCA appears to prohibit a person only from circumventing encryption on *copyrighted* works ("work[s] protected under this title"),⁴⁴⁰ a person who wished to copy a public domain movie on DVD still needs to obtain a decrypting device to disable the encryption on the DVD. But the DMCA would still appear to prohibit *the manufacture and dissemination* of any such circumventing software that decrypts the encryption on DVDs.⁴⁴¹ Thus, a person who wanted to make a legitimate copy of a public domain movie on DVD would not be able to find someone who could legally sell decrypting software that is needed to make the copy.⁴⁴² As the district court held, the DMCA prohibits the decrypting software, even if it has a "substantial, noninfringing use" that would allow its dissemination under the doctrine established by the Su-

436. *Corley*, 273 F.3d at 459; see Benkler, *Looking Glass*, *supra* note 35, at 210.

437. *Corley*, 273 F.3d at 459.

438. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (stating that fair use "is not to be simplified with bright-line rules, for the [Copyright] statute, like the doctrine it recognizes, calls for case-by-case analysis"); Lloyd L. Weinreb, *Fair Use*, 67 *FORDHAM L. REV.* 1291, 1291 (1999).

439. See Samuelson, *supra* note 250, at 160-61.

440. 17 U.S.C. § 1201(a)(1) (2000).

441. *Id.* § 1201(a)(2).

442. See Samuelson, *supra* note 250, at 161.

preme Court in *Sony*.⁴⁴³ Put simply, DMCA abrogates the rule in *Sony* that allows for the sale of technologies that are capable of substantial, noninfringing uses.

The “different rules” established by the DMCA are democracy-disabling. First, fair use has historically served an important role in preventing the government from unduly restricting speech through copyright, and it has also facilitated the People’s ability to comment, criticize, teach, and learn—all critical endeavors for a democracy. Likewise, as discussed already, the public domain is instrumental in ensuring the people’s access to culture and know-how that ultimately enables them to engage in the creative and expressive pursuits. The DMCA, however, has great potential to undermine both fair use and the public domain by not allowing the public to engage in the expressive endeavors those doctrines authorize. Instead of supplementing copyright law, the DMCA threatens to *supplant* it with “different rules.”

2. *Catastrophe and Different Rules in Government Secrecy*

Following the terrorist attacks on September 11, the government has attempted to become more vigilant in protecting our domestic security. The government has adopted many new measures that utilize secrecy as an essential component of their strategy.⁴⁴⁴ To be sure, after 9/11, no one in this country should doubt either our dependence on our government to protect us from terrorist acts or the courage of so many who carry out that protection each day. Because we live in a democracy, however, the tragedies of 9/11 do not obviate the basic need of U.S. citizens to be able to evaluate the conduct of their government.

The challenge post 9/11 is balancing this basic need with the government’s need to more effectively guard our country against terrorism. While no one can deny that the government has a legitimate need to use secrecy in urgent situations involving national security, there is a danger in making secret more and more things that previously had been open to the public. What if the government makes a mistake in concealing information that should be available to the public, or, even worse, in arresting, surveilling, deporting, or trying someone in secret? How would, or could, the public even know it?

a. *The Removal of Information from Web Sites and New FOIA Policy*

The Bush Administration has adopted two policy changes that negatively affect the amount of information in the public domain. First, fol-

443. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000). See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

444. See *supra* notes 141–55 and accompanying text.

lowing 9/11, federal agencies removed many materials that had been publicly available on agency Web sites in an apparent effort to implement the Administration's instruction "to safeguard sensitive but unclassified information related to America's homeland security," a newly created but undefined category of information.⁴⁴⁵ From the standpoint of the public domain, there is nothing inherently wrong with the mere act of removing material from government Web sites. One might expect that over the course of time government Web sites will remove old information and post new information to stay current. But that is not what happened here. The government has removed material *precisely to make them unavailable to the public* because the material purportedly falls within the vague class of "sensitive but unclassified" information. Each agency can exercise considerable discretion in removing public material from its Web site, and there is no public record maintained on what information has been removed.⁴⁴⁶ OMB Watch has estimated the amount of documents removed to be in the thousands.⁴⁴⁷

In addition to the removal of public information from Web sites, the government has also adopted a more restrictive FOIA policy under which Attorney General Ashcroft will defend the discretionary decisions of agencies to withhold information requested by the public "unless [the decisions] lack a sound legal basis."⁴⁴⁸ This marks a dramatic change from the prior policy of Attorney General Reno, which established a "presumption of disclosure" and policy to "defend agencies that are sued for non-disclosure only when it was 'reasonably foreseeable that disclosure would be harmful' to an interest protected by the law."⁴⁴⁹

b. Secret Arrests, Secret Detention, and Secret Tribunals

As a part of its law enforcement response to 9/11, the government has asserted greater authority to use secrecy in arresting, detaining, trying, and deporting individuals. These cases present a more complicated analysis than Congress's direct removal of works from the public domain in the copyright context. There, it was clear that the government action took away something (indeed, many things) from the public domain. Here, however, the government has invoked secrecy *before* the matter has entered the public domain. While these cases most directly implicate

445. See Memorandum for Departments and Agencies from Laura L.S. Kimberly, Acting Director Information Security Oversight Office, at <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm> (Mar. 19, 2002).

446. See The Bush Administration's Secrecy Policy: A Call to Action to Protect Democratic Values, at <http://www.ombwatch.org/article/articleview/1145/1/18> (Oct. 25, 2002).

447. *Id.*

448. See *supra* note 445.

449. See Press Release, Department of Justice, Government Adopts New Standard for Openness (Oct. 4, 1993), at <http://www.fas.org/sgp/clinton/reno.html>.

the constitutional rights of the individuals whom the government has detained, the cases also implicate the First Amendment rights of the public and press to have access to such proceedings. For the latter, the question is whether the government is seeking to remove a type of proceeding or subject matter that should properly reside in the public domain because it involves information or proceedings that belong to the public.

(i) *Secret Proceedings for Aliens*

Since 9/11, the U.S. government has detained at least 762 aliens in secret, at times without publicly revealing their names or the location of their detentions and while subjecting a number of the aliens to secret deportation hearings.⁴⁵⁰ These September 11 detainees were all apparently held on valid immigration charges,⁴⁵¹ but they were held or deported by more restrictive and secretive procedures. Under the so-called “hold until cleared” policy, the government detained aliens, at times without charge and in secret, until the FBI cleared them of any connection to terrorism.⁴⁵²

After this policy was instituted the media reported allegations that the government was mistreating the detainees.⁴⁵³ The allegations included claims that the government (1) had detained the detainees without informing them of the charges on which they were being held for lengthy periods of time, (2) had denied the detainees access to their attorneys, families, and embassy officials, (3) had detained people who were not involved in terrorism, and (4) had physically and verbally abused the detainees.⁴⁵⁴ Amnesty International and the Lawyers Committee for

450. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 2 (Apr. 2003) [hereinafter IG REPORT]. At first, the government did not require detainees or their lawyers to keep information secret outside of the hearing. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 707 (6th Cir. 2002). Subsequently, DOJ instituted an interim rule that authorized immigration judges to issue protective orders requiring detainees and their attorneys to keep certain information secret indefinitely. See *Protective Orders in Immigration Administrative Proceedings*, 67 Fed. Reg. 36,799 (May 21, 2002) (to be codified at 8 C.F.R. pt. 3).

451. IG REPORT, *supra* note 450, at 15.

452. *Id.* at 37. The government has also detained an undisclosed number of individuals as material witnesses. See *Center for National Security Studies v. United States Dept. of Justice*, 331 F.3d 918, 921 (D.C. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3248 (U.S. Sept. 29, 2003) (No. 03-472); 18 U.S.C. § 3144 (2003). Unfortunately, the IG REPORT did not analyze the government's use of material witness status to detain individuals, so the available public information is even more scant. See IG REPORT, *supra* note 450, at 4; HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 60 (August 2002) [hereinafter HUMAN RIGHTS ABUSES] (discussing the detention of thirty-five individuals as material witnesses).

453. IG REPORT, *supra* note 450, at 2.

454. *Id.*

Human Rights issued reports detailing alleged human rights abuses committed by the government.⁴⁵⁵

Following these reports, the Department of Justice's Office of Inspector General (IG) began an investigation of the government's treatment of the September 11 detainees.⁴⁵⁶ The IG eventually issued a report of its findings that was made public in June 2003.⁴⁵⁷ The IG Report was highly critical of the government's treatment of the September 11 detainees and largely confirmed the detainees' allegations of abuse and mistreatment.

Among the key findings, the IG Report concluded that:

- (1) the government failed to serve many detainees with the charges underlying their detention, in some cases for weeks or months, notwithstanding the INS's stated goal of 72 hours;⁴⁵⁸
- (2) shortly after the investigation of detainees began, the government realized that many of the detainees had no connection to the attacks or terrorism;⁴⁵⁹
- (3) despite the government's belief that detainees who were found to be of "no interest" could be cleared "within a few days," the clearance process was "slow and not given sufficient priority," with the average length of detention lasting 80 days from arrest and more than one quarter of the detentions lasting over three months;⁴⁶⁰
- (4) the government detained aliens for more than the 90 days allotted following a final order of removal, even though the aliens wanted to leave the country (and even though

455. HUMAN RIGHTS ABUSES, *supra* note 452; LAWYERS COMMITTEE FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11 (Sept. 5, 2002).

456. The IG did so pursuant to its authority under the Inspector General Act, 5 U.S.C. §§ 1-12 (2000), and the Patriot Act, the latter of which directs the Office of the IG to review claims of civil rights violations by DOJ employees. USA PATRIOT Act, Pub. L. No. 107-56, § 1001 (2001).

457. IG REPORT, *supra* note 450.

458. *Id.* at 35. Before September 11, INS regulations required the INS to charge a noncitizen within 24 hours of detention or release the individual. 8 C.F.R. 287.3(d) (2001). After September 11, the INS issued a new regulation—without a period for public comment—that increased the time to forty-eight hours and created an exception that allows the INS to hold noncitizens without charge for "an additional reasonable period" in an emergency. 8 C.F.R. 287, INS No. 2171-01 (2003). The exception for immigration detention appears to allow the government the discretion to detain an individual even beyond the 7-day period that the PATRIOT Act allows the government to detain aliens suspected of terrorism without charge. USA PATRIOT Act, Pub. L. No. 107-56, § 412(5).

459. IG REPORT, *supra* note 450, at 47.

460. *Id.* at 46, 51.

some in the government doubted the legality of such detention);⁴⁶¹ and

- (5) the government adopted a policy to request that all September 11 detainees be held without bond, even in cases for which the INS “had no information from the FBI to support that argument.”⁴⁶²

Perhaps the most disturbing of the IG Report’s findings was the arbitrary way in which the government classified detainees into one of three groups: (1) “high interest” detainees who were considered to have the greatest potential to have a link to the September 11 investigation or terrorism; (2) “of interest” detainees “who might have some terrorist connections”; and (3) “interest undetermined” detainees for whom the FBI could not rule out that they did not have a connection to the September 11 attacks.⁴⁶³ If an alien fell within any of these categories, the government would hold the alien in detention until cleared by the FBI of any connection to terrorism. Remarkably, this new system “was not memorialized in writing,”⁴⁶⁴ and apparently was instituted by word of mouth. Even worse, the government failed to “develop clear criteria for determining who was, in fact, ‘of interest’ to the FBI’s terrorism investigation.”⁴⁶⁵ The lack of such criteria often led to the detention of aliens based on arbitrary factors⁴⁶⁶ “rather than any evidence that they were terrorists.”⁴⁶⁷ The IG Report was highly critical of “the indiscriminate and haphazard manner” in which the government categorized and detained “many aliens who had no connection to terrorism.”⁴⁶⁸ Significantly, when

461. *Id.* at 70.

462. *Id.* at 89.

463. *Id.* at 18.

464. *Id.* at 37.

465. *Id.* at 40.

466. *Id.* at 70. In its report, Human Rights Watch suggests that the detention of September 11 detainees may have been based not on arbitrary factors, but instead on “little more than a form of profiling on the basis of nationality, religion, and gender. Being a male Muslim non-citizen from certain countries became a proxy for suspicious behavior.” HUMAN RIGHTS ABUSES, *supra* note 452, at 12.

467. IG REPORT, *supra* note 450, at 41.

468. *Id.* at 70. The IG REPORT concluded:

[W]e question the criteria (or lack thereof) the FBI used to makes its initial designation of the potential danger posed by September 11 detainees. The arresting FBI agent usually made this assessment without any guidance and based on the initial detainee information available at the time of arrest. In addition, there was little consistency or precision to the process that resulted in the detainees being labeled ‘high interest,’ ‘of interest,’ or ‘of undetermined interest.’

Id. at 158; see also *id.* at 186 (noting that government agents “did little to distinguish” aliens with “evidence of ties to terrorism from those encountered coincidentally . . . with no indication of any ties to terrorism”); *id.* at 18 (“initial assessment was often based on little or no concrete information tying the detainee to the September 11 attacks or terrorism”); *id.* at 41–42 (some detainees “appear to have been arrested more by virtue of chance encounters or tenuous connections to a . . . lead rather than by

the FBI could not determine at the outset that the individual was “of interest,” the INS treated the individual “of interest” until cleared by the FBI.⁴⁶⁹ However, to date, no September 11 detainee has been charged with a terror-related crime.⁴⁷⁰

The arbitrary way in which the government categorized September 11 detainees was further compounded by the disparate treatment the detainees received based on their categorization.⁴⁷¹ The “high interest” detainees were put in high-security federal prisons, where their treatment was much worse than that faced by “of interest” detainees, who typically were held in lower security facilities.⁴⁷²

In its investigation of the federal prison in Brooklyn, the IG Report found that the “high interest” detainees were subjected to severe conditions, including physical abuse. The detainees “were subjected to the most restrictive conditions of confinement authorized by [Bureau of Prison] policy”⁴⁷³ and were confined to their cells under “‘lockdown’ for 23 hours a day,”⁴⁷⁴ with continual video camera surveillance in their cells and their cell lights illuminated for 24 hours a day for a period of several months.⁴⁷⁵ Nearly all of the detainees interviewed by the IG’s Office noted experiencing “exhaustion, depression, stress, and sleep deprivation”⁴⁷⁶ due to the round-the-clock illumination of lights in their cells.

The IG Report concluded that “substantial evidence” indicated that some correctional officers physically abused the detainees, especially during the first few months following 9/11.⁴⁷⁷ For example, the detainees claimed that when they arrived at the prison, the correction officers “forcefully pulled them from the car, slammed them into walls, dragged them by their arms, stepped on the chain between their ankle cuffs, verbally abused them, and twisted their arms, hands, wrists, and fingers.”⁴⁷⁸ One officer corroborated the detainees’ claim in a sworn affidavit to the IG, but the officer later attempted to recharacterize his statement.⁴⁷⁹ Sev-

any genuine indications of a possible connection with or possession of information about terrorist activity”).

469. IG REPORT, *supra* note 450, at 40.

470. Edward Alden, *Rethink on Round-Up of Terror Suspects*, FIN. TIMES, June 14, 2003, at 10.

471. IG REPORT, *supra* note 450, at 158.

472. *Id.* at 111.

473. *Id.* at 112.

474. *Id.*

475. *Id.* at 155, 162.

476. *Id.* at 163.

477. *Id.* at 162.

478. *Id.* at 144.

479. *Id.* at 145.

eral of the detainees have brought a civil rights lawsuit against the government based on its alleged mistreatment of them.⁴⁸⁰

The IG Report also found that the government's treatment of the detainees frustrated their ability to communicate with counsel or family. Initially, the detainees were subjected for several weeks to a total "communications blackout," during which time they were not permitted to communicate with anyone by phone or mail.⁴⁸¹ Even after the blackout was lifted, the prison officials imposed a make-shift policy of one legal telephone call per week, which "severely limited the detainees' ability to obtain, and communicate with, legal counsel."⁴⁸² Because most of the detainees did not have legal counsel before entering the federal prison, they had to locate a lawyer from prison.⁴⁸³ However, detainees were not always made aware of their opportunity to make a weekly legal call,⁴⁸⁴ and the list of pro bono attorneys the officials provided the detainees was inaccurate and outdated.⁴⁸⁵ "As a result, detainees often used their sole legal call during a week to try to contact one of the legal representatives on the pro bono list, only to find that the attorneys either had changed their telephone number or did not handle the particular type of immigration situation faced by the detainees."⁴⁸⁶ Because the detention of the September 11 detainees was kept secret from normal prison logs, prison officials mistakenly told the detainees' legal counsel and family that the detainees were not at the prison, when in fact they were.⁴⁸⁷

Although the IG Report did not evaluate the government's use of secrecy in detaining or deporting the September 11 detainees,⁴⁸⁸ the findings of the Report certainly provide reason for pause. Had the IG Report not made public the severe flaws in the government's "hold until clear" policy for the September 11 detainees, it seems doubtful that the government would have changed its policy. The use of secrecy in the government's treatment of the detainees created a situation in which few officials might dare to question the policy, which itself was created by verbal instructions handed down through the chain of command, entirely outside of public scrutiny. Indeed, even immediately following the publi-

480. See *Turkmen v. Ashcroft*, No. 02-civ-2307 (E.D.N.Y. filed Apr. 17, 2002); Tom Hays, *Report Backs Muslims' Complaints*, FT. WORTH STAR-TELEGRAM, June 23, 2003, at 4.

481. IG REPORT, *supra* note 450, at 158.

482. *Id.* at 130, 159.

483. *Id.* at 131.

484. *Id.* at 132 (noting that official asked "are you okay?" to inquire whether detainee wanted to make legal call).

485. *Id.* at 161.

486. *Id.*

487. *Id.* at 115.

488. *Id.* at 4.

cation of the IG Report, the Justice Department initially attempted to cast the report in a positive light, asserting that it supported the view that the government's "actions are fully within the law."⁴⁸⁹ DOJ claimed to "make no apologies for finding every legal way possible to protect the American public from further terrorist attacks."⁴⁹⁰ The press release was followed by Attorney General Ashcroft's testimony before Congress, in which he vigorously defended the government's "hold until clear" policy against the criticisms in the IG Report as well as those from members of Congress.⁴⁹¹ However, afterwards, FBI Director Mueller publicly recognized the need for changes in its detention policy following the IG Report, including the development of better criteria for categorizing detainees and more efficient disposition of their cases.⁴⁹²

The IG Report casts into a new light the government's use of secret deportation hearings for September 11 detainees. The government has deported an undisclosed number of aliens through secret hearings in "special interest" cases,⁴⁹³ which includes any detainee whom the FBI has designated as "high interest," "of interest," or "interest undetermined."⁴⁹⁴ According to the Justice Department, this new category of "special interest" cases involves an alien who "might have connections with, or possess information pertaining to, terrorist activities in the United States."⁴⁹⁵ Following the September 11 attacks, Chief U.S. Immigration Judge Michael Creppy issued a directive requiring that all proceedings in any case designated by the Executive to be a "special interest" case to be closed to the public, press, and family members of the alien.⁴⁹⁶ No entry for the case is even to be placed on the docket.⁴⁹⁷ "In short, the Directive contemplates a complete information blackout along both substantive and procedural dimensions."⁴⁹⁸

A circuit split has developed as to the constitutionality of the Creppy Directive and the government's use of secret deportation hearings. The

489. Dep't of Justice, Statement of Barbara Comstock, Dir. of Public Affairs, Regarding the IG's Report on 9/11 Detainees, June 2, 2003, at http://www.usdoj.gov/opa/pr/2003/June/03_opa_324.htm.

490. *Id.*

491. Stephen Dinan, *Ashcroft Wants Powers Expanded to Fight Terror; Hcuse Panel Scolds Justice's "Dubious Actions."* WASH. TIMES, June 6, 2003, at A1.

492. Alden, *supra* note 470, at 10.

493. North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 202 (3d Cir. 2002). At least one commentator has suggested that secret hearings were used for *all* of the September 11 detainees that were deported. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 962 (2002).

494. IG REPORT, *supra* note 450, at 5.

495. North Jersey Media Group, 308 F.3d at 202.

496. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683-84 (6th Cir. 2002).

497. *Id.* at 684.

498. North Jersey Media Group, 308 F.3d at 203.

Sixth Circuit, in *Detroit Free Press v. Ashcroft*,⁴⁹⁹ held that the First Amendment guarantees the public and the press a qualified right of access to deportation hearings—a right that can be overcome only if the government’s invocation of secrecy can withstand strict scrutiny.⁵⁰⁰ Applying the two-part “experience and logic” test for determining First Amendment rights of access elaborated in *Richmond Newspapers*,⁵⁰¹ the Sixth Circuit found that: (1) “deportations proceedings historically have been open”;⁵⁰² and (2) that public access serves a vital role in acting “as perhaps the only check on abusive government practices” “[i]n an area such as immigration, where the government has nearly unlimited authority.”⁵⁰³ Because the Creppy Directive imposed a blanket rule of secrecy without individualized showings of need or any standards, the Directive was not narrowly tailored.⁵⁰⁴

The Third Circuit reached, in a 2–1 decision, the opposite conclusion in *North Jersey Media Group, Inc. v. Ashcroft*.⁵⁰⁵ Also applying the *Richmond Newspapers* test, the court held that: (1) open deportation hearings have not reached the level of an “unbroken, uncontradicted history”⁵⁰⁶; and (2) the positive role that public access may play is countervailed by the negative effect on national security it may have through the possible disclosure of sensitive information.⁵⁰⁷

Because the Supreme Court denied certiorari in these cases, it is not clear if or when the circuit split will be resolved. The number of “interest” aliens has dwindled after most have been deported,⁵⁰⁸ so it is not apparent if future cases challenging the Directive will arise.

From the standpoint of the public domain, the Creppy Directive is suspect in two respects. First is the way in which it was adopted in secret and outside the public domain. The Directive was not a public order or

499. 303 F.3d 681 (6th Cir. 2002).

500. *Id.* at 705.

501. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring). The Court later described the experience and logic test as follows:

First, because a tradition of accessibility implies the favorable judgment of experience, we have considered whether the place and process have historically been open to the press and general public. . . . Second, . . . the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question.

Press-Enter. Co. v. Super. Ct., 478 U.S. 1, 8 (1986) (*Press-Enterprise II*) (internal quotation and citation omitted).

502. *Detroit Free Press*, 303 F.3d at 701.

503. *Id.* at 704.

504. *Id.* at 710.

505. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 201–02 (3d Cir. 2002).

506. *Id.* at 201.

507. *Id.* at 202.

508. “As of June 13, 2002, only seventy-four remained in custody.” *Center for National Security Studies v. United States Dep’t of Justice*, 331 F.3d 918, 921 (D.C. Cir. 2003).

regulation, but rather a secret directive that instructed immigration judges not to disclose its content.⁵⁰⁹ The Executive thus authorized secret proceedings by a directive that itself was initially secret, even further reducing the possibility of public scrutiny of its content or the practice it authorized.

Second, the Creppy Directive allows deportation proceedings to be removed from the public domain based on an ad hoc, unwritten system of classifying aliens that the IG later determined was arbitrary in classifying “many aliens who had no connection to terrorism.”⁵¹⁰ In seeking secret deportation hearings, the INS simply relied on law enforcement’s initial determination of “special interest” status which, in the end, was an arbitrary procedure with few standards or safeguards.⁵¹¹

Although neither the Sixth nor the Third Circuit had the benefit of the IG Report when deciding the constitutionality of the secret deportation hearings, I believe the Report provides considerable support for the Sixth Circuit’s analysis. As the court noted, deportation hearings have been presumptively open from their creation in the first immigration act in 1882, which only required closure of exclusion hearings.⁵¹² Since 1965, INS regulations have contained an express provision providing that deportation hearings are to be presumptively open.⁵¹³ Although exceptions have been allowed to close deportation hearings, the majority of “experience” in our immigration laws has allowed open hearings.⁵¹⁴

509. The directive is now in the public domain through its revelation in litigation. See Memorandum from Michael Creppy to All Immigration Judges and Court Administrators, Sept. 21, 2001 (on file with author).

510. IG REPORT, *supra* note 450, at 70, 158.

511. *Id.* at 5.

512. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 701 (6th Cir. 2002). The distinction between exclusion (before entry into the United States) and deportation (after entry) is supported by the Supreme Court’s case law. Aliens seeking entry into the United States with no ties to the United States are not “persons” within the meaning of the Fifth Amendment and therefore have no claim to due process. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 598–99 (1953). Aliens who have gained entry into the United States do, however, have a right of due process. See *Kwock Jan Fat v. White*, 253 U.S. 454, 464–65 (1920). Even the Third Circuit acknowledged that “[t]he Supreme Court has consistently held that persons facing deportation possess far greater legal rights than those contesting exclusion.” *North Jersey Media Group*, 308 F.3d at 211 n.8.

513. See 8 C.F.R. § 3.27 (2003). Under the regulation, hearings for abused alien children are required to be closed, and in other cases the immigration judge has discretion to close the hearing to protect “witnesses, parties, or the public interest.” *Id.*

514. See *Detroit Free Press*, 303 F.3d at 701–03. The Third Circuit found that “the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access,” apparently elevating the standard to proof for “experience” to an “unbroken, uncontradicted history” of open access. *North Jersey Media Group*, 308 F.3d at 211–12. But this standard of an “unbroken, uncontradicted history” appears to limit dramatically the Supreme Court’s formulation of the “experience” prong. See *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 10 (1986) (*Press-Enterprise II*) (finding the experience of open preliminary hearings, notwithstanding fact that several states allowed closed hear-

The IG's Report substantiates the compelling "logic" of openness in deportation hearings to ensure that the proceedings are conducted fairly and properly, and to inform the public of the administration of government.⁵¹⁵ Even without the benefit of the IG Report, the Sixth Circuit recognized the inherent flaws in the Creppy Directive: "By the simple assertion of 'national security,' the Government seeks a process where it may, without review, designate certain classes of cases as 'special interest cases' and, behind closed doors, adjudicate the merits of these cases to deprive non-citizens of their fundamental liberty interests."⁵¹⁶ This makeshift, standardless use of secrecy has essentially no checking mechanism to prevent unwarranted attempts to keep hearings secret. The IG Report confirms the worst of the Sixth Circuit's fears—that, without any established standards or procedures, the government's categorization of "in-interest" aliens was essentially arbitrary or based on mere speculation.⁵¹⁷

While some extreme situations may perhaps necessitate some level of secrecy in deportation hearings, strict scrutiny should be required on a case-by-case basis before departing from the presumptively open deportation procedures.⁵¹⁸ The problem with the Creppy Directive is that it seeks a mandatory rule of secrecy based on the government's mere invocation of a "special interest," all of which occurs behind closed doors.⁵¹⁹ The public cannot know how the vague standard is being applied, and whether properly, much less the propriety of the government's conduct in deporting the individual. The Creppy Directive allows the government to "selectively control[] information rightfully belonging to the people" based on the government's mere invocation of a "special interest."⁵²⁰ Under this regime, "no real safeguard on [the government's] exercise of authority exists."⁵²¹

ings upon proper showing); *In re* The Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1332 (D.C. Cir. 1985) (Scalia, J.) ("A historical tradition of at least some duration is obviously necessary.").

515. *Detroit Free Press*, 303 F.3d at 703-04.

516. *Id.* at 710.

517. *Id.* at 692 ("[N]o definable standards used to determine whether a case is of 'special interest' have been articulated.")

518. See *Detroit Free Press*, 303 F.3d at 692-93; *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 228 (3d Cir. 2002) (Scirica, J., dissenting); see also *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13-14 (1986) (*Press-Enterprise II*).

519. *Detroit Free Press*, 303 F.3d at 710 ("The directive is over-inclusive by categorically and completely closing all special interest hearings without demonstrating, beyond speculation, that such a closure is absolutely necessary.").

520. *Id.* at 683. For example, the government conceded that three secret hearings challenged in *Detroit Free Press* did not involve any information that threatened national security. *Id.* at 709.

521. *Id.* at 710.

(ii) *Secret Proceedings for Enemy Combatants*

When the government seeks to take away people's liberty during criminal investigation, the normal criminal procedures would require formal charges to be made against the individuals in a public proceeding,⁵²² the allowance of the individuals to exercise their Sixth Amendment right to counsel (and the provision of such counsel if necessary),⁵²³ and the eventual opportunity for the individuals to face the charges of the government and offer a defense at a public trial with a jury of their peers.⁵²⁴

These public criminal procedures help to ensure that the government's prosecution of individuals is subject to the crucible of public scrutiny. An open court proceeding supplies critical information that enables people to scrutinize and evaluate the administration of justice.⁵²⁵ Without such information, people would have no way to evaluate the government's conduct in arresting, detaining, putting on trial, and punishing individuals. But to further the goals of democratic governance, the Constitution requires that criminal trials be open to the public.⁵²⁶ A criminal trial is a "public thing" to which the public must be guaranteed a right of access.⁵²⁷

Within two months of the attacks of 9/11, the President instituted different rules to allow for the expanded use of the concept of "enemy combatant" to hold individuals in secret detention without allowing for access to legal counsel or the courts.⁵²⁸ The government continues to hold

522. See *Mallory v. United States*, 354 U.S. 449, 455–56 (1957); *McNabb v. United States*, 318 U.S. 332, 344–47 (1943).

523. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

524. U.S. CONST. amend. vi.

525. See *supra* note 168 and accompanying text.

526. *Id.*

527. These public proceedings contrast with the secretive processes of the Star Chamber in England. See *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (discussing Star Chamber).

528. On November 13, 2001, the President issued an order allowing for the detention of non-citizens as enemy combatants and trial by military tribunal. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001). Because the order does not apply to U.S. citizens, the President's designation of Yaser Hamdi and Jose Padilla, two U.S. citizens, as enemy combatants may not fall within the Nov. 13, 2001 military order, but some other unspecified assertion of executive power. See Amanda Schaffer, Comment, *Life, Liberty, and the Pursuit of Terrorists: An In-Depth Analysis of the Government's Right to Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission*, 30 FORDHAM URB. L.J. 1465, 1479–81 (2003). Courts have held that the President's use of enemy combatant status against U.S. citizens was authorized by Congress's general enactment following September 11 that authorized the President to "use all necessary and appropriate force" against persons involved in the terrorists attacks. *Hamdi v. Rumsfeld*, 316 F.3d 450, 467 (4th Cir. 2003), *petition for cert. filed*, No. 03-6696 (U.S. Oct. 1, 2003); see *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

two U.S. citizens, Yaser Hamdi and Jose Padilla,⁵²⁹ and many other non-citizens⁵³⁰ in secret detention as enemy combatants. In so doing, the government seeks to keep the detention of the individuals outside the normal, and predominantly public, criminal process. Although the government has the putative power to prosecute enemy combatants in a military tribunal, up to this time the Administration has used its enemy combatant designations of U.S. citizens not to prosecute, but to hold them indefinitely.⁵³¹

Hamdi was captured during the fighting in Afghanistan and has been detained at the Naval Station Brig in Norfolk, Virginia since April 2002.⁵³² The Fourth Circuit ruled that the President as Commander in Chief has the constitutional power to hold Hamdi in secret detention without formal charges and without access to counsel, because Hamdi had been “captured in a zone of active combat in a foreign theater of

529. *Hamdi*, 316 F.3d at 460; *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

530. On June 23, 2003, the Administration announced that President Bush had designated a third enemy combatant, Ali Saleh Kahlah Al-Marri, who allegedly was an Al Qaeda operative and part of a plan to wage a second round of attacks against the U.S. Al-Marri has been held since December 2001, at first as a material witness and then on charges of credit card fraud and lying to the FBI. Al-Marri, is a Qatari citizen and Saudi native, who was living in Peoria, Illinois with his wife and five children. The government has claimed that an Al Qaeda detainee revealed that Al-Marri is “an Al Qaeda sleeper operative who was tasked to help new Al Qaeda operatives get settled in the United States for follow-on attacks after 9/11.” When Al-Marri was first arrested, the government allegedly had evidence that Al-Marri had made calls to an associate of a top Al Qaeda financier linked to the September 11 attacks, that Al-Marri possessed stolen credit card numbers to fund terrorist activities, and that Al-Marri had audio lectures from Bin Laden, prayers in Arabic to protect Bin Laden, and photos of the September 11 attacks. See Josh Meyer, *Suspect Is Declared an Enemy Combatant*, L.A. TIMES, June 24, 2003, at A1. The government is also holding an untold number of people captured in Afghanistan as enemy combatants at the U.S. naval base in Guantanamo Bay, Cuba. *Id.*

531. As of July 2003, the government has used the criminal process, and not military tribunals, to prosecute individuals for terror related offenses. John Walker Lindh, a U.S. citizen and the so-called “American Taliban” who was caught in the fighting in Afghanistan, pleaded guilty to two federal offenses for aiding the Taliban and carrying explosives. See “*I Made a Mistake in Joining the Taliban*”; *Apologetic Lindh Gets 20 Years*, WASH. POST, Oct. 5, 2002, at A1. The attempted “shoe bomber” Richard Reid also pleaded guilty to federal charges for attempting to blow up a plane on Dec. 22, 2001. See “*I Am an Enemy of Your Country*”; “*Shoe Bomber*” Pleads Guilty, WASH. POST, Oct. 5, 2002, at A1. In the first post 9/11 terror case to be decided by trial, a jury convicted two men of being part of a “combat operational sleeper cell” for Islamic terrorists, but acquitted a third defendant of being a part of the terrorist cell. See Robert E. Pierre & R. Jeffrey Smith, *Jury Splits Verdict in Terror Trial: Two Men Convicted in Alleged ‘Sleeper Cell’ Plot; One Is Acquitted*, WASH. POST, June 4, 2003, at A10. On July 3, 2003, the U.S. government announced that it may try six suspected Al Qaeda terrorists by military tribunal at Guantanamo Bay. See John Mintz, *Six Likely to Face Military Tribunals; Captives Tied to Al Qaeda, U.S. Says*, WASH. POST, July 4, 2003, at A1. Two of the suspects are British citizens, while one is Australian. See Glenn Frankel & John Mintz, *Two Britons, Australian Among Six Facing Trial; U.S. Tribunal Process Questioned*, WASH. POST, July 5, 2003, at A13.

532. *Hamdi*, 316 F.3d at 460; A.B.A. TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, *supra* note 143, at 3 n.1.

conflict.”⁵³³ In such case, the court must “avoid encroachment into the military affairs entrusted to the executive branch.”⁵³⁴ Although upholding Hamdi’s detention, the Fourth Circuit expressly declined to issue any judgment about the government’s detention of a U.S. citizen who was not in a zone of combat at all, but was apprehended on American soil.⁵³⁵

That issue is raised by the *Padilla* case.⁵³⁶ Padilla was arrested in Chicago on a material witness warrant that was carried out by federal agents on May 8, 2002.⁵³⁷ Subsequently, the President designated Padilla as an enemy combatant and the Department of Defense took custody of him, detaining him at the Consolidated Naval Brig in Charleston, South Carolina.⁵³⁸ On June 10, 2002, in a hastily called news conference from Moscow, Attorney General Ashcroft announced the arrest of Padilla, whom the government alleged was attempting to make a “dirty bomb” in the U.S with some connection to Al Qaeda.⁵³⁹ Defense Secretary Rumsfeld explained Padilla’s detention outside of the “normal [criminal] procedure” as necessary to gather intelligence from Padilla.⁵⁴⁰ In denying a habeas petition filed on Padilla’s behalf, Judge Mukasey held that the President has the constitutional authority to designate Padilla as an enemy combatant, although the court reserved judgment on whether Padilla was properly classified as an enemy combatant.⁵⁴¹

A number of scholars have called into question various aspects of the Executive’s attempt to use enemy combatant status and military tribunals in its war on terrorism.⁵⁴² The main constitutional issue concerns whether the defendant’s constitutional rights are being violated by treatment as an enemy combatant outside the criminal process with its traditional safeguards. Another issue, and the one I will focus on here, concerns the denial of the public’s rights of access to what may be subject matter that, by its nature, should be within the public domain or open to the public through the criminal process. In criminal prosecutions, the ac-

533. *Hamdi*, 316 F.3d at 459.

534. *Id.* at 473.

535. *Id.* at 465.

536. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

537. *Id.* at 568–69.

538. *Id.* at 571; A.B.A TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, *supra* note 143, at 3 n.2.

539. James Risen & Philip Shenon, *U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1; *Padilla*, 233 F. Supp. 2d at 573.

540. *Padilla*, 233 F. Supp. 2d at 574.

541. *Id.* at 596.

542. See, e.g., Katyal & Tribe, *supra* note 144, at 1268 (arguing that the President’s use of enemy combatant status and military tribunals is unconstitutional because it violates a structural constitutional restraint that requires “the concurrence of all three branches . . . [to] decisively alter anyone’s legal rights”); Koh, *supra* note 144, at 339 (noting that president’s military order undermines the constitutional principle of separation of powers).

cused has a Sixth Amendment right to a public trial,⁵⁴³ while the public enjoys a First Amendment right of access to such proceedings.⁵⁴⁴

A court must therefore determine whether the person being detained by the government should be properly treated as (1) a criminal defendant within the public safeguards of the criminal process, or (2) an enemy combatant within the secret military process. The government's use of secret military procedures would be unconstitutional if a court found that the Executive wrongly categorized someone as an enemy combatant or improperly used secret military procedures against the individual. Such government action would be unconstitutional for a number of reasons, including the denial of the defendant's Sixth Amendment right to a public trial or other criminal proceeding, and the denial of the public's First Amendment right of access to what should be a proceeding open to the public.

In reviewing the government's designation of an enemy combatant,⁵⁴⁵ the court must test the legal sufficiency of the government's designation to see if "there is some evidence to support [the] conclusion that [the individual] was, like the German saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war."⁵⁴⁶ Even if the government's factual allegations are supported by some evidence, a court could find that the allegations are legally insufficient to support the conclusion that the individual is an enemy combatant.⁵⁴⁷

Without attempting to decide these issues firmly or finally, I think the strongest case for the government's recent designations of enemy combatant status was made against Hamdi. Hamdi's capture in the field of battle during a war makes the government's claim to application of the

543. U.S. CONST. amend. vi.

544. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

545. The government has conceded that the President's discretion to designate a person as an enemy combatant is not unfettered or unreviewable. The government's proposed standard of review is that the President's designation should be upheld as long as the government provides "some evidence" to support the designation. See *Hamdi v. Rumsfeld*, 316 F.3d 451, 474 (4th Cir. 2003); *Padilla*, 233 F. Supp. 2d at 608. I will not attempt to evaluate whether this is the proper standard. Assuming it is the proper standard, the key is defining what constitutes an enemy combatant or the indicia of being an enemy combatant.

546. *Padilla*, 233 F. Supp. 2d at 608. The Supreme Court in *Quirin* provided the following examples of enemy combatants: "The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property[.]" *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

547. See *Hamdi*, 316 F.3d at 472 (Deference to the Executive's designation "does not preclude us from determining in the first instance whether the factual assertions set forth by the government would, if accurate, provide a legally valid basis for Hamdi's detention under that power[.]").

laws of war and status of enemy combatant quite powerful. According to the government affidavit, Hamdi received weapons training from the Taliban and was captured in Afghanistan with the Taliban while carrying an AK-47 rifle.⁵⁴⁸ These circumstances strongly support the conclusion that Hamdi was an enemy combatant: someone who was engaged in a mission against the United States on behalf of an enemy with whom the United States is at war. Like the German saboteurs in *Quirin*, Hamdi was captured during circumstances that provide substantial indicia of involvement with an enemy of the United States.⁵⁴⁹ Where, as in *Hamdi*, the putative combatant is caught on enemy soil during war while armed with foreign weapons and serving with an enemy force, the designation of enemy combatant deserves considerable deference (as the Fourth Circuit concluded).⁵⁵⁰

Padilla's designation, however, presents a closer question, at least under the unsealed version of facts presented in the opinion. Unlike Hamdi, Padilla was apprehended on United States soil, in Chicago, with much less indicia that Padilla was engaged as an enemy combatant in a war against the United States. The government apparently did not believe that Padilla was a member of Al Qaeda, only that he was "closely associated" with the group, having received some training from Al Qaeda and having discussed with one senior Bin Laden lieutenant in Afghanistan the possibility of detonating a "dirty bomb" within the United States.⁵⁵¹ Apparently, the government did not allege that Padilla had actual possession of any explosives or Al Qaeda material at the time of his arrest. Unlike the individuals in *Quirin* or *Hamdi*, Padilla was not captured during circumstances or with physical evidence (such as a gun, ammunition, explosives, or enemy material) that would readily indicate that Padilla was fighting in a war against the United States.⁵⁵²

Courts reviewing the Padilla case⁵⁵³ should attempt to define more concretely the indicia that support (or not) the government's designation of enemy combatant. In *Quirin*, the indicia of enemy combatant were readily apparent: (1) German citizens during World War II (2) entered

548. *Hamdi*, 316 F.3d at 461.

549. *Cf. Quirin*, 317 U.S. at 21.

550. *Hamdi*, 316 F.3d at 460-62.

551. *Padilla*, 233 F. Supp. 2d at 572.

552. *Cf. Quirin*, 317 U.S. at 36-37 (noting that individuals were enemy combatants when "acting under the direction of the armed forces of the enemy"); *id.* at 37-38 ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention.").

553. The district court reserved judgment on Padilla's case pending his submission to contest the government's showing. *Padilla*, 233 F. Supp. 2d at 610.

the United States with German military uniforms that were later disposed and (3) with explosives and (4) large sums of money from the Germans (5) allegedly to blow up installations in the United States.⁵⁵⁴ However, in *Milligan*, the indicia were lacking: a U.S. citizen—whom the military alleged was part of a secret society that conspired to steal weapons and overthrow the government during the Civil War—was captured in Indiana, not in one of the Confederate states.⁵⁵⁵ As the Supreme Court concluded, even if *Milligan* “had conspired . . . to assist the enemy” while in Indiana, the facts did not support the conclusion that he was an enemy combatant,⁵⁵⁶ or “a part of or associated with the armed forces of the enemy.”⁵⁵⁷ At least on the information that has been revealed, Padilla’s case seems closer to *Milligan* than *Quirin*. Padilla apparently was not captured with physical evidence tying him to Al Qaeda forces, whether it be money, Al Qaeda material, or explosives. Greater scrutiny should be applied to determine what was the precise nature of Padilla’s alleged involvement with Al Qaeda. The absence of an alleged agency relationship would militate strongly against an assertion of enemy combatant status.

From the perspective of the public domain, the government’s designation of enemy combatants is suspect to the extent that any individuals are improperly classified as enemy combatants when they should be treated as criminal defendants and subject to public criminal proceedings.⁵⁵⁸ The government’s use of enemy combatant status in the cases made known to the public is less suspect, however, than the govern-

554. *Quirin*, 317 U.S. at 7–8, 21.

555. *Ex parte Milligan*, 71 U.S. 2, 6–7 (4 Wall) (1866).

556. *Id.* at 131; see *Quirin*, 317 U.S. at 44.

557. *Quirin*, 317 U.S. at 45.

558. A related issue arises when the government uses criminal procedures against a terror suspect, but then attempts to keep parts of the proceedings or evidence secret. The government’s case against Zacarias Moussaoui, a French citizen and the alleged “twentieth hijacker” who was supposed to be a part of the September 11 attacks, has spawned considerable controversy with the government’s attempt to keep parts of his case secret and to prevent Moussaoui from interviewing a witness Ramzi Binalshibh, who was captured in Pakistan and who allegedly told the U.S. government that Moussaoui was not a part of the September 11 plot. See Jerry Markon, *Court Seeks Deal on Terror Witness Access*, WASH. POST, Apr. 16, 2003, at A12. Judge Brinkema ordered that the government allow Moussaoui to depose the witness. See *United States v. Moussaoui*, 333 F.3d 509, 512 (4th Cir. 2003) (dismissing government’s appeal for lack of jurisdiction). Judge Brinkema also expressed great concern about the government’s attempt to use a “shroud of secrecy” in prosecuting the defendant. See *United States v. Moussaoui*, No. CR. 01-455-A, 2003 WL 21266379 (E.D. Va. Apr. 4, 2003) (“The Court . . . is disturbed by the extent to which the United States’ intelligence officials have classified the pleadings, orders and memorandum opinions in this case; and further agrees with the defendant’s skepticism of the Government’s ability to prosecute this case in open court in light of the shroud of secrecy under which it seeks to proceed.”). The government refused to comply with Judge Brinkema’s order, setting up the possibility of a dismissal of the case but appeal by the government or perhaps attempted transfer of the case to a military tribunal. See Jerry Markon, *Moussaoui Prosecutors Defy Judge*, WASH. POST, July 15, 2003, at A1.

ment's designation of 750 or more "special interest" alien cases. Unlike the alien cases, the government has publicly revealed the identities of the putative enemy combatants shortly after the President designated them as enemy combatants (although not the identities of those combatants captured in Afghanistan and detained in Guantanamo Bay). Moreover, courts have scrutinized the Executive's designation of two U.S. citizens as enemy combatants with individualized review of each case. The same cannot be said for "special interest" deportations, which involved secret deportation hearings of individuals whose identities have not been disclosed and whose designations were not subject to any individualized review under the Third Circuit's decision.

c. Expansion of Secret FISA Surveillance

I will end this Article as I began, with the secret world of FISA, a statute that establishes an exceptional apparatus for the government to conduct secret electronic surveillance of individuals in this country. FISA carves out a rare space in our democracy in which the public domain simply does not exist. Absent a right of access to any FISA related information, people must ultimately place blind trust in the government that it is not misusing its FISA powers, whether by conducting FISA surveillance for illegitimate purposes or by making misrepresentations in its submissions to the FISA Court. Blind trust is normally not the quality we expect of an informed citizenry in a democracy, but perhaps in this rare case we can tolerate it. The government may have a compelling need to use extreme, secretive measures when attempting to surveil agents of a foreign power who may be engaging in espionage. But, as the FISA Court's first published opinion revealed, there are dangers to depending on blind trust. Lost amid the Administration's public hailing⁵⁵⁹ of the FISA Court of Review's decision to absolve the government from using a "wall" in FISA minimization procedures was the stark fact that the FISA Court had found that government agents had submitted numerous false affidavits in the past to obtain FISA searches of individuals in the United States. Because FISA operates outside of the public domain, we may never know the full details about these falsehoods or the government's explanation for making them. But the incident should shake at least some of our confidence in blind trust.

In this light, the government's expansion of its FISA powers under the USA PATRIOT Act⁵⁶⁰ ("PATRIOT Act") and the Administration's

559. See David G. Savage & Henry Weinstein, *Court Widens Wiretapping in Terror Cases*, L.A. TIMES, Nov. 19, 2002, at A1.

560. Under the PATRIOT Act, some of the changes to FISA are slated to sunset on Dec. 31, 2005. Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (2001). One can expect a major battle in Congress over whether the changes to FISA should be made permanent.

contemplation of even greater expansion in a follow-up act being drafted by the Justice Department should provide reason for pause. The PATRIOT Act amended FISA to allow electronic surveillance as long as a “significant purpose” of the surveillance is to gather foreign intelligence from a person suspected of being an agent of a foreign power.⁵⁶¹ This marks a change from previous case law that recognized that it was impermissible for the government to use a FISA search if its primary purpose was to conduct a criminal investigation of the suspect.⁵⁶² In such case, the government was required to satisfy the more stringent requirements of Title III (the Federal Wiretap Act).

The PATRIOT Act also amended FISA to allow greater types of secret searches against U.S. citizens and lawful permanent residents. FISA now allows the government to obtain the secret use of pen registers and trap and track devices (that can monitor the numbers dialed by a phone and the numbers of incoming calls) against individuals, based on a certification by the government that the information sought is “relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities.”⁵⁶³ FISA also authorizes the government to conduct “roving surveillance” of a suspect’s communications regardless of location, phone, or email.⁵⁶⁴

In perhaps the most controversial provision of all, FISA now authorizes the government to require any entity or person to produce “any tangible thing”—apparently, including someone’s library and computer records—as part of an investigation “to protect against international terrorism or clandestine intelligence activities.”⁵⁶⁵ There is growing public concern that the government could use this authority to search the library and computer records of U.S. citizens without their knowledge and with few, if any, safeguards built into the system.⁵⁶⁶ Under the prior provision, FISA only authorized limited production requests upon a showing of “specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign

561. See 50 U.S.C. § 1804(a)(7)(B) (2000), amended by USA PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001).

562. See *supra* notes 11–12.

563. 50 U.S.C. § 1842(a)(1), amended by USA PATRIOT Act, Pub. L. No. 107-56, § 214, 115 Stat. 272, 286 (2001). Prior to this change, FISA did not allow such secret searches; instead, the government had to use the standard criminal procedures for obtaining a pen register. See 18 U.S.C. § 3122(b)(2); *American Civil Liberties Union v. U.S. Dep’t of Justice*, 265 F. Supp. 2d 20, 22–23 (D.D.C. 2003).

564. 50 U.S.C. § 1805(c)(2)(B), amended by USA PATRIOT Act, Pub. L. No. 107-56, § 206, 115 Stat. 272, 282 (2001).

565. *Id.* § 1861(a), amended by USA PATRIOT Act, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001).

566. See Kathryn Martin, Note, *The USA PATRIOT Act’s Application to Library Patron Records*, 29 J. LEGIS. 283, 288 (2003).

power.”⁵⁶⁷ Under the new provision, the government need not allege any such facts or connection to a foreign power by the target of the surveillance. FISA imposes a gag order on any library or person served with such a production request by the government.⁵⁶⁸ FISA would thus allow for the government to keep its searches of a person’s library or other records entirely secret, without any notice to the individual or opportunity for public scrutiny. Although the provision forbids the government’s use of surveillance against a person “solely upon the basis of activities protected by the first amendment of the Constitution,”⁵⁶⁹ it is difficult to see how an affected party could challenge an illegal search if the search is kept entirely secret. Attorney General Ashcroft has indicated, however, that as of September 2003, the government had not undertaken any such FISA search of a person’s library records.⁵⁷⁰

The Justice Department is now contemplating even further expansions of FISA, a fact that was only revealed through the efforts of the nonprofit watchdog the Center for Public Integrity.⁵⁷¹ FISA has defined “agent of foreign power” for U.S. citizens to require that the person be suspected of engaging in clandestine intelligence gathering for a foreign power, “which activities involve or may involve a violation of the criminal statutes.”⁵⁷² The Justice Department has proposed removing any limitation to criminal activities: what the U.S. citizen is doing could be perfectly legal, and the proposed amendment to FISA would still allow secret electronic surveillance of that person.⁵⁷³ The Justice Department has also proposed expanding the definition of “foreign power” to include a single person suspected of being engaged in such activities.⁵⁷⁴ While the government has proposed this provision out of a concern for a “lone wolf” terrorist, this contemplated provision may allow for indiscriminate surveillance of U.S. citizens who have no real connection to a foreign country, government, or entity—which was the essential animating force of FISA, the Foreign Intelligence Surveillance Act, as originally enacted.⁵⁷⁵

567. *American Civil Liberties Union*, 265 F. Supp. 2d at 23.

568. 50 U.S.C. § 1861(d), amended by USA PATRIOT Act, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001).

569. *Id.* § 1861(a)(1), amended by USA PATRIOT Act, Pub. L. No. 107-56, § 215, 115 Stat. 272, (2001).

570. See Dan Eggen, *Patriot Monitoring Claims Dismissed*, WASH. POST, Sept. 19, 2003, at A2.

571. See The Center for Public Integrity, <http://www.publicintegrity.org> (last visited Oct. 8, 2003).

572. 50 U.S.C. § 1801(b)(2)(A).

573. Domestic Security Enhancement Act of 2003 § 102, at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (proposed USA PATRIOT Act II) (draft Jan. 9, 2003).

574. *Id.* § 101.

575. See Alison A. Bradley, Comment, *Extremism in the Defense of Liberty?: The Foreign Intelligence Surveillance Act and the Significance of the USA PATRIOT Act*, 77 TUL. L. REV. 465, 489 (2002).

While the government may have legitimate reasons to seek to expand its secret FISA powers, any such expansion comes with inherent dangers. Expanding the scope of the government's powers to engage in secret surveillance and searches through secret, *ex parte* procedures necessarily reduces the scope of information in the public domain related to the government's conduct. People have no rights to access anything deemed by the government to be related to FISA surveillance. In fact, in FISA's entire twenty-five-year history, none of the thousands of people who have been subjected to covert FISA surveillance has ever been granted the opportunity to review the affidavits the government used to obtain the search through the *ex parte* procedures of FISA. We have countenanced FISA's secret procedures and searches in our democracy only as an exceptional procedure, separate from the criminal process, that was necessary to serve national security interests. These *exceptional* procedures were thought an improvement on the abuses of the past in which the FBI under J. Edgar Hoover conducted completely unregulated "black bag" operations on people whom the government viewed as suspicious based on "national security grounds," such as the civil rights leader Dr. Martin Luther King, Jr.⁵⁷⁶

The danger in expanding FISA's secrecy measures is transforming the exceptional procedure into the standard, prevailing practice, thereby displacing the traditional safeguards of the criminal process. Even before the Patriot Act amendments, FISA appeared to be the government's procedure of choice over Title III for obtaining electronic surveillance. In 1994, the government sought over 600 FISA applications, 200 more than it sought under Title III.⁵⁷⁷ During the period from 1978 through 1999, the FISA Court approved 11,883 FISA searches sought by the government, while not denying any.⁵⁷⁸ After the Patriot Act, it is more than likely that the government will attempt to utilize FISA (over Title III) even more.

I do not mean to suggest in any way that whenever the government uses secrecy, there is reason to suspect that government agents are attempting to skirt the law. It is my belief that probably in the good majority of instances involving government secrecy we can expect that government agents are faithfully carrying out the duties entrusted to them within the letter of the law. The question is not, however, what my

576. See S. REP. NO. 95-604(II), at 28 (1978), reprinted in 1978 U.S.C.C.A.N. 3970, 3997. President Nixon authorized extensive use of secret, unregulated electronic surveillance of suspected "subversive groups," as well as his political adversaries in the Democratic Party. See Bradley, *supra* note 575, at 469.

577. See MCGEE & DUFFY, *supra* note 3, at 329.

578. See Bradley, *supra* note 575, at 479.

belief is, or even whether government agents are, on the whole, acting properly. Rather, the question is whether a system of democracy can tolerate more and more things related to the administration of government that do not ever fall into the public domain—whether because of the secret procedures for FISA searches, enemy combatants, or “special interest” deportation hearings, or because of a vague policy denying public access to information deemed sensitive by the government. As the Court has noted, “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”⁵⁷⁹

What is worrisome for our democracy is that the expansion of the government’s secrecy domain results in a corresponding shrinkage of the public domain. Where the public domain does not operate, the government controls the public’s ability to access information that is necessary to critique the administration of government. Under FISA, there is little, if any, way for people to know if the government is carrying out unlawful or unconstitutional searches against them, since the searches are conducted in secret.⁵⁸⁰ Secrecy vitiates scrutiny and therein lies the danger for democracy.

3. *The Extinction of the Public’s Domain?*

Although we have not yet reached the stage of the public domain’s extinction, the current situation is precarious. The government has asserted the extraordinary power to remove things from the public domain through intellectual property and government secrecy. If courts uphold the government’s assertion of power over the public domain, then, as depicted below in Diagram D, the government can pierce through the buffer of the public domain (as depicted by the arrow in the center of the diagram) and effectively deny the public’s full access to culture, know-how, and information—things that all once belonged to the people.

This piercing of the public domain upsets the careful checks and balances effectuated by the public domain. As depicted in Diagram C,⁵⁸¹ the public domain is meant to serve as a restraint against government overreaching by creating a buffer zone in which the public is guaranteed not only rights of full access, but also the ultimate control over the material. The government’s removal of materials from the public domain, however, enables it to invade the public domain, cutting off the public’s right of full access and usurping the power of the people. In such case, and in

579. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

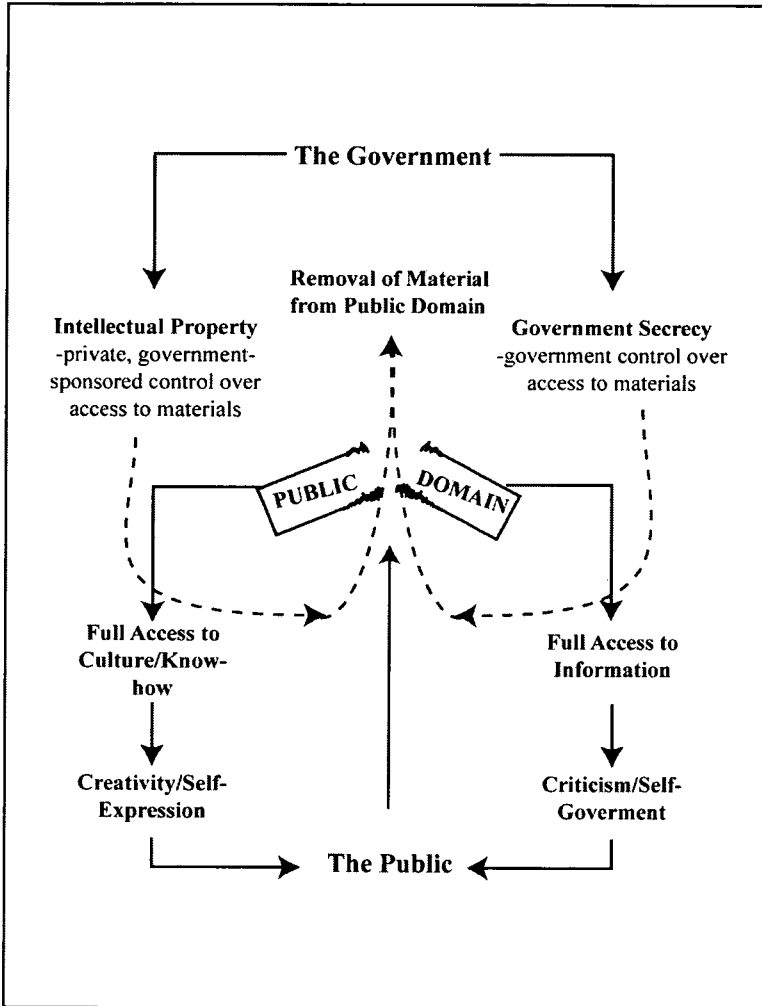
580. See Amy Goldstein, *Fierce Fight Over Secrecy*, *Scope of Law*, WASH. POST., Sept. 8, 2003, at A1.

581. See *supra* Diagram C.

short order, the public domain will be lost. For if the public domain provides no restraint on government power, then the public domain does not act as a buffer and simply drops out of the picture. And, then, we find ourselves left with the exact same predicament as depicted earlier in Diagram B, a society in which everything is potentially subject to government control.⁵⁸²

DIAGRAM D

THE GOVERNMENT'S ASSERTION OF POWER OVER THE PUBLIC DOMAIN



582. See *supra* Diagram B.

D. CAVEATS AND CONCERNS

1. *Competing Views of the Public Domain*

I have elaborated a conception of the public domain based on the first principles on which the doctrine was established. I have traced the development of the concept in the case law and its derivation from notions of public rights and public property, focusing on those cases that were pivotal in recognizing the concept. The public domain, as it was originally understood, served as an important restraint on the government's power to control public access to materials.

This is not to say that there is no competing view of the public domain. As evolution theory suggests, we may find competing doctrines that vie to fill the same niche. There is a competing view that the public domain imposes no substantive limit on government power and the government may therefore alter it at will.⁵⁸³ The question, then, is which view of the public domain is right. I believe the view that the public domain is a substantive restraint is more faithful to Supreme Court precedent and the first principles on which the public domain was established. I have also attempted to show how and why this conception of the public domain is essential to democratic governance. But, as evolution theory teaches, the soundness of this doctrine does not necessarily insure its survival. Ultimately, the survival of the concept of the public domain will depend largely on the decisions courts make in cases involving the public domain in the not too distant future. "Different rules" are threatening to displace the principles on which the public domain is based.

2. *Exceptions to the Rules Governing the Public Domain*

One might also object to my use of categorical rules to describe the public domain, for example, in my contention that Congress has no power to remove material from the public domain through the grant of intellectual property rights. It could be argued, however, that every rule has exceptions, as suggested by my analysis of secret deportation hearings that are permissible if justified by strict scrutiny. It could also be argued that catastrophes or emergencies, such as war, may necessitate

583. The government has asserted this competing view in defense of copyright restoration's removal of thousands of works from the public domain. For support, the government offers sporadic examples in which Congress purportedly removed material from the public domain by the grant of intellectual property rights in the past. See Mem. in Supp. of Def. Mot. to Dismiss, *Golan v. Ashcroft*, No. 01-B-1854, at 3-4 (D. Colo. filed Apr. 29, 2003). For argument's sake, I'll assume that some of these past examples are instances in which Congress removed material from the public domain. This, however, says nothing about the constitutionality of the enactments. Nor does it vitiate the existence of the long line of case law recognizing the concept of the public domain as a substantive limit on government power.

departures or exceptions to the normal rules.⁵⁸⁴ And the use of such exceptional procedures or measures may coexist with, instead of vitiating, the ordinary rules.⁵⁸⁵

While it is true that legal rules sometimes have exceptions, and emergencies may sometimes require them, exceptions are just that—exceptions, and not the rule. Today's debate over the concept of the public domain in copyright law is, however, not about recognizing an exception; it is about the very rule. The government has asked courts to recognize the rule that it has a general power to remove works from the public domain by the grant of copyrights, not in an exceptional circumstance, but in *any* circumstance. Likewise, in the context of government secrecy, the government has asked courts to recognize that it has a general power to hold secret deportation hearings not in an exceptional circumstance, but in *any* circumstance, since First Amendment scrutiny does not apply at all, according to the government.⁵⁸⁶ Thus, whether or not exceptions exist to the presumptive rule, what is at stake in these cases is the very notion that the public domain acts as a restraint on government power under the Copyright Clause or First Amendment. To embrace the government's view would mean that the public domain has no significance as a legal doctrine and that the government can restrict people's access to things in the public domain at will.

3. *More Than Just Conclusions?*

Like the categories of "public forum" in First Amendment law,⁵⁸⁷ the term public domain is open to the criticism that it is a conclusory or formalistic label that obscures the real issues in a case. This objection applies not just to my theory of the public domain, but to any theory that supports the use of the term.

While I concede that labeling something "in the public domain" is a conclusion, I do not believe this simple fact vitiates the importance of the term. Legal conclusions often have important consequences for future conduct. When the Court says facts, ideas, and other material or proceedings are all in the public domain, this conclusion carries important ramifications beyond a single case. People know that for their future conduct such subject matter is free for their unrestricted use. These categories of material are—as the traditional public fora of public streets and parks are in the First Amendment context—indicators of areas in which the public has important rights of access.

584. See, e.g., Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1058–69 (2003).

585. *Id.* at 1097.

586. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 686 (6th Cir. 2002).

587. See *United States v. Kokinda*, 497 U.S. 720, 740–42 & n.1 (1990) (Brennan, J., dissenting).

Moreover, the term “public domain” is not just a conclusion or an empty label as may sometimes be the case with the more open-ended term the “public interest.” The public domain is a doctrine that has an underlying theory or logic that helps to frame the analysis of different issues involving intellectual property and government secrecy. When we speak of the public domain, we are talking about a sphere in our democratic society that is ultimately meant to be beyond the government’s control or interference. The doctrine gives us more than just the conclusion that material is beyond government control; it tells us the reason why it is beyond government control as well as the particular mechanism that makes it beyond government control. When we deem something to be a “public thing” or in the “domain of things public,” we are affirming its importance in our democratic form of government. When the public owns it, no one has authority to take it away from the public because it is so essential to democratic governance that all citizens must have access to it.⁵⁸⁸

4. *Oscillation Versus Punctuated Equilibrium*

My use of punctuated equilibrium theory ignores other kinds of development in the law. It is quite possible that the law develops in some areas by oscillating between two different poles, such as increased government openness and increased government secrecy, or strong IP protection and a more balanced approach. I do not rule out the possibility that such oscillation occurs. But this does not preclude the possibility that the law faces punctuated equilibria as well. Ackerman’s theory shows quite convincingly, I believe, that major shifts in the law do occur in certain, punctuated moments. I have tried to sketch out above the reasons why the concept of the public domain may now be facing such a moment. The controversies in which the public domain is at issue challenge the very notion that the concept has any legal significance at all. The choice is not one of oscillation between different poles, but of the very existence of the pole itself.

⁵⁸⁸ Perhaps to some the notion of public ownership may seem like an archaic notion. I believe, however, it still has tremendous purchase today, particularly in cases that go to the heart of democratic governance. It is evident in the Sixth Circuit’s holding that the Creppy Directive was unconstitutional, *Detroit Free Press*, 303 F.3d at 683 (“When government begins closing doors, it selectively controls information rightfully belonging to the people.”), as well as in Fifth Circuit’s recent decision holding that municipal codes are in the public domain and owned by the people, *Veeck v. Southern Bldg. Code Congress Int’l, Inc.*, 293 F.3d 791, 799 (5th Cir. 2002) (en banc) (“[P]ublic ownership of the law means precisely that ‘the law’ is in the ‘public domain’ for whatever use the citizens choose to make of it.”).

5. *No Natural Legal Selection*

Finally, the analogy I have drawn to evolution is not perfect. For if it were, we would be helpless to stop the “different rules” imposed by catastrophes or the extinction of doctrines they caused. Extinction of doctrines would occur as a natural process.

Unlike in evolution, however, the “different rules” in the law are created by intentional acts of human beings—Congress passes a law, the Executive issues an order, and courts render a decision. At each level, the decision to adopt a “different rule” is always one that involves the possibility of rejecting the rule. Congress could have decided against removing works from the public domain by the grant of retroactive copyrights. The Executive could have decided against the use of secrecy in detaining U.S. citizens outside the criminal process or in deportation proceedings against aliens. And courts have the power to reject a “different rule” that is unconstitutional or, where ambiguity in the rule exists, to interpret it in a way so as to avoid constitutional difficulties. “Different rules” need not—indeed, should not—be allowed to displace the constitutional principles of the public domain under the Copyright Clause and First Amendment.

It is not inevitable, I hope, to cede the public domain to the pressures caused by the government’s attempt to expand its zone of secrecy, remove works from the public domain, or deprive the public access to things once considered public. In the law, at least, a catastrophe can be avoided. The question then is whether we have the will to avoid it.

CONCLUSION

The concept of the public domain has never been more the subject of debate. Today’s debate is seriously flawed, however. First, it has ignored the origin of the concept and the historical development of the term from the twin concepts of *publici juris* and public property. Unmoored from its origin, the public domain becomes in today’s debate an empty shell, a figment that people see and grasp only on the surface. Second, the debate focuses primarily on copyright law and almost exclusively on intellectual property law to understand the concept of the public domain. This copyright-centric view of the public domain ignores the many uses of the public domain in other areas of law involving government secrecy.

This Article attempts to correct these two major flaws, first, by tracing the historical development of the concept of the public domain and, second, by examining the interrelationships among the various uses of the public domain in IP and government secrecy cases. Drawing upon evolution theory as a framework, I have proposed a unified theory of the

public domain that shows the parallel origin, structure, and function of the various uses of the public domain in IP and government secrecy cases. By dispersing power among the people and according everyone a right of free access, the public domain serves as a constitutional restraint on the government's power to control the public's access to culture, know-how, and information. Whatever lies in the public's domain belongs, by definition, to the people and is, therefore, off-limits to government control.

Under this understanding of the public domain, there are reasons for concern about recent measures adopted by the government that adversely affect the public domain. These have occurred in both the context of IP, where the government has asserted the power to remove thousands of works from the public domain, and in the area of government secrecy, where the government has withdrawn increasingly more information and its own conduct from the purview of the public domain, post-9/11.

What we are now witnessing may very well be the extinction of the public domain as we know it. Just as in nature where superior organisms, best-fitted to the environment, may become extinct in a sudden, "catastrophic" moment, so too a superior doctrine that is best-fitted to democratic governance may become extinct in a catastrophic moment that imposes "different rules" on what is necessary for survival. For the public domain, these "different rules" are not of the positive kind as they are in Bruce Ackerman's concept of a "constitutional moment," which is democratic-enhancing because effectuated by "We the People." The moment we now face is, by all measures, democratic-disabling: The government asserts the power to shrink the public domain (by removing thousands of works from the public domain) and the power to skirt it (by shifting its conduct from the purview of the public domain to the domain of secrecy). If the government's view prevails, and courts recognize a general power in the government to remove material from the public domain, the government can control the public's access to culture and know-how, just as it can control the public's access to information related to the administration of government. The public's domain would then become the government's domain, where everything is ultimately subject to government control.
