

## PRINCIPLES IN PRACTICE: “UNSTUCK” OR STICKY?

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In response to Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).

In previous writings, Professors Balkin and Siegel (the authors), both together and separately, have made major contributions to the scholarly literatures on constitutional doctrine and on social movement activism. Their recent essay, *Principles, Practices, and Social Movements*,<sup>1</sup> attempts to bridge the two fields at a high level of abstraction, albeit with useful examples. The bridge is an elegant structure, but not without flaws. It is a valuable project that will provide a point of departure for future scholars who may wish to cross the same divide.

### I. OVERVIEW OF THE BALKIN-SIEGEL POSITION

The authors introduce us to “two current controversies in American law and politics . . . [:] whether the expansion of copyright . . . conflicts with the free speech principle . . . [and] whether governmental collection and use of racial data violates the antidiscrimination principle.”<sup>2</sup> Both controversies involve the claimed “application of a longstanding principle to a longstanding practice—a practice that heretofore has not been understood to be implicated by the principle.”<sup>3</sup> Such a claim “draws into question not only the legitimacy of the practice, but also the authority and scope of the principle.”<sup>4</sup> Thus, “[w]hile some argue that the free speech principle delegitimizes expansion of copyright terms . . . , others insist that the challenged practice is fully consistent with the free speech principle . . . .”<sup>5</sup> Hence this question:

Does the free speech principle call into question copyright or does

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<sup>1</sup> Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).

<sup>2</sup> *Id.* at 927.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

copyright raise disturbing questions about the scope and meaning of the free speech principle? . . . [The] Essay is about the ways that principles and practices can draw each other's authority into question, and about the role that political contestation plays in spurring those challenges . . . . A principle always comes with an imagined regulatory scene that makes the meaning of the principle coherent to us. When that background understanding is disturbed the principle becomes "unstuck" from its hermeneutic moorings; it no longer seems clear how the principle applies or even whether it should apply.<sup>6</sup>

## II. PRACTICES AND PRINCIPLES

The authors repeatedly describe the "unsticking" situation as one in which the contending practices and principles are "longstanding." But why must they be longstanding? True, a long and widely accepted practice usually enjoys a strong presumption of constitutionality, therefore has a leg up on any abstract principle that gets in its way, and may require the trimming of that principle to make room for it. (This may indeed be what has happened in the Copyright/First Amendment situation, as we shall see.) On the other hand, a novel practice, even without a presumption of validity, can present a new and unexpected challenge to a principle that was not designed for it. The authors briefly refer to three examples in which principles "once uncontroversially accepted become counterintuitive . . . as they are applied to new situations and problems": affirmative action, telecommunications regulation, and campaign finance reform.<sup>7</sup> All three examples involve novel, not longstanding, practices. The use of racial preferences in university admissions was a recent innovation when it was challenged in the Supreme Court<sup>8</sup> in the 1970s. The unprecedented "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992<sup>9</sup> reached the Supreme Court<sup>10</sup> only two years after enactment. The Federal Election Campaign Act of 1971,<sup>11</sup> which was partially invalidated in *Buckley v. Valeo*,<sup>12</sup> had been enacted only three years earlier. In all three instances, the questioned

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<sup>6</sup> *Id.* at 928.

<sup>7</sup> *Id.* at 929-30.

<sup>8</sup> *See De Funis v. Odegaard*, 416 U.S. 312 (1974) (law school); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (medical school).

<sup>9</sup> Pub. L. 102-385, § 4, 106 Stat. 1460, 1471-77 (codified as amended at 47 U.S.C. § 534 (2006)).

<sup>10</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

<sup>11</sup> Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-55).

<sup>12</sup> 424 U.S. 1 (1976).

practices were understood to be constitutionally problematic from the beginning. Plainly, principles can be rendered problematic even, and perhaps especially, by practices that are brand new.

For that matter, why must the principle itself be “longstanding?” The privacy principle unveiled by the Court in *Griswold v. Connecticut*<sup>13</sup>—no more than distantly related to any constitutional text or precedent—was only eight years old when the Court extended it from contraception to abortion. Once again, then, why did the authors confine their “model” to “longstanding” practices and principles? Perhaps they wanted to make things as hard for themselves as possible—wanted to show that even in the situation least intuitively favorable to their thesis, where the compatibility between the particular practice and particular principle seemed most unassailable—this understanding could still be “disturbed” by scene-shifting and social movement pressures. Or perhaps they just wanted to talk about copyright and racial data-collection, and looked for the narrowest features they had in common.

A central concept in the authors’ model is the “regulatory scene”—“the set of background understandings about the paradigmatic cases, practices, and areas of social life”<sup>14</sup>—in which a constitutional principle is originally forged, from which it derives its meaning, and the disturbance of which disorients or “unsticks” the principle. Thus, “[t]he regulatory scene for the no-content-discrimination principle is the practice of state censorship or repression of dissent.”<sup>15</sup> The history of the free speech principle, however, is the history of its expansion from this original regulatory scene to other forms of regulation, other subjects of discussion (e.g., literature or commerce), other (e.g., nonverbal) modes of speech, and other (e.g., electronic) media of communication. Are all of these extensions new and different “regulatory scenes?” Are any of them? If the former, then the unsticking of constitutional principles is not an intriguing exception but a garden-variety feature of constitutional law. Balkin and Siegel appear to have in mind a much more limited set of cases, though their limiting characteristics (other than “longstandingness”) are not entirely clear.

My sense is that the most interesting situations are those in which practice and principle are both grounded in and claim justification from the same liberal value (free speech versus free speech, equality versus equality), or in which one high-ranking liberal value is pitted

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<sup>13</sup> 381 U.S. 479 (1965).

<sup>14</sup> Balkin & Siegel, *supra* note 1, at 929.

<sup>15</sup> *Id.* at 931.

against another (free speech versus equality). Nearly all of the examples mentioned by the authors—affirmative action, campaign finance reform, “must-carry” cable regulation, and, I would add, the regulation of hate speech (pornography or university racial- or sex-speech codes)—fit this pattern. (The only one that doesn’t fit is racial data-gathering, and even that one sometimes does). In these cases, application of the constitutional principle would not only carry it beyond its traditionally justifying norms and values, but would actually turn the principle against those norms and values (or others of equal stature).

### III. THE COPYRIGHT EXAMPLE

The example on which the authors chiefly focus is the alleged conflict between copyright practice and free speech principle. The case that has, so far at least, been the key battleground for this controversy is *Eldred v. Ashcroft*,<sup>16</sup> decided in 2003. At issue was the constitutionality of the Sonny Bono Copyright Term Extension Act of 1998<sup>17</sup> (CTEA), which lengthened the duration of copyrights from seventy to ninety years both for future and existing copyrighted works, including those about to fall into the public domain. The petitioners were individuals and businesses that relied on public domain speech for their livelihood or creativity, including commercial book publishers, a non-profit film-preservation group, a noncommercial Internet publisher (Eldred), and other members of the “free culture” movement (sometimes also known as the anti-enclosure movement, the anti-copyright movement, intellectual property restrictors, or digitalists). They were represented by Lawrence Lessig, a leading light of the free culture movement and a distinguished legal scholar. They sought a declaratory judgment that the statute violated both the Copyright Clause of Article I<sup>18</sup> (in that repeated retroactive extensions of the term were functionally equivalent to a perpetual grant) and the First Amendment (in that the statute was a content-neutral restriction of speech and, as such, was subject to intermediate scrutiny rather than the rational basis review that applied to the Copyright Clause claim).<sup>19</sup>

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<sup>16</sup> 537 U.S. 186 (2003).

<sup>17</sup> Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended at 17 U.S.C. §§ 302, 304 (2006)).

<sup>18</sup> See U.S. CONST. art 1, § 8, cl. 8 (empowering Congress “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their Writings and Discoveries”).

<sup>19</sup> At one point, the authors say “[w]hen we move from prosecutions of anti-war protesters to the constitutionality of . . . injunctions for copyright infringement, we do

The Court, by a 7-2 vote, rejected both claims. Justice Ginsburg wrote for the Court; no member of the majority wrote separately;<sup>20</sup> and Justices Stevens and Breyer wrote dissents, but neither endorsed the petitioners' free-standing First Amendment claim.<sup>21</sup> On the Copy-

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not know whether these practices are discriminations on the basis of content to which strict scrutiny might apply." Balkin & Siegel *supra* note 1, at 932. But it is clear that the content-based/content-neutral distinction was not at issue in *Eldred*. Petitioners expressly conceded that the statute was content-neutral and entitled only to intermediate (but still heightened) scrutiny. *Eldred*, 537 U.S. at 218 n.23. Judicial precedent and the weight of scholarly opinion support that concession. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 536 (1987) (finding that statute granting exclusive rights to use the word "Olympic" for commercial purposes is content-neutral); *Regan v. Time, Inc.* 468 U.S. 641, 656 (1984) (holding that color and size limitations on the publication of color reproductions of U.S. currency is a content-neutral restriction); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294, 326-30 (S.D.N.Y. 2000) (holding that the Digital Millennium Copyrights Act's prohibition on the distribution of software designed primarily to circumvent access or copying codes is content-neutral); see also Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional*, 36 LOY. L.A. L. REV. 83, 93-94 (2002) (distinguishing general copyright statutes from hypothetical discipline-specific copyright statutes and noting that the former are content-neutral); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skin*, 54 STAN. L. REV. 1, 47-54 (2001) (characterizing copyright as content-neutral). But see Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 186 (1998) ("It's also incorrect to argue that intellectual property law is content-neutral and therefore should be subject to laxer rules.").

<sup>20</sup> Lessig later declared himself mystified by the fact that the five conservative Justices who, in *United States v. Lopez*, 514 U.S. 549 (1994) and *United States v. Morrison*, 529 U.S. 598 (2000), voiced deep concern for the need to limit congressional power under the Commerce Clause, seemed unconcerned about limiting congressional power under a neighboring Article I clause that contains express language of limitation. LAWRENCE LESSIG, *FREE CULTURE: HOW THE BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 218-20, 242-43 (2004). The fact that none of these five felt it necessary to explain themselves or for any other reason to write separately was also troubling, implying either that they fully agreed with the majority opinion (an opinion frequently criticized in the law reviews) or that any disagreements were too minor to warrant public airing.

At least two members of the "silent five" revealed their thinking during oral argument. Justice O'Connor worried that, Congress having repeatedly extended copyright from the very beginning of our history, Lessig's position risked disturbing these prior extensions, or at the very least that of 1976. *Id.* at 238. Chief Justice Rehnquist's difficulty was more basic: that Lessig was asserting a "right to copy verbatim other people's books." *Id.* at 240. Nor, in retrospect, is there any mystery about Justice Scalia's vote, since in *Gonzales v. Raich*, 125 S.Ct 2195, 2215 (2005), Scalia had supplied the decisive fifth vote to uphold the application of the federal Controlled Substance Act (CSA) to state-authorized use of marijuana for medical purposes. He distinguished *Lopez* and *Morrison* on the ground that the statutes in those cases, unlike the CSA, were not integral parts of a comprehensive legislative scheme clearly within congressional Article I power. Copyright, of course, satisfied Justice Scalia's position.

<sup>21</sup> Justice Stevens did not speak to the First Amendment issue at all. Justice Breyer went no further than to say that the rationality of the congressional action should be considered "in light of the expressive values underlying the Copyright Clause, related as it is to the First Amendment," and that he would "look harder than does the major-

right Clause issue, the Court, relying on text, history, and precedent, and adopting a highly deferential stance, concluded that the CTEA was a “rational exercise of the legislative authority conferred” by the Clause.<sup>22</sup> On the First Amendment issue, it rejected petitioners’ “plea for imposition of uncommonly strict scrutiny of a copyright scheme that incorporates its speech protective purposes and safeguards,”<sup>23</sup> such as the “fair use” exception and the distinction between copyrightable expression and uncopyrightable facts and ideas. The Court stressed the proximity in time of the Copyright Clause and the First Amendment and inferred from this the Framers’ view that “copyright’s limited monopolies are compatible with free speech principles” and (echoing language in a previous case) that “‘copyright itself [was intended] to be the engine of free expression.’”<sup>24</sup> It declared that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches” but that “[t]o the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them.”<sup>25</sup>

Does *Eldred* exemplify the kind of controversy described in the Balkin-Siegel model—a longstanding practice claimed to violate a longstanding principle? Not exactly. Extension of the copyright term for existing as well as future works was clearly a longstanding practice; Congress had practiced it on several occasions both in the nineteenth and twentieth centuries,<sup>26</sup> without constitutional challenge. But the opposing constitutional principle—that the statute was separately subject to heightened scrutiny under an independently applicable First Amendment—was anything but longstanding. The contrary proposition—that the First Amendment does *not* protect copying or other infringing uses of copyright material, that the Amendment does *not* place external limits on copyright law, and that a law presumed or held to be valid under the Copyright Clause need *not* run another and more demanding gauntlet under the First Amendment—was far better grounded in precedent and, arguably, in history. The Copyright

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ity at the statute’s rationality”—though less hard than the Court had done in some previous rational basis precedents. *Eldred*, 537 U.S. at 264, 245. He also took “into account the fact that the Constitution is a single document, that it contains both a Copyright Clause and a First Amendment, and that the two are related.” *Id.* at 243.

<sup>22</sup> *Id.* at 204.

<sup>23</sup> *Id.* at 219.

<sup>24</sup> *Eldred*, 537 U.S. at 219 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)).

<sup>25</sup> *Id.* at 221.

<sup>26</sup> Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of Mar. 4, 1909, ch. 329, Pub. L. No. 60-349, 35 Stat. 1075; Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541.

Clause and the Amendment were almost contemporaneous, and the first Copyright Act was already on the books when the Amendment was ratified. Moreover, the two regimes coexisted for 180 years without a hint of conflict. Legal scholarship turned its attention to the issue in 1970, when a seminal article by Melville Nimmer explored the relationship between the two regimes and concluded that they were generally compatible because of copyright law's internal safeguards, which adequately (with rare exceptions) accommodated free speech values.<sup>27</sup> Lower federal courts soon adopted the Nimmer view,<sup>28</sup> and the Supreme Court likewise embraced it, first in a brief 1977 footnote,<sup>29</sup> and later, more extensively, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, which famously declared that "the Framers intended copyright itself to be the engine of free expression,"<sup>30</sup> and that the idea/expression dichotomy had struck a "definitional balance" between the First Amendment and the Copyright Act.<sup>31</sup> Thus, by 1985, the principle of compatibility, and of the non-applicability of the First Amendment per se to copying, was no longer merely a tacit and untested assumption but the explicit doctrine of the Supreme Court. The Nimmer/*Harper & Row* resolution was not merely (what the authors call) a "mediating" rule designed to preserve a longstanding First Amendment principle without discarding existing copyright practice. It was a reconciliation of two constitutional provisions of equal antiquity whose de facto existence and assumed compatibility predated any other understandings of the meaning of the First Amendment. For the same reasons, the copyright/free speech interface was not a new "regulatory scene," different from some earlier setting in which the meaning of the First Amendment was originally forged.

Balkin and Siegel concede that Nimmer's resolution "stabilized the conflict between free speech and copyright for a time."<sup>32</sup> Their argument is that this more-or-less-settled understanding was "disrupted" by the growth and commercialization of the Internet in the 1990s and the emergence of mobilized and countermobilized groups seeking to protect and advance their respective interests in response

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<sup>27</sup> Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 UCLA L. REV. 1180 (1970).

<sup>28</sup> See, e.g., *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1171 n.16 (9th Cir. 1977).

<sup>29</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 577 n.13 (1977).

<sup>30</sup> 471 U.S. 539, 558 (1985).

<sup>31</sup> *Id.* at 556.

<sup>32</sup> Balkin & Siegel, *supra* note 1, at 935.

to the new digital technology.<sup>33</sup> In effect, the authors argue that the emergence of the Internet and the social movement contestation that churns around it has created a new “regulatory scene” in which the application of the First Amendment to copyright has become newly uncertain.

The authors do not explain how political contestation or effective mobilization by the opponents of copyright extension will alter the constitutional issue or its outcome. It is easy to see how ramped-up political activism can lead to successful results in the *legislative* arena and, beyond that, how it can increase the flow of constitutional litigation to the courts and ultimately to the Supreme Court. In the long run, it can create a legion of citizens duly appreciative of the cultural riches and interactive opportunities that digital technology makes available to them and that expanded (or even unexpanded) copyright restriction denies them. That legion may even include judges, their families, or others to whom they listen. In the short term, however, the constitutional bearing of social movement activity is not crystal clear. The best answer is that digital technology makes possible far more extensive use of expressive materials in the public domain than was ever dreamed of before and thus increases, perhaps dramatically, the costs to the public of prolonged extension of the copyright monopoly. Whether this alteration of the empirical cost-benefit balance will be seen to have constitutional significance is difficult to predict.

At present, only Justice Breyer seems to regard either of the constitutional issues in *Eldred* as hinging on a cost-benefit balancing test. A surprising feature of the case is how little was made of the technological point either by the petitioners or (no doubt in consequence) by the Justices (with the exception of Breyer). Lessig’s brief does not make a special point of the impact of the statute on the new digital media<sup>34</sup> of expression and, in an oral exchange with Justice Kennedy, he disclaimed any such empirical argument.<sup>35</sup> The Ginsburg and Stevens opinions do not mention the new technology. In sum, Breyer aside, the opinions and arguments in *Eldred* would not have been significantly different had the issues been presented in an infringement suit where the sole infringer and the sole copyright owner were both commercial book publishers. Whether they would have been differ-

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<sup>33</sup> *Id.* at 936.

<sup>34</sup> Such a demonstration was made difficult by the procedural posture of the case, a facial challenge to the statute with no trial record.

<sup>35</sup> Transcript of Oral Argument at 10, *Eldred v. Ashcroft*, 537 U.S. 186 (No. 01-168).

ent if the sole infringer had been a noncommercial Internet publisher like Eldred himself is hard to say. Such a case might conceivably squeeze within a liberal reading of the fair use exception, and that might be the wave of the future. *Eldred* will stand as a strong precedent against self-standing First Amendment scrutiny but leaves the door open a crack for liberalization of copyright's internal safeguards. In this latter context, however, the burden of persuasion will rest upon the would-be users of copyrighted material rather than upon the government.

As of now, it must be said that the copyright/free speech interface is *not* an illustration of how constitutional principles become unstuck under the disruptive pressure of social movement activities. It is an illustration of the resiliency—the “stickiness”—of established principles even in the face of powerful advocacy, scholarly criticism, and technological pressure. That, of course, may change as the free culture movement gains adherents and political momentum. Balkin and Siegel predict that it will. They liken *Eldred* to *Bowers v. Hardwick*,<sup>36</sup> which in 1986 upheld Georgia's sodomy law only to be overruled seventeen years later in *Lawrence v. Texas*.<sup>37</sup> They suggest that *Eldred* was decided in the early stages of the free culture movement just as *Bowers* was in the early years of the gay rights movement and that further mobilization and contestation by the former movement may achieve the same success it did for the latter.

There are, however, pertinent differences between the sodomy and copyright situations. For one thing, Georgia's sodomy statute was one of many such laws enacted by state legislatures long ago but still on the books. Gay rights advocates could pick them off one by one, leaving the Court to mop up the few remaining outliers, as it did in *Lawrence*. In both sodomy cases, the Court took note of prevailing public attitudes, measured by a head count of state statutes. *Bowers* observed that all states still had sodomy laws a quarter-century earlier and that twenty-four still had them;<sup>38</sup> *Lawrence*, going the other way, pointed out that nearly half of those statutes had been repealed in the intervening years and that none of the rest was enforced.<sup>39</sup> No such metric of shifting public opinion will be available in the copyright context, where Congress alone has the power to legislate.

The free culture movement might very well win victories in Congress, but these would not necessarily enhance the prospect of consti-

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<sup>36</sup> 478 U.S. 186 (1986).

<sup>37</sup> 539 U.S. 558 (2003).

<sup>38</sup> 478 U.S. at 192-94.

<sup>39</sup> 339 U.S. at 573.

tutional victory in the Supreme Court; indeed they might have the opposite tendency. A possibility in point is a bill proposed by Lawrence Lessig immediately after *Eldred* and introduced in Congress a few months later as the Public Domain Enhancement Act<sup>40</sup> (PDEA). It would provide an initial copyright term of fifty years, renewable for two additional ten-year terms on payment of a small fee. Still-valuable copyrights would of course be renewed, while those no longer valuable would presumably be allowed to lapse. Since it is estimated that 98% of all copyrighted materials no longer have commercial value a half century after their creation, enactment of the PDEA would regain for the public domain much of the ground lost to it by the CTEA and *Eldred*. But by reducing the adverse impact of copyright law on free expression, the reform might weaken, not strengthen, the case for free-standing First Amendment scrutiny. Indeed, the shortened initial term might well come to be viewed as simply another “internal” safeguard for free expression.

A second difference between the sodomy and copyright issues is the opposite-cutting way in which international legal norms bore upon each. In both *Lawrence* and *Eldred*, the Court attached significance to those norms. Non-conformity to the European Convention on Human Rights counted against the Texas sodomy statute, whereas the need for conformity to the Berne Convention was a major justification for the CTEA. Given that the United States is a large net exporter of intellectual property, and that it aspires to leadership in the international effort to prevent piracy, it arguably cannot afford to be seen as less protective of copyright than its European counterparts. This may be an ongoing obstacle to assaults upon further copyright extension laws.

A more basic difference, perhaps, lies in the nature of the rights being asserted. That a person should be made a criminal for his or her private sexual choices is an idea whose time has long since passed in this and other liberal societies. That a person should not be permitted to make unauthorized use of someone else’s work is an idea whose time has *not* passed and may never pass.

It should be noted, once again, that even if the Court were persuaded that the built-in safeguards do not adequately protect free speech values, its response would more likely be to broaden or supplement those built-ins (either through statutory construction or Copyright Clause interpretation) rather than to disturb the settled understanding that the First Amendment, with its heightened levels of

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<sup>40</sup> H.R. 2601, 108th Cong. (2003).

judicial scrutiny, does not operate as an independent and external constraint on copyright. Whether this internal/external distinction would matter in practice would depend on how much deference the Court gave congressional judgments in the process of defining and applying the newly liberalized standards.

#### IV. RACIAL DATA-COLLECTION

The authors' racial data-collection example is less persuasive than the copyright one. That the use of racial categories in the census would be held unconstitutional without regard to its intended or actual use is intuitively unlikely. Unlikely, too, is the prospect that a successful social movement could be mobilized in support of such an outcome. The authors offer little of a concrete nature to combat these intuitions: one failed district-court lawsuit in 2000<sup>41</sup> and a badly beaten constitutional initiative in California (Proposition 54) seeking to bar collection of race-related information for use in public education, contracting, or employment.<sup>42</sup> It is important to add that whether or not the collection of racial data is deemed a "racial classification," its constitutional fate would depend heavily on the use to which it was put. Collection of such data for the purpose of civil rights enforcement would almost certainly survive whatever scrutiny it received, even if nominally "strict."

No more persuasive is the authors' suggestion that the reception and use of a racial identification contained in a victim's description of a perpetrator may be a racial classification subject to strict constitutional scrutiny.<sup>43</sup> Discussion of this issue has focused on the Second Circuit's decision in *Brown v. City of Oneonta*,<sup>44</sup> and in particular on the controversial opinion of Judge Guido Calabresi, dissenting from the court's denial of rehearing en banc.<sup>45</sup> The point to be stressed is that

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<sup>41</sup> *Morales v. Daley*, 116 F. Supp.2d 801, 820 (S.D. Tex. 2000) (holding that census questions asking for racial self-classification do not violate Equal Protection or First Amendment rights).

<sup>42</sup> See Balkin and Siegel, *supra* note 1, at 941-42. This initiative was sponsored by Ward Connerly, the indefatigable champion of colorblindness, who had earlier managed a successful initiative (Proposition 209) to bar racial affirmative action by state agencies or universities. Proposition 209 won handily (54% to 46%). Proposition 54, on the other hand, was rejected by nearly two to one (64% to 36%). The California citizens who had voted against Proposition 54 must have included many who voted in favor of Proposition 209. They apparently realized the difference between a *use* of racial data of which they disapproved and the *collection* of data capable of being put to a variety of uses, including some of which they did approve.

<sup>43</sup> *Id.* at 944-45.

<sup>44</sup> 221 F.3d 329 (2d Cir. 2000).

<sup>45</sup> 235 F.3d 769, 779 (2d Cir. 2000).

Judge Calabresi did *not* say that the giving, receiving, or faithfully acting upon the witness's description should trigger strict scrutiny. His more modest proposition was that strict scrutiny is triggered when the police "ignore essentially everything but the racial part of a victim's description, and, acting solely on that racial element, stop and question all members of that race they can get hold of, even those who grossly fail to fit the victim's description[.]"<sup>46</sup> Even a constitutional traditionalist could accept that view. A police officer's behavior in casting his investigative net only over black people would be constitutionally suspicious even in the absence of any description by a witness; scrupulous adherence to a witness's racial identification would ease that suspicion; but selective deviation from the description, through disregard of its nonracial elements, would make the officer's conduct all the more suspicious, for it would strengthen the inference that he was acting on a racial classification of his own rather than merely following a lead. The witness's identification, in short, is a relevant fact in determining the constitutionality of the officer's behavior but is not itself constitutionally central.

Indeed, it is doubtful that the witness identification problem is properly viewed as a racial data problem at all. It has more in common with the sit-in cases of the early 1960s, in which ostensibly neutral state trespass laws were enforced against black demonstrators who entered and refused to leave restaurants or lunch counters despite racially exclusive signs posted by the owners. There, as here, the issue was whether state officers enforcing neutral state laws violated the Equal Protection Clause by acting upon racial inputs supplied by private actors but acting on racial inputs supplied by private actors became constitutionally responsible for those inputs and thereby violated the Equal Protection Clause. The Supreme Court stopped short of such a holding in the sit-in case. It would be even less inclined to find constitutional wrongdoing here.

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<sup>46</sup> *Id.* at 781.