The Historical Origins of the Conflict between Copyright and the First Amendment

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INTRODUCTION

This Article addresses the argument that certain aspects of copyright law violate the First Amendment—an argument numerous copyright and constitutional law scholars advance—from a historical perspective.[1] The Federal Courts have largely rejected versions of this argument, although in the wake of the *Eldred v. Ashcroft* decision there is some small indication that they are more willing to apply First Amendment doctrine to copyright cases.[2] Most of the literature addressing the

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1. *See generally* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 S. CAL. L. REV. 1275 (2003); Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2003); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283 (1979); Alan E. Garfield, *The Case for First Amendment Limits on Copyright Law*, 35 HOFSTRA L. REV. 1169 (2007); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Steven J. Horowitz, *A Free Speech Theory of Copyright*, 2009 STAN. TECH. L. REV. 2 (2009), *available at* http://stlr.stanford.edu/pdf/horowitz-free-speech-theory.pdf; Lawence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. PITT. L. REV. 281 (2004); Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (196); Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970); L. Ray Patterson *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987) [hereinafter Patterson, *Free Speech, Copyright, and Fair Use*]; Note, *"Recoding" and the Derivative Works Entitlement: Addressing the First Amendment Challenge*, 119 HARV. L. REV. 1488 (2006); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and how Copying Serves It*, 114 YALE L.J. 535 (2004); Alfred C. Yen, *Eldred, The First Amendment, and Aggressive Copyright Claims*, 40 HOUS. L. REV. 673 (2003).

2. Eldred v. Ashcroft, 537 U.S. 186 (2003). *See also* Golan v. Holder, 609 F.3d 1076 (10th Cir. 2010) (analyzing whether the Uruguay Round Agreements Act violates the First Amendment); Kahle v. Gonzales, 487 F.3d 697 (9th Cir. 2007) (analyzing whether renewal and extension provisions of the Copyright Renewal Act and the Copyright Term Extension Act trigger First Amendment scrutiny). For cases denying the application of First Amendment principles to copyright law, *see* Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine."); L.A. News Serv. v.

relationship between copyright law and the First Amendment approaches the question from either a doctrinal or an originalist perspective.[3] Both perspectives face large problems. The doctrinal angle must contend with the large body of case law refusing to apply the First Amendment to copyright infringement suits, while the originalist perspective struggles with the lack of evidence of the intent of the ratifiers with respect to the relationship between the two clauses. In response to these two approaches, this Article argues that in order to understand the current tension between the First Amendment and the Copyright Clause, it is necessary to go beyond the founding generation and investigate the way both copyright and the First Amendment were transformed by the generation that lived through the period surrounding the Civil War and ratified the Fourteenth Amendment.[4] Furthermore, because of the importance of historical struggles to the interpretation of the First Amendment, it is helpful to step outside the courtroom in order to understand the values that animate the Free Speech Clause.[5] An understanding of this history

Tullo, 973 F.2d 791, 795 (9th Cir. 1992) ("First Amendment concerns are also addressed in the copyright field through the 'fair use' doctrine."). *See also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576–79 (1977); Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622 (9th Cir. 2003); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1400 (9th Cir. 1997); New Era Publ'ns Inter., Aps v. Henry Holt & Co., Inc., 873 F.2d 576, 584 (2nd Cir. 1989); Authors League of Am., Inc. v. Oman, 790 F.2d 220 (2nd Cir. 1986); Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986); Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1099–1100 (2nd Cir. 1982); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758–59 (9th Cir. 1978); Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 311 (2nd Cir. 1966) (Lumbard and Hays, JJ., concurring); Religious Tech. Center v. Netcom On-Line Commc'n Servs., Inc., 923 F. Supp. 1231, 1258 (N.D. Cal. 1995); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 467 F. Supp. 366 (S.D.N.Y. 1979). Faced with the sheer weight of cases rejecting First Amendment challenges to copyright, some scholars have recently begun to look to other sections of the Constitution to limit copyright's expansion. *See, e.g.*, Jennifer E. Rothman, *Liberating Copyright: Thinking Beyond Free Speech*, 95 CORNELL L. REV. 463 (2010).

3. For articles addressing the issue from a doctrinal perspective *see, e.g.*, Goldstein, *supra* note 1; Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002). For articles addressing the issue from an originalist perspective *see, e.g.*, Thomas Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004). *See also* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2005) (addressing the Copyright Clause's internal limits).

4. Rather than primarily focusing on Supreme Court cases that interpret the Constitution, a task that has already been accomplished ably by others, this Article applies Professor Philip Bobbitt's method of Constitutional interpretation to the problem. Professor Bobbitt views arguments from case law as only one way, among many, to extract meaning from the Constitution. In addition to parsing case law, Professor Bobbitt advocates examining the text of the Constitution, the history of its ratification and the structures of governance that the Constitution sets up. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–8 (1982). This methodology differs from originalism in that it does not privilege the intentions of the Founders over the ratifiers, and that it does not privilege the original framers of the Constitution over framers of later amendments to the Constitution.

5. Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1115, 1179 (1996) ("Today, as lawyers, law teachers, and law students we generally think of free-speech issues as matters decided by courts. The Lovejoy experience shows that free speech is a much broader political tradition and that crucial free-speech decisions are made by citizens, by the press, by

clarifies the constitutional values embodied in the Copyright Clause and the First Amendment, and thus offers textual and historical grounding for the arguments that there is a tension between the two clauses that must be reconciled.

Briefly, after examining how the animating values of the two clauses diverged during the Nineteenth Century, this Article concludes that the Supreme Court is correct to hold that the Copyright Clause and the First Amendment coexist largely in peace, as the Copyright Clause is the "engine of free expression."[6] However, contrary to the Court's originalist bent, the time period relevant to determining whether copyright was to function as an engine of free speech is not the founding of the Republic, but rather the ratification of the Fourteenth Amendment. During this time, as freedom of speech was reconceptualized to protect a core right to speak publicly, theories of copyright were gaining hold that would make more and more speech private property. An examination of the changes undergone by the values underlying the Copyright Clause and the First Amendment during the crucial Civil War period partially vindicates the Supreme Court's reading of the two clauses. This history also clarifies the circumstances under which enforcement of laws passed under the authority of the Copyright Clause may violate the First Amendment. Rather than supporting the Court's holding that copyright laws must undergo First Amendment scrutiny when they go beyond the historical "core of copyright protection," the history analyzed in this Article supports the argument that copyright laws must undergo heightened First Amendment scrutiny when they encroach on the core of speech protected by the First Amendment. This Article also suggests that given the difficulty in using the blunt nature of remedies available to Federal Courts' in copyright cases and the difficulties involved in reconciling the post Civil War Clauses, the Copyright Clause imposes a duty on lawmakers to use the copyright power in a way that preserves a vibrant and open public forum.

One might object to this historical approach by arguing that since copyright and free speech were not seen as conflicting during the Nineteenth Century, that period should not be relevant to the current conflict.[7] It is true that the relationship between the two clauses was first investigated by scholars in the 1970's and only became a popular topic after the passage of the Sonny Bono Copyright Extension Act and the Digital Millennium Copyright Act in 1998.[8] However, while the current interest in the conflict has been sparked by the conjunction of a recent expansion of copyright protection and the development of technological innovations that make it much easier to infringe these expanded rights, the

legislators, and by public officials who are not judges.") [hereinafter Curtis, *The 1837 Killing of Elijah Lovejoy*]; Rubenfeld, *supra* note 3, at 30–31.

6. *Eldred*, 537 U.S. at 219 (quoting *Harper & Row*, 471 U.S. at 558).

7. Commentators sometimes state in passing that there was no conflict between the First Amendment and the Copyright Clause during the Nineteenth Century. *See, e.g.*, Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 1, at 33 ("The American copyright of the nineteenth century did not create free speech problems. No problems arose partly because free speech doctrines remained undeveloped and partly because statutory copyright required publication and, therefore, dissemination of the copyrighted work regardless of its content.").

8. *See* the publication dates of articles cited *supra* note 1.

constitutional values that make possible both the modern expansion of copyright and a broader, more libertarian reading of the First Amendment date from the historical period examined in this Article.

The current debate—which for the most part focuses on the values at the time of the founding, the current doctrine interpreting the two clauses, and current policy concerns—will benefit from an investigation of the period of time when the values underlying the First Amendment and the Copyright Clause diverged. In short, even though the two conditions necessary to precipitate a crisis between copyright and the First Amendment—new copying technology and a more expansive copyright—were not in place during the period surrounding the Civil War, that period was the critical constitutional moment where the values underlying the two clauses changed, and thus is relevant to the current debate.

The First Part of this Article explains the peaceful relationship between copyright and the First Amendment at the founding. The Second Part explains how the values underlying the two clauses diverged during the Civil War generation. The Third Part asks whether the Supreme Court's theory that the Copyright Clause was designed to function as an "engine" for the marketplace of ideas is an accurate understanding of the relationship between the two clauses.[9] Finally, Part Four briefly applies the result of this historical analysis to the current debate over how to reharmonize the clauses.

I. THE PEACEFUL COEXISTENCE OF THE COPYRIGHT CLAUSE AND THE FIRST AMENDMENT AT THE FOUNDING

It is sometimes stated that since the same Congress—a political body that included many of the framers of the Constitution—that drafted and voted for the First Amendment also approved the first Copyright Act, copyright and free speech must be compatible.[10] Putting aside whether solely the proximity in time of these two laws immunizes copyright from First Amendment scrutiny, the intuition that underlies this statement is sound. There is scant evidence that anyone at the founding seriously thought that the Copyright Clause, the first Copyright Act and the First Amendment were in serious conflict.[11] This Section explores four reasons for their early peaceful coexistence.

First, at the founding it was not entirely clear how expansive a copyright regime the Copyright Clause would permit. The text of the Copyright Clause does not make it clear whether that clause embodies a natural rights theory of intellectual property or a utilitarian theory.[12] If the Copyright Clause embodies a natural rights theory of intellectual property, it would authorize a more expansive copyright

9. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 9, 558 (1985).

10. *Eldred*, 537 U.S. at 219 ("The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles.").

11. *See infra* Part I.A.

12. *See infra* Part I.A.

regime that would pose a larger threat to Free Speech.[13] A utilitarian theory would suggest a more limited copyright regime.[14] Since the ratifiers of the Constitution did not take a firm position on which regime the Constitution sanctioned, they effectively passed the question of how much speech the copyright regime would be allowed to regulate on to later generations. Second, to the extent that the ratifiers directly addressed the potential conflict between copyright and free speech, the argument that the preamble of the Copyright Clause was an internal pro free speech limitation won out.[15] Third, copyright and the First Amendment were seen as contributing to the same project of enlightening the American people and developing a republican discourse about good government.[16] Fourth, the ratifiers of the First Amendment did not contemplate that it would apply to laws that did not attempt to directly control speech.[17] It is important to understand these four reasons why, initially, no one thought the Copyright Clause would conflict with the First Amendment in order to appreciate how later changes in the values embodied in the two clauses would create the potential for conflict.

A. THE AMBIVALENCE OF THE COPYRIGHT CLAUSE

The Copyright Clause did not solely embody one particular theory explaining why authors should be entitled to exclusive rights to their writings. Philosophers of intellectual property often make a clean division between the natural rights justification for intellectual property and the utilitarian justification.[18] To oversimplify, the natural rights theory argues that an author gains a property right in his creation, either by virtue of his intellectual labor, just as a landowner gains a property right in his land by virtue of his tilling the soil, or by virtue of the fact that his personality is expressed in the work.[19] The utilitarian theory views rights granted by legislatures to authors as a balancing of costs and benefits that is justified only to the extent that it does more good than harm.[20] Theoretically, a copyright regime based on a pure natural rights theory would recognize a perpetual copyright in the same way ownership of land in fee simple is theoretically perpetual.[21] In contrast, a utilitarian system would narrowly tailor author rights so that they aligned with the public goals the legislature envisioned the copyright regime serving.[22]

13. *See infra* Parts II.B, IV.

14. *See, e.g.*, JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 21–27 (2008).

15. *See infra* Part I.B.2.

16. *See infra* Part I.B.3.

17. *See infra* Part I.B.4.

18. For the natural rights justification, *see* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–329 (1988). For the utilitarian justification, *see* BOYLE, *supra* note 14, at 17–27.

19. BOYLE, *supra* note 14, at 27–29; Jane Ginsburg, *Creation and Commercial Value: Copyright Protection for Works of Information*, 90 COLUM. L. REV. 1865, 1886 (1990).

20. BOYLE, *supra* note 14, at 22.

21. The Supreme Court rejected this logical conclusion of the natural rights theory of copyright in *Wheaton v. Peters*, 33 U.S. 591 (1834).

22. BOYLE, *supra* note 14, at 21.

In the historical period surrounding the drafting of the Articles of Confederation and the Constitution, this utilitarian theory was often conceptualized in contractual terms.[23] The State grants the author certain rights with respect to his work in exchange for providing the public with access to his writings.[24] Many of the state copyright statutes that precede the Copyright Clause in the United States Constitution follow this contractual concept of copyright, as they include mechanisms that allow for compulsory licensing of the work if the author fails to make enough copies of it available to the public at a reasonable price.[25] Some of the statutes also split the damages assessed against an infringer of a copyright between the author and the State—a scheme that looks more like it is regulating the book trade to ensure an adequate supply of publicly available works rather than recognizing property rights that exist as a matter of natural right.[26]

However, the early authors that lobbied for copyright protection, and the legislatures that granted that protection, were unconstrained by such philosophical niceties. They constructed regimes that borrowed freely from both theories.[27] A brief selection of colonial copyright enactments shows that legislators made the same type of lawyerly kitchen sink arguments that lobbyists were making, mixing regulatory theories of public good with the plea that it would simply be unjust not to protect someone who has spent years working on a particular work. The Confederate Congress committee charged with considering the problem of literary property and made up of James Madison, Hugh Williamson and Ralph Izard, reported that they were "persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce . . . ."[28]

In the same vein, the preamble of the Massachusetts general copyright statute, enacted on March 17, 1783, is typical of most of the State copyright statutes passed pursuant to the Confederate Congress's recommendation in its free use of both natural rights and utilitarian theories of intellectual property:

> Whereas the Improvement of Knowledge, the Progress of Civilization, the public Weal of the Community, and the Advancement of Human Happiness, greatly depend on the Efforts of learned and ingenious Persons in the various Arts and Sciences; as the principle Encouragement of such Persons can have to make great and beneficial Exertions of this Nature must exist in the legal Security of the Fruits of their Study and Industry to themselves; and as such Security is one of the natural Rights of all Men, there being no Property more peculiarly a Man's own than that which is

23. BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 94, 122 (1967).

24. Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 1, at 60.

25. BUGBEE, *supra* note 23, at 94, 122.

26. *See* BUGBEE, *supra* note 23, at 118.

27. Professor Jane Ginsburg has shown that both theories were indeed in the intellectual drinking water at the time of the founding of the American intellectual property system. Jane Ginsburg, *A Tale of Two Copyrights*, 64 TUL. L. REV. 991, 1002–05 (1990).

28. BUGBEE, *supra* note 23, at 110.

> produced by the Labour of his Mind . . . . [29]

The Massachusetts preamble clearly views the natural rights justification for intellectual property—"there being no Property more peculiarly a Man's own than that which is produced by the Labour of his Mind"—and the utilitarian justification—"as the principle of Encouragement of such Persons can have to make great and beneficial Exertions of this Nature must exist in the legal Security of the Fruits of their Study and Industry to themselves"—as being mutually reinforcing, rather than at odds.[30] All in all, twelve out of the thirteen States enacted Copyright statutes at the Confederate Congress's urging. Few were as long or as philosophical as Massachusetts', but most of them included the same meshing of natural rights and utilitarian considerations.[31]

The text of the Constitutional Copyright Clause evinces the same ambivalent attitude toward the theoretical justifications for copyright found in earlier Copyright enactments of the individual States. On the one hand, the Clause limits the power of Congress to grant authors exclusive rights in their works for "limited times," and only for the purpose of advancing the "Progress of Science and the Useful Arts," suggesting a utilitarian copyright regime. On the other hand, it speaks of "securing the exclusive rights" of Authors, which could be read to imply that authors were already entitled to these rights in some form and that the Constitution was merely comfirming those rights and clarifying their limits.[32] While the founding generation was ambivalent about what theory supported copyright, it will become apparent that during the 1840s and 1850s the natural rights justification began to overtake the utilitarian justification in the minds of legislators, courts, and the people.[33]

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29. *Id.*

30. *Id.*

31. Connecticut's preamble, which North Carolina, Georgia, New York and South Carolina copied more or less directly read:

> It is perfectly agreeable to the Principles of natural Equity and Justice, that every Author should be secured in receiving the Profits that may arise from the Sale of his Works, and such Security may encourage Men of Learning and Genius to publish their Writings; which may do Honor to their Country, and Service to Mankind.

BUGBEE, *supra* note 23, at 108. New Hampshire's statute resembled Massachusetts's more than Connecticut's. New Jersey's was a slight variation on the Connecticut model. Virginia passed a copyright bill, after Noah Webster lobbied both James Madison and George Washington, with wording very similar to the future Copyright Clause in the U.S. Constitution: "for securing to the authors of literary works an exclusive property therein, for a limited time." BUGBEE *supra* note 23, at 110. Delaware was the only State not to pass a copyright statute. Oren Bracha, *Commentary on the Connecticut Copyright Statute 1783*, *in* PRIMARY SOURCES IN COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008).

32. The argument that the Copyright Clause is declaratory was made in the first major copyright case to reach the Supreme Court. *See* Wheaton v. Peters, 33 U.S. 591 (1834); Oren Bracha, Owning Ideas: A History of Anglo-American Intellectual Property 315 (June 2005) (unpublished J.S.D. dissertation, Harvard Law School) (on file with Harvard Law School Library, Harvard University) [hereinafter Bracha, Owning Ideas].

33. *See infra* Part II.B. Both the utilitarian and natural rights theories were still very much up in the air at the time of the 1831 amendment that extended the terms from two fourteen year terms to two twenty-eight year terms. Speaking against the proposed retroactive term extension, Representative

B. THE RELATIONSHIP BETWEEN THE COPYRIGHT CLAUSE AND THE FIRST AMENDMENT AT THE FOUNDING—THE PREAMBLE AND REPUBLICAN VALUES

Though the ratifiers of the Constitution were ambivalent about the theoretical justifications for a copyright regime at the time of the ratification of the Constitution, the history of the relationship between copyright and free speech did cause some of them to question the free speech bona fides of the copyright clause. There was some anti-Federalist opposition to the Copyright Clause precisely because it was thought to endanger free speech. Examining the Federalist response to this anti-Federalist argument sheds light on why the ratifiers ultimately thought the Copyright Clause did not endanger First Amendment values.

1. The Early Alliance Between Copyright and Censorship

From their earliest days, copyright regimes have had a complex relationship with censorship.[34] The first exclusive rights to print certain works were granted in Venice in 1474.[35] In England, the Stationers' Company was chartered by Queen Mary in 1556, receiving the exclusive right to print in England in exchange for the promise to not print anything the Crown did not want them to print.[36] The symbiotic relationship between the printers and the Crown, which allowed the

Hoffman characterized copyright as an implied contract between the public and the author: "There was an implied contract between them [the author] and the public. They, in virtue of their copyright, sold their books to the latter at an exorbitant rate; and the latter, therefore, had the right to avail themselves of the work, when the copyright expired." 7 REG. DEB. 423 (1831). Representative Verplanck defended the extension on pure natural rights reasoning:

> The whole [implied contract] argument was founded on a mistake, apparent to the eye of common sense, and repugnant to the law of the land. There was no contract; the work of the author was the result of his own labor. It was a right of property existing before the law of copyrights had been made. That statute did not give the right, it only secured it; it provided a legal remedy for the infringement of the right, and that was the sum of it. It was, he repeated, merely a legal provision for the protection of a natural right.

Id. at 424.

An exchange of letters between Daniel Webster, the most well-known lawyer of the time and defender of the natural rights justification for copyright as cocounsel in *Wheaton v. Peters*, and Noah Webster, the well-known advocate for strong copyright protection, reveals that while Daniel Webster in his capacity as a lawyer and Senator moved freely between defending perpetual copyright and a copyright limited in time, he personally believed that neither was precluded by the Copyright Clause of the Constitution. In response to Noah Webster's petition that he introduce a bill securing perpetual copyright, Daniel Webster admitted that he had his doubts as to the natural rights theory and the wisdom of perpetual copyright on policy grounds:

> Most people, I think, are as well satisfied (or better) with the reasoning of Mr. Justice Yates, as with that of Lord Mansfield, in the great case of Miller and Taylor. But after all, property, in the social state, must be the creature of law; and it is a question of expediency, high and general, not particular expediency, how and how far the rights of authorship should be protected. I confess, frankly, that I see, or think I see, objections to make it perpetual.

Oren Bracha, *Commentary on the U.S. Copyright Act 1831*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (2008), http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22us_1831%22.

34. *See* Goldstein, *Copyright and the First Amendment*, *supra* note 1, at 983–84.
35. *See* BUGBEE, *supra* note 23, at 22.
36. *See* Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 1, at 20.

Crown to control the dissemination of ideas and expression, was particularly useful to the Crown during this period of religious conflict. In pressing the Crown to renew its exclusive right to print, the Stationers' Company regularly argued that censorship was essential to good government.[37] The Company's relationship with the Crown lasted until 1694, when Parliament refused to renew the Licensing Act of 1662.[38]

With the expiration of the last Licensing Act, the explicit use of copyright as a form of censorship died out. The Statute of Anne—passed in 1709 at the urging of the publishers who had lost their monopoly with the death of the Licensing Acts—pointedly granted the exclusive right to publish to the author or the publisher, but not to the company as a whole.[39] Monopolies had been outlawed in England by the Statute of Monopolies in 1624, but this statute exempted patents and copyrights.[40] The Statute of Anne was clearly designed to be antimonopolistic and not censorial, although whether it was successful is less clear.[41]

2. The Anti-Federalist Objection to the Copyright Clause and the Federalist Response

During the ratification debates of the Constitution, a few anti-Federalists drew on copyright's historical association with censorship to point to the proposed Copyright Clause as an example of how, despite Federalist protestations to the contrary, the Constitution allowed the new national government to control speech.[42] Even though the Statute of Anne severed the explicit connection between government censorship and copyright, copyright retained the potential to serve as a tool of censorship.[43]

The Founders' decision to give Congress the power to grant copyrights to authors only—unlike the Statute of Anne which allowed publishers to receive copyrights directly—minimized the danger that a group of publishers, like the Stationers' Company, would emerge and act as a quasi governmental body that controlled public access to information.[44] However, even though Congress was only given the power to grant copyrights to authors, the danger remained that it

37. *Id.* at 21.

38. *See id.* at 23.

39. *See id.* at 25.

40. Massachusetts passed a similar law prohibiting monopolies in 1641. *See* BUGBEE, *supra* note 23, at 61.

41. *See* Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 1, at 27–30.

42. *Id.* at 17.

43. Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 1, at 24 ("Acts of censorship protected the stationers' copyright, but they neither created nor defined it. Consequently, the demise of press control, in itself, did not deprive copyright of its efficacy as a devise of censorship.").

44. *See* Goldstein, *supra* note 1, at 986 (analyzing the First Amendment dangers of "enterprise monopolies," entities that control large numbers of copyrights, thus exerting quasi-governmental control over the public's access for information). *See also* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 364–86 (explaining the First Amendment dangers of concentrating copyrights in a small number of large holders).

might choose to favor certain authors with copyrights and deny copyrights to others whose speech it found seditious. A similar argument was made during the Pennsylvania ratification debates:

> Tho it is not declared that Congress have a power to destroy the liberty of the press; yet, in effect they will have it. For they will have the powers of self-preservation. They have a power to secure to authors the right of their writings. Under this, they may license the press, *no doubt*; and under licensing the press, they may suppress it.[45]

Although Congress's speedy enactment of a general copyright statute reduced the risk that Congress would pick and choose between appropriate authors, the Federalist response to this argument during the ratification debate is relevant because it sheds light on how the ratifiers viewed the relationship between the Copyright Clause and the First Amendment.[46] James Wilson, a prominent Federalist and an active participant in the drafting of the Constitution, argued that nothing in Article I, section 8 granted Congress the power to regulate the press.[47] In addition to the argument that the regulation of speech simply was beyond Congress's enumerated powers, Federalists pointed out that the Copyright Clause is the only power granted to Congress that includes a built-in purpose limitation.[48] Congress would only be able to use this power to promote the "Progress of Science and the useful Arts" and not to regulate the press. In sum, the Federalists read the Copyright Clause as including an internal limit, which prevented Congress from using copyright to abridge the Freedom of Speech. Thus, the ratification of the First Amendment did not add any limitations on Congress's power to grant copyrights that were not already incorporated into the Copyright Clause itself. By ratifying both the Constitution and the First Amendment, then, the People did not say that Copyright is immune from First Amendment scrutiny, but rather that the Copyright Clause must be interpreted as being consistent with First Amendment values.

3. The Shared Republican Values of the First Amendment and the Copyright Clause

Although the built-in limitation on this enumerated power is generally ignored

45. Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 1, at 17 n.50 (quoting 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VOL. XIV, COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 454, 50 The First Copyright Act was enacted in 1790 by the Second Congress).

46. The first copyright act was enacted in 1790 by the Second Congress. Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790) (repealed).

47. Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 1, at 18. On the importance of James Wilson, *see* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 467 (2005).

48. *See* Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 1, at 13–14 n.40 (quoting Roger Sherman: "First, the copyright clause is in fact 'the promotion of Science' clause: the only provision of section eight of [the first Article of] the Constitution defining the purpose of, and therefore limiting, a power of Congress. Second, the promotion of learning is inherently antithetical to censorship."). *See also* AMAR, AMERICA'S CONSTITUTION, *supra* note 47, at 112.

today, the limitation clearly mattered to the ratifiers.[49] During the ratification debate, Federalists relied on a limitation internal to the clause to argue that it would not abridge freedom of speech.[50] But the Copyright Clause was not seen as neutral with respect to free speech; rather, the phrase "progress of the science and arts" imbued the clause with the republican purpose of promoting the diffusion of learning through society. The copyright regime, which mirrored the original role of juries in the constitutional scheme, was meant to help educate the public so they could exercise their civic duties well.[51] During the passage of the first Copyright Act, George Washington explained:

> [T]he promotion of science and literature would help to secure a free constitution . . . by convincing those who are entrusted with public administration that every valuable end of government is best answered by the enlightened confidence of the public; and by teaching the people themselves to know and value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority.[52]

The title of the first copyright statute clearly advertises the types of works the ratifiers thought they would be encouraging—works useful to a young republic with a whole continent of unexplored land stretching before them: "An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned."[53] Similarly, in an address to Congress soon after the Constitution was ratified, George Washington explaind the enlightening purpose of the copyright act in this

49. *See generally* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771 (2005) (making a historical argument that the first part of the Intellectual Property Clause was intended to limit Congress's power rather than being merely a nonbinding preamble). For a failed attempt to give practical effect to the preamble of the Copyright Clause, *see* Lawrence Lessig's argument before the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Transcript of Oral Argument at 3, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618).

50. *See supra* Part I.B.

51. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 93–94 (1998) (arguing that the primary purpose of juries is not primarily the efficient or accurate adjudication of disputes but rather a kind of civics lesson for the jurors).

52. *See* Netanel, *Copyright and a Democratic Civil Society*, *supra* note 1, at 357.

53. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1790) (repealed). Professor Ginsburg claims that the following types of works were copyrighted under the early statute:

> For example, examination of the 5,368 publications (including newspapers and pamphlets) listed in the 1790–92 and 1798–99 volumes of Charles Evans's American Bibliography indicates that republican publishing habits corresponded to the "new republican ideology [that] defin[ed] the virtuous citizen as one who was broadly informed about political doctrine and public affairs." Evans's records for these years show 540 newspapers (157 newspapers for 1790–92, 383 for 1798–99), 441 titles in Political Science (207 for 1790–92, 234 for 1798–99), 302 titles in History (117 for 1790–92, 185 for 1798–99), 270 titles in Social Science (125 for 1790–92, 145 for 1798–99), and 61 Fourth of July orations for 1798–99. By contrast, the publication of novels appears fairly modest: 43 titles for 1790–92 and 119 for 1798–99. This relative paucity of fiction also may reflect republican values. Thomas Jefferson stated, "A great obstacle to good education is the inordinate passion prevalent for novels, and the time lost in that reading which should be instructively employed."

Ginsburg, *A Tale of Two Copyrights*, *supra* note 27, at 1002–03 (citations omitted).

way:

> Nor am I less persuaded that you will agree with me in opinion, that there is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is in every country the basis of public happiness . . . .[54]

Noah Webster's *A Grammatical Institute of the English Language* exemplifies the uncontroversial works the Founders envisioned protecting by copyright.[55] Public educators, not artists, were intended to be the primary beneficiaries of copyright.

These republican goals of copyright were consistent with First Amendment values. The works the Founders intended to protect were uncontroversial and contributed to the steady progress of knowledge. Moreover, the early First Amendment's primarily structural concern with protecting popular majorities from aristocratic legislative majorities was not implicated by granting protection to such republican works.[56] Copyright was seen as furnishing incentives to create the works that fed this public republican discourse on government and that generally contributed to knowledge. As will be seen later in this Article, this characteristic of copyright at the founding supports the modern Supreme Court's metaphor that copyright was intended to be the "engine of free speech."[57] Similarly, it is hard to see how a generation that believed knowledge was steadily progressing would view a copyright regime that incentivizes authors to contribute to that public body of knowledge as infringing the First Amendment. Thus, to the extent that anyone at the time gave any thought to the intersection of copyright and free speech, the substance of the copyright and free speech regimes were seen as mutually reinforcing.[58]

4. The First Amendment's Structural Bent

The lack of any substantive free speech opposition to copyright at the founding is evident from the fact that the only constitutional criticism of giving Congress the power to grant copyrights concerned the danger that Congress would misuse this power and license the press.[59] The concern for the misuse of power by legislative

54. BUGBEE, *supra* note 23, at 137.

55. NOAH WEBSTER, A GRAMMATICAL INSTITUTE OF THE ENGLISH LANGUAGE (Isaiah Thomas & Ebenezer T. Andrews eds., 6th ed. 1800) (articulating and standardizing the grammar of American English).

56. AMAR, THE BILL OF RIGHTS, *supra* note 51, at 25–32. The early republican ideal of copyright mirrors Professor Mieklejohn's argument that a commitment to self-government entails an absolute prohibition on public discussion that touches on matters of governance. *See* ALEXANDER MIEKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948). *See also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 551.

57. *See infra* Parts III & V for the full discussion, including why the modern understanding of copyright as an "engine of free speech" is different than at the founding.

58. For a recent argument using a different methodology that the Copyright Clause must be read to incorporate First Amendment Values, *see* Stephen J. Horowitz, *A Free Speech Theory of Copyright*, 2009 STAN. TECH. L.R. 2 (2009).

59. *See supra* Part I.B.2.

majorities, which Professor Blasi calls the "checking value" of the First Amendment, is separate from the question of what the contours of the copyright power should be—that is, how much expression copyright should protect.[60] Rather, the checking value is only concerned with the danger that elected representatives will abuse whatever power they are granted.[61] At the state level, the ability of the legislature to grant copyrights was unquestioned. The only issue at the national level was whether giving a strong new federal government the power to grant nationwide copyrights would tempt that government to directly regulate speech.[62]

C. WHY THE COPYRIGHT CLAUSE AND THE FIRST AMENDMENT DID NOT CONFLICT WHEN THEY WERE RATIFIED

In sum, the ambivalence of the Founders with regard to the theoretical justification for copyright, the internal limitations of the Copyright clause, its republican aspirations and the structural orientation of the First Amendment all explain why the theories underlying the Copyright Clause and First Amendment were not seen to be in conflict at the time of the founding. Furthermore, as a practical matter, copyright was not a top priority for the ratifiers of the Constitution and the Bill of Rights. Larger political issues like the number of representatives in each house of Congress, how slaves would be counted electorally and the powers of the Executive and Congress dominated the ratification debates.[63] Furthermore, the less expansive nature of copyright regime made it even less conspicuous than it is today.[64]

60. Blasi, *The Checking Value in First Amendment Theory*, *supra* note 56, at 528.

61. *Id.* at 528–36. For an argument that at the founding the antebellum bill of_rights was concerned primarily with structural issues, such as the danger a regime would permit public officials to abuse their power, rather than "rights" in the libertarian sense of the term, *see also* AMAR, THE BILL OF RIGHTS, *supra* note 51, at 3–133 (1998).

62. *See supra* note 31 for a brief survey of the state copyright statutes. *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1703–13 (1991), for an argument that at the Founding the dangers of State regulation of speech were considered much less severe than those of the federal government regulating speech. *See also* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the First Amendment does not apply against the individual States).

63. Oren Bracha, *Commentary on the Intellectual Property Constitutional Clause 1789*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (2008), http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22us_1789%22.

64. At the time of the Founding, copyright protected much less than the modern copyright system does. Only unauthorized verbatim reproductions of copyrighted works, or verbatim reproductions with only slight variations meant to evade the copyright statute, were considered infringing. *See infra* Part II.B. As copyright expanded to cover more expression and technological developments made infringement easier, copyright effectively silenced more and more people. Even today, Congress does not think deeply about copyright policy. Congress outsources the drafting of copyright legislation to the industries that legislation governs. *See* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870–79 (1987) (examining the interindustry negotiations involved in the drafting of the Copyright Act of 1976). *See also* L. Ray Patterson, Comment, *Eldred v. Reno, An Example of the Law of Unintended Consequences*, 8 J. INTELL. PROP. L. 223, 230 (2001) ("The custom of allowing the copyright industry to write copyright legislation apparently dates back to 1905 when Thorvald Solberg, the Register of Copyright, wanted a new copyright statute and realized that he would

The Copyright Clause was certainly not viewed as a substantive innovation, but rather as a solution to the collective action problem that had plagued State efforts to grant meaningful copyright protection. During the month before the Constitutional Convention, James Madison captured both the relative lack of interest in the question of intellectual property as well as the practical reason why the drafters found it necessary to include the Copyright Clause in the Constitution at all: "[W]ant of concert in matters where common interest requires it . . . . Instances of inferior moment are the want of uniformity in the laws concerning naturalization and literary property".[65] The plight of Noah Webster, who spent years traveling up and down the continent trying to secure copyrights to his monumental *A Grammatical Institute of the English Language*, was well known to the Founders, many of whom were members of the assemblies that he petitioned.[66] Some States tried to solve the obvious problem of piracy of their works in neighboring States by passing copyright laws which would only take effect when every other State passed similar laws.[67] However, since Delaware failed to pass a copyright statute, the statutes with this provision never went into effect.[68] This failure was clear evidence, to anyone who still needed convincing, that a national remedy was necessary.[69] The uneventful and unopposed insertion of the clause in the Constitution speaks to the general agreement that a national remedy to the problem was required.[70]

II. TRANSFORMATIONS

To the extent that the troubled history of copyright and censorship made the Founders uneasy about the coexistence of the Copyright Clause with the First Amendment, this uneasiness was tempered by the fact that the two clauses were seen to participate in the same republican project. As further protection against the free speech dangers of copyright, the founding era notions of what constituted free speech were incorporated into the preamble of the Copyright Clause.[71] However, as the republican project embodied in the Constitution was tested by the conflict over slavery during the Nineteenth Century, both the copyright regime and the First Amendment underwent profound transformations that upset this easy coexistence and gave rise to unavoidable tensions between the two clauses.

A. THE TRANSFORMATION OF THE FIRST AMENDMENT

In the past century, the Supreme Court held that the First Amendment protects

have to have the cooperation of the industry to get it.").

65. BUGBEE, *supra* note 23, at 125.

66. *See id.* at 106–08.

67. *Id.* at 109–24.

68. *Id.* at 123–24.

69. *Id.* at 124.

70. Irah Donner, *The Copyright Clause of the United States Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 376 (1992).

71. *See supra* Part I.B.2.

the right to think and express ideas that may be considered dangerous by the majority of citizens.[72] Twentieth Century Justices have explained that the First Amendment embodies a political philosophy that considers vigorous, even dangerous, dissent as essential to the health of the body politic.[73] However, it is not clear that the ratifiers believed that a free speech right protecting views considered dangerous by a large majority was as essential to the health of a democracy as we do today.[74] While the First Amendment embodied a commitment to enlightened tolerance of dissenting speech at the Federal level, it also reflected a strong commitment to the doctrine of states' rights in that it did not restrict the ability of state governments to abridge the freedom of speech.[75] Furthermore, the core of speech protected by the amendment was not dissenting speech that the majority considered dangerous to society. Rather, the history of the free speech struggles leading up to the ratification of the Consitution convinced the ratifiers that the speech of the majority of the People needed protection from suppression by the majority of the legislature.[76] The modern understanding of the First Amendment was developed by the American people themselves, beginning with the popular rejection of the Alien and Sedition laws and culminating in the Fourteenth Amendment's transformation and incorporation of the First Amendment.[77] The absolutist understanding of free speech as a natural right of all citizens, including those whose views are violently opposed to those of the majority, was in large part the product of the abolitionist movement and the history of the suppression of antislavery speech in the Antebellum South. As the Civil War approached, people began to argue that the First Amendment recognized an absolute and natural right

72. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding a state criminal syndicalism statute, under which Ku Klux Klan members were prosecuted for speech abstractly advocating violence, unconstitutional because it covered speech that was not directed at inciting "imminent lawless action").

73. One of the most quotable expressions of this understanding of the First Amendment was penned by Justice Brandeis in *Whitney v. California*:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.

274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

74. *Compare* Yassky, *supra* note 62, at 1703–17 (relying in part on the work of historian Leonard Levy to argue that the failure to apply the First Amendment to the states created a "legacy of suppression" of speech at the state level in the antebellum United States), *with* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 461 n.26 (1985) ("In recent years, discussion of the original understanding of the first amendment has been dominated by Leonard Levy's provocative, elaborately documented, and in my opinion, seriously flawed thesis that the framers of the Bill of Rights had a narrow and essentially non-libertarian view of the freedoms of speech and the press.").

75. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

76. *See* AMAR, THE BILL OF RIGHTS, *supra* note 51, at 20–26.

77. *See id.* at 22–23.

to speak for all citizens, including those whose views were violently opposed to those of the majority. The decision by the ratifiers of the Fourteenth Amendment to incorporate the First Amendment against the states reflected this new understanding of what speech the First Amendment was designed to protect. In other words, the abolitionist struggle for a broader reading of the First Amendment not only drove the expansion of the Amendment's application (to the states) but also drove the expansion of the scope of the right of free speech.[78]

Before the passage of the Fourteenth Amendment, the Supreme Court read the First Amendment to apply only to the federal government.[79] Despite James Madison's contrary intuition, state regulation of speech was viewed as less dangerous than federal regulation of speech.[80] The states were seen to be closer to the people whose speech they were regulating, and thus were more likely to be held accountable for any antispeech measures they passed.[81] In opposition to this reading of the First Amendment, abolitionists took the stance that a representative democracy requires a core area of speech that is absolutely free from all government suppression and also free from some private suppression.[82] The post Civil War Congress drafted the Fourteenth Amendment with this recent struggle for a new libertarian conception of free speech in mind.[83] Thus, in incorporating the First Amendment against the states, the Fourteenth Amendment also ratified this new reading of the First Amendment.[84] Surveying the abolitionists' struggle against the Southern sedition laws and proslavery mobs will help understand the contours of the postincorporation First Amendment. It will show how the postincorporation First Amendment poses new problems for an expansive copyright regime.

During the lead up to the Civil War, from the 1830s onward, the South became more and more committed to a concept of free speech that was severely curtailed in order to protect the majority of the community from what was perceived as the threat posed by minority speakers.[85] The threat was that abolitionist ideas would spark an uprising by the slaves, confirming the slaveowner's greatest fear. This fear was exacerbated by the radical abolitionists' increasingly strident

78. For an argument that the Fourteenth Amendment's incorporation of the Bill of Rights against the states changed the meaning of those rights, *see* AMAR, THE BILL OF RIGHTS, *supra* note 51, at 215–31. For a brief discussion of the role of abolitionist speech in the transformation of the First Amendment, *see id.* at 241–42.

79. *See Barron*, 32 U.S. (7 Pet.) at 250.

80. *See* Yassky, *supra* note 62, at 1708.

81. *See id.*

82. *See* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 77–80.

83. *See* AMAR, THE BILL OF RIGHTS, *supra* note 51, at 145–62, 186 (arguing that most of the drafters of the Fourteenth Amendment agreed with the arguments of abolitionists and others that argued that *Barron* was wrongly decided, that the Bill of Rights applied against the states, and that the rights in the Bill of Rights were more robust than had been held by courts).

84. *Id.*

85. *See* Curtis, *The 1837 Killing of Elijah Lovejoypra*, *supra* note 5, at 1117–18. *See also* RUSSEL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 28–33 (1963) (examining the slaveholders' almost paranoid fear of antislavery speech).

denunciations of the South's "peculiar institution."[86] As an indication of the extent of this paranoia, consider the radical aboutface in the thinking Dr. Thomas Cooper, the president of South Carolina College and a prominent Southern intellectual. After the Nat Turner rebellion of 1831, Cooper wrote that he did not believe abolitionist publications should be tolerated.[87] However, in 1829, only a few years before, he had published *The Right of Free Discussion*, which opens with the following language:

> I intend, therefor, upon the present occasion, to maintain the RIGHT OF FREE DISCUSSION, in its fullest extent; as applied to any and every question, opinion, tenant, or doctrine, political, theological, moral, metaphysical, or philosophical, within the widest range of human inquiry. . . .[88]

Dr. Cooper had been a leading defender of an enlightenment conception of freedom of thought in the lower South.[89] The speed at which his thought changed is indicative of the unwillingness of the rest of the South to tolerate antislavery speech.

Printers of abolitionist material were prosecuted under sedition laws passed by the Southern states.[90] The destruction of abolitionist presses by proslavery mobs received the blessing of the community.[91] Ministers were prosecuted for preaching that slavery violated the Gospel and for distributing antislavery books.[92] A university professor was driven out of the State merely for speaking favorably

86. NYE, *supra* note 85.

87. CLEMENT EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH 26 (1940).

88. Thomas Cooper, *The Right of Free Discussion*, *in* 3 PHILOSOPHICAL WRITINGS OF THOMAS COOPER 4 (Udo Thiel ed., 2001).

89. *See* EATON *supra* note 87, at 25.

90. For example, Georgia passed legislation providing that "anyone found guilty of introducing into the state or circulating any publication for the purpose of exciting a revolt among the slaves was liable to the penalty of death." North Carolina passed legislation providing that "Persons convicted of writing or circulating publications, `the evidence tendency whereof would be to excite insurrection, conspiracy, or resistance in the slaves or free negroes should for the first offense be imprisoned for not less than a year and be put in the pillory and whipped, at the discretion of the court, but for the second offense should suffer death without benefit of clergy." Virginia passed a law providing that "any person who should print or circulate a book, pamphlet, or newspaper for the purpose of persuading slaves to rebel or denying the right of masters to property in their slaves and inculcating the duty of resistance to such right, should be deemed guilty of felony. To enforce these provisions postmasters and justices of the peace were given inquisitorial power over the mails, and offenders against these laws could be arrested by any free white person." There was considerable opposition to these laws when they were passed, but as the Civil War approached, all the Southern states, even the states in the Upper South less committed to the slavery cause, passed strong sedition laws. EATON, *supra* note 87, at 122–24, 127. Although the full draconian force of these laws was usually tempered in application by the courts, the laws remained on the books and had an undoubted chilling effect of antislavery speech in the antebellum South. *Id.* at 131.

91. *See* Curtis, *The 1837 Killing of Elijah* Lovejoy, *supra* note 5, at 1125.

92. *See* Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1136 (1993) [hereinafter Curtis, *The 1859 Crisis over Hinton Helper*'s *Book*].

about the Republican candidate for President.[93] In all these cases, minority speech was labeled "incendiary," and censored because it was viewed as causing "bad tendencies" in everyone who heard it, regardless of whether they were slaves, freedmen or poor non slaveholding whites.[94]

During this time, abolitionist lawyers and their adversaries were in the midst of a debate concerning whether the First Amendment was solely a check on the power of the national government or whether it was a preexisting natural right that should therefore apply against both state and federal government.[95] A pivotal moment in this debate was the murder of the Reverend Elijah P. Lovejoy.[96] Before this event, Abolitionists were the primary advocates for the stance that a representative democracy requires a core area of speech that was absolutely free from suppression.[97] Indeed, a number of Northerners were not adverse to the passage of antiabolitionist speech laws in their States.[98] Most of them disapproved of abolitionist ideas and abolitionist speech, viewing them as fanatical and dangerous.[99] The prevailing opinion was that slavery was an evil, but it was an evil for which the South was not morally responsible since slavery had been created by the British.[100]

The Reverend Lovejoy published a paper that took antislavery positions from time to time.[101] Driven out of Missouri, he set up a press in Alton, Illinois.[102] He was murdered by a mob that came to destroy his press.[103] His death was the most dramatic of a series of events in which mobs in the States bordering the South destroyed abolitionist presses.[104] At first many viewed the destruction of the abolitionist presses by mobs as being simply what abolitionists deserved for

93. *Id.* at 1136.

94. *See* the opinion of Georgia governor Wilson Lumpkin in his message to the legislature in 1835 ("Should, however the abolitionists be permitted to proceed without molestation or only have to encounter the weapons of reason and argument, have we not reason to fear, that their untiring efforts may succeed in misleading the majority of a people who have no direct interest in the great question at issue, and finally produce interference with the constitutional rights of the slaveholders."), *quoted in* EATON, *supra* note 87, at 128.

95. AMAR, THE BILL OF RIGHTS, *supra* note 51, at 145–62.

96. Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1111, 1145–47.

97. AMAR, THE BILL OF RIGHTS, *supra* note 51, at 160–62.

98. *See* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1222.

99. *See id.* at 1120–21.

100. *See id.* at 1118. *See also* the argument of future Chief Justice Taney while defending the right of a Maryland citizen to criticize slavery in court in 1819 ("A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily, or suddenly removed. Yet while it continues it is a blot on our national character, and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away . . . "), *quoted in* EATON, *supra* note 87, at 132.

101. Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1132–35.

102. *Id.* at 1135–37.

103. *Id.* at 1142.

104. Mob violence was a common symptom of the fear of slave revolt that gripped the South in the 1830s. *See* EATON, *supra* note 87, at 97 (describing a breakout of mob violence in Mississippi in 1835). *See also* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5 (describing the story of another publisher that was pursued by mobs).

speaking out against slavery.[105] However, after the Reverend Lovejoy's death, many in the Northern mainstream began to take the position that the private suppression of speech they did not like posed a threat to speech they did like.[106] A growing number of people began to think that even though abolitionist ideas may not be popular, they needed to be protected or else other speech would be in danger.[107] The soaring natural rights and religious rhetoric used by abolitionists provided the conceptual framework to articulate these new worries.[108] The northern press, an important element of this influential northern opinion, also began to view the destruction of abolitionist presses by mobs as a threat to free speech.[109] The same mainstream presses that had supported the mobs and had refused to print discussions of the slavery issue began to see the suppression of abolitionist speech as an issue that concerned them, though they continued to roundly denounce abolitionists.[110]

To be clear, Northern opinion saw the destruction of presses by mobs as not merely a problem to be dealt with by criminal or tort law—though it clearly was, as well—but also as a violation of the constitutional right to speak.[111] The idea is that the First Amendment has a positive component—that is, the freedom to speak—as well as the traditional negative component of freedom from governmental suppression.[112] To be sure, this reading of the First Amendment must contend with the language of that Amendment. The Amendment reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[113] On its face, this language does not seem to grant an absolute right to speak to every person; it only prohibits the government from passing a law abridging the freedom of speech. The abolitionist argument, then, was that the First Amendment recognized this natural right to speak without being coercively silenced by other people when it referred to the "freedom of speech."[114]

The members of the Republican Party who drafted the Fourteenth Amendment, and the ratifiers of that Amendment, forged their understanding of what "freedom of speech" meant during the struggle over the suppression of abolitionist speech.[115] These men viewed Southern sedition laws as falling well within the core of the

105. *See* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1121–22.

106. *Id.* at 1145.

107. *Id.*

108. *See, e.g.*, this quote from a newspaper of the time: "Freedom of opinion and of the press is an inalienable privilege secured to us by our political magna carta as well as by the original inherent right of our nature . . . .", *quoted in* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1147. *See also* NYE, *supra* note 85, for a discussion about William Ellery Channing, a famous Unitarian minister and a moderate antislavery spokesman.

109. *See* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1121, 1146–47.

110. *Id.*

111. *See id.* at 1147.

112. *See id.* at 1180.

113. U.S. CONST. amend. I.

114. *See* AMAR, THE BILL OF RIGHTS, *supra* note 51, at 134–56, for an argument that this reading of the First Amendment was supported by the "declaratory theory" of rights, according to which the Bill of Rights were seen as "declaratory of certain fundamental common-law rights."

115. *Id.* at 186.

evils that the Fourteenth Amendment was designed to prevent.[116] During the lead up to the Civil War, the Republican party frequently denounced the antirepublican character of the South, of which the governmental and private suppression of speech was seen as one of the chief evils.[117] Thus, when the States ratified the Fourteenth Amendment, not only did they incorporate the First Amendment against the States, they also replaced the federalist conception of the First Amendment with the conception of "freedom of speech" developed in the abolitionist struggle against southern sedition laws and southern mobs.

To summarize, there are at least three important aspects of this transformation of the concept of free speech. First, free speech was seen as protecting the speaker not only from government control but also from certain types of private attempts to control speech.[118] Northerners came to see mob suppression of antislavery speech as dangerous to public discourse. Second, even minority speech that was considered dangerous by a large section of the population came to be seen as requiring protection. Free speech advocates frequently argued that today's minority speech is tomorrow's majority speech and that the best minds of their generation were often rejected by their contemporaries before their greatness was recognized.[119] Third, this free speech space was protected from both state and federal suppression.

B. THE TRANSFORMATION OF THE COPYRIGHT REGIME

The copyright regime also underwent profound changes during this period. Copyright has expanded continuously from its early beginnings in the 1790 Copyright Act, covering more works and extending the period of protection from the initial fourteen plus fourteen years to the current life plus seventy years.[120] The second half of the Nineteenth Century was a time of momentous change, not only in the length of copyright protection, but also in the nature of the works protected and in the character of the creators' exclusive rights. As Professor Oren Bracha expresses it, while a present day copyright lawyer would have a difficult time practicing at the turn of the Nineteenth Century, he would be relatively at home at the turn of the Twentieth.[121] During the Nineteenth Century, there was a shift

116. *Id.* at 161–62. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 100–02 (1970) (analyzing the political consciousness of the party that drafted and ratified the Fourteenth Amendment).

117. *See* FONER, *supra* note 116.

118. *See* Curtis, *The 1837 Killing of Elijah Lovejoy supra* note 5, at 1180.

119. Galileo was a popular example. *Id.* at 1144.

120. *Compare* Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (repealed) (establishing a term of fourteen years and fourteen year renewal), *with* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (superseded 1976) (establishing a term of twenty-eight years with twenty-eight year renewal), Copyright Act of 1976, Pub. L. No. 94-553, § 302(a), 90 Stat. 2541, 2572 (establishing a term of life of the author plus fifty years), *and* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998) (codified as 17 U.S.C. § 302) (establishing a term of life of the author plus seventy years and the earlier of one hundred and twenty-five years after creation or ninety-five years after publication for corporate works).

121. *See* Bracha, Owning Ideas, *supra* note 32, at 399.

toward a natural rights justification for copyright as the utilitarian justification fell out of favor. This shift had important consequences for the amount of control authors were given over their expressive works.

The most significant change was the move from the relatively clear traditional notion of protecting the verbatim "copy" to the more amorphous concept of protecting the "work." As this conceptual shift took place, the economics of the entertainment industry were also changing, prompting members of the industry to lobby Congress for more intellectual property protection.[122] At the end of the Eighteenth Century, copyright was primarily a regulation of the book trade.[123] This regime tolerated a great deal of the copying and adapting that would be seen as illegal and unjust today. Most notably, abridgements and translations of another's work were viewed as not only noninfringing, but as useful activities that gave a larger section of the public access to the work in question.[124] By the middle of the Nineteenth Century, however, popular sentiment, and eventually black letter law moved in favor of granting authors broader rights to exploit the entire economic value of their work, through translations, abridgements, adaptations, dramatizations and other derivative works.[125]

The case of *Stowe v. Thomas* demonstrates the shift toward a stronger natural rights theory.[126] The 1853 case pitted Harriet Beecher Stowe, who had authorized a German translation of her bestselling *Uncle Tom's Cabin* for the German speaking market in Pennsylvania, against the defendant who beat her to the same market with his own translation that was published in *Die Free Press*.[127] The issue was whether the author of a copyrighted work had the exclusive right to translate that work.[128] Justice Grier held that an author only has the exclusive right to

122. *Id.* at 375 ("The pattern of expansion through the statutory amendments might mislead. One may conclude from it that the growth of copyrightable subject matter was merely a function of new emerging technologies and the consolidation of political influence and power in the hands of relevant emerging interest groups. There is no doubt, that such factors played a crucial role in the process. Yet at this point I want to illuminate the connections between the expanding subject matter of copyright and other conceptual developments more internal to legal discourse.").

123. *Id.* at 289. *See also* Steal This Footage, *Interview with Eben Moglen—From the Birth of Printing to Industrial Culture; the Root of Copyright*, STEAL THIS FILM 2 (April 2007), http://footage.stealthisfilm.com/video/10 (discussing the history of copyright).

124. *See* BENJAMIN KAPLAN, AN UNHURRIED LOOK AT COPYRIGHT 17 (1967) ("[T]he infringement problem was being answered, seventy-five years after [the Statute of Anne], by looking not so much to what the defendant had taken as to what he had added or contributed."); Gyles v. Wilcox, (1740) 26 Eng. Rep. 489 (Ch.) 490 (Gr. Brit.) ("[T]his must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, because not only the paper and print, but the invention, learning, and judgment of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of the author."). *See also* Newbery's Case (1773) 98 Eng. Rep. 913 (Ch.) (Gr. Brit.).

125. *See, e.g.*, Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (right to public performance of dramatic works); Act of Mar. 3, 1865, ch. 126, 13 Stat. 540 (copyright for photographs); Copyright Act of 1870, ch. 230, § 86, 16 Stat. 198 (right to translate and right to extended dramatization); Act of Jan. 6, 1987, ch. 4, § 4966, 29 Stat. 481 (right to perform musical compositions).

126. 23 F. Cas. 201 (C.C.E.D. Pa. 1853).

127. *Id.* at 201

128. *Id.*

reproduce the concrete expression of the ideas and conception that make up her work, but has no right to those ideas and conceptions themselves.[129] Since clothing the same ideas in another language could not be called a "copy" of the original expression, the author had no exclusive right to translate her work.[130] Justice Grier goes so far as to say:

> By the publication of Mrs. Stowe's book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much publici juris as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, play-rights and poetasters. They are no longer her own—those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished.[131]

Thus, *Stowe v. Thomas* is an eloquent articulation of the traditional copyright regime principles applied to a more modern economic situation—a bestselling author who wants to exploit new markets for her work.

The decision was widely criticized in the years that followed.[132] Congress pointedly overturned it with the 1870 ammendment to the copyright statute.[133] By 1868, a Court held in *Daly v. Palmer* that a play that borrowed the idea of rescuing a woman tied to traintracks just in time, while having a significantly different plot, infringed the play, *Under the Gaslight*, that originated that scene.[134] *Daly* illustrates the new copyright paradigm in holding that a theatrical idea from one play cannot be recast in a different play without the permission of the creator of the original.[135] The movement from conceptualizing infringement as verbatim copying to conceptualizing infringement as adapting a preexisting idea to a new work and a new market is the movement from protecting the authors' "copy" to protecting their "work."[136] *Daly* is an extreme example. After *Baker v. Seldon*, in 1879, established the doctrine that ideas are not copyrightable, it is unlikely that *Daly* would have been decided the same way.[137] Nevertheless, *Daly* illustrates the trend

129. *Id.* at 207.

130. *Id.* ("A 'copy' of a book must, therefore, be a transcript of the language in which the conceptions of the author are clothed; . . . The same conceptions clothed in another language cannot constitute the same composition, nor can it be called a transcript or 'copy' of the same 'book.' I have seen a literal translation of Burns' poems into French prose; but to call it a copy of the original, would be as ridiculous as the translation itself.").

131. *Id.* at 208 (internal quotation omitted).

132. Eaton Drone took the time in his leading 1879 treatise to demolish the reasoning of *Stowe*. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 449–55 (1879). *See also* Oren Bracha, *Commentary on Stowe v. Thomas, USA (1853)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900) (2008), http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22us_1853b%22.

133. Copyright Act of 1870, ch. 320, § 86, 16 Stat. 198 (1870).

134. Daly v. Palmer, 6 F. Cas. 1132, 1139 (C.C.S.D.N.Y. 1868).

135. *See id.* at 1132.

136. Bracha, Owning Ideas, *supra* note 32, at 303.

137. *See* Baker v. Seldon, 101 U.S. 99 (1879).

of expanding the scope of copyright protection.[138]

The "work" is the creation of an author abstracted from any particular medium.[139] Integral to this new concept is the idea that the creator should be able to have a general right to control his creation.[140] As a practical matter, this development caused the bundle of rights the author held to expand significantly. In theory, the creator would be entitled to the entire market value of the work, including any value that could be earned from adaptation of the work to different markets.[141] Derivative rights are precisely the right to exploit all potential markets for a work.[142] This type of a late Nineteenth Century right stands in stark contrast to copyright law as it existed at that turn of the Nineteenth Century. The move to protect the "work" raises more questions in copyright doctrine than it answers, since the right of the author cannot conceivably extend to every future creation that only remotely touches his original work.[143] What is nonetheless clear is that this shift places copyright law on a collision course with the postincorporation First Amendment.

III. THE "MARKETPLACE OF IDEAS": AN ATTEMPT TO HARMONIZE THE CLAUSES

By the second half of the Nineteenth Century, the values animating the copyright and free speech regimes had undergone a transformation. To a large extent, however, these regimes still coexisted peacefully. The deep reason for this peaceful coexistence is latent in the Republican campaign slogan of the 1850s that placed "Free Labor" and "Free Speech" side by side: "Free Speech, Free Press, Free Men, Free Labor, Free Territory, Fremont."[144] By creating a market for

138. The fact that the Court felt it necessary in 1879 to create the idea/expression doctrine is illustrative of copyright's movement from protecting authors from only verbatim copying to protecting them from use of the concrete ideas embodied in their work.

139. Bracha, Owning Ideas, *supra* note 32, at 354. *See also* Patterson, *Free Speech, Copyright, and Fair Use*, *supra* note 1, at 11.

140. *Id.* at 354.

141. *Id.* at 303, 319, 322.

142. Bracha, Owning Ideas, *supra* note 32, at 5. *See also* Jane Ginsburg, *Creation and Commercial Value: Copyright Protection for Works of Information*, 90 COLUM. L. REV. 1865, 1886 (1990) (arguing that a "personality justification," which would protect works that could be seen as an extension of the author's unique personality, supported the rise of derivative rights); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y 209 (1982) (examining different justifications for derivative rights).

143. *See* Folsom v. Marsh, 9 F.Cas. 342 (1841) (providing an early description of copyright as metaphysical); Bracha, Owning Ideas, *supra* note 32, at 217 (observing that it is when the law starts protecting "works" not "copies" that copyright becomes "metaphysical"). *Compare* Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997) (holding that decorative ceramic tiles created by a company that mounted an artist's copyrighted works into tiles were not "derivative works" and rejecting the Ninth Circuit's approach), *with* Mirage Editions v. Albuquerque A.R.T., 856 F.2d 1341, 1344 (9th Cir. 1988) (holding that a tile-preparing process that was similar to the process in *Lee v. A.R.T. Co.* results in derivative works), *and* Alfred Bell Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951) (providing an approach that differs from both *Lee* and *Mirage*).

144. AMAR, THE BILL OF RIGHTS, *supra* note 51, at 235.

speech—especially dissenting and controversial speech—the Copyright Clause actually served the First Amendment. The Supreme Court adopted a version of this argument in *Harpers & Row v. Nation Enterprises*.[145]

Authors, including authors of fiction, were instrumental in sparking public debate over the most important questions leading up to the Civil War. Abraham Lincoln called Harriet Beecher Stowe "the little woman who wrote the book that made this great war."[146] Frederick Douglass was another popular abolitionist writer whose work forced people to confront slavery, an issue that they would have rather avoided.[147] Hinton Helper's *The Impending Crisis of The South: How to Meet It*, which urged nonslaveholding whites to revolt against the economic system of slavery, was a prime example of an incendiary work.[148] It was controversial and widely read.[149] Although their works were often popular, many of the views of these authors obviously fell outside the mainstream of southern society. Thus, there is a strong argument that a Copyright Clause that allowed all authors a strong property right in their creations regardless of the content of those creations, such that no one could interfere with their markets, made good First Amendment sense.

A content neutral copyright would protect the property rights of all authors regardless of whether the majority of society agreed with their opinions.[150] A form of this argument is made by Professor Neil Netanel when he argues that the historical alternative to a copyright system is a patronage system of some form, and the Founders were anxious to avoid a patronage system.[151] Presumably, under a patronage system artistic challenges to the established order would be less likely to occur, as authors would be unlikely to criticize the people who paid them.[152] While

145. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("[I]t should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

146. AMAR, AMERICA'S CONSTITUTION, *supra* note 47, at 95 (2006). *See also* Bracha, Owning Ideas, *supra* note 32, at 355 n.251 ("[I]t seems hardly accidental that Stowe was the first case to seriously test the translation rule in the United States. It enjoyed unprecedented popularity in a newly appearing national market. As such it attracted many adaptations and translations. Thus Stowe's stakes in expanding the scope of copyright protection as to encompass such ubiquitous and potentially valuable secondary uses were especially high.").

147. *See* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1118 ("[T]he preferred way of dealing with the problem [of slavery] was *not* to deal with it and to wait.").

148. HINTON ROWAN HELPER, THE IMPENDING CRISIS OF THE SOUTH: HOW TO MEET IT (1857)

149. *See* Curtis, *The 1859 Crisis over Hinton Helper*'s *Book*, *supra* note 92, at 1148–49 ("In December 1860, the New York Tribune, which was promoting the book, cheerfully reported that the Southern 'Fire-eaters' and Northern 'Doughfaces' had by their persistent discussion of The Impending Crisis generated a circulation rapidly approaching that of *Uncle Tom's Cabin*.").

150. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (making the related and familiar argument that copyright must not make decisions concerning what to protect based on the aesthetic opinions of judges).

151. *See* Netanel, *Copyright and a Democratic Civil Society*, *supra* note 1, at 357–58.

152. *See id.* at 353 ("Prior to the first modern copyright statutes in the eighteenth century, writers and artists were heavily dependent on royal, feudal, and church patronage for their livelihoods. This dependency undermined expressive autonomy and thwarted the development of a vital, freethinking intelligentsia."). *See also* BOYLE, *supra* note 14, at 22 (quoting Thomas Babington Macaulay: authors "must be remunerated for their literary labour. And there are only two ways in which they can be

the argument that a strong copyright regime supports democratic deliberation is consonant with ideas circulating in the founding era, it becomes particularly relevant to the question of the relationship between copyright and the First Amendment after the abolitionist struggle discussed above changed the focus of the First Amendment to the protection of dissenting speech.[153] After the Civil War, it became relevant to the First Amendment to argue that a full blooded property right for authors would encourage the type of constructive and creative dissent that ultimately brought the downfall of the South's "peculiar institution."

The author's right to the market value of and general control over her work was grounded in a theory of natural justice where the author's labor produced value that could only justly be realized by the author.[154] Securing for authors the right to the full value of their works fit well into the free labor ideology of the time, which was an essential part of the ascendant Republican Party at the passage of the Fourteenth Amendment.[155]

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remunerated. One of those ways is patronage; the other is copyright . . . I can conceive no system more fatal to the integrity and independence of literary men than one under which they should be taught to look for their daily bread to the favour of ministers and nobles.").

153. For a founding era version of the argument that copyright supports democratic innovation argument *see* BUGBEE, *supra* note 23, at 111–12 (noting that the tireless founding era copyright promoter, Noah Webster, did not focus his arguments against a patronage system on the ground that a copyright system would promote dissent or public deliberation. Rather, he wrote to Elias Boudinot, President of the Confederate Congress at the time, urging that "[a] literary reputation is necessary in order to complete [the United States'] national character . . . . As we have few Gentlemen of fortune sufficient to enable them to spend a whole life in study, or induce others to do it by their patronage, it is more necessary, in this country than in any other, that the rights of authors should be secured by law.").

154. *See* Bracha, Owning Ideas, *supra* note 32, at 371 ("They abstracted the concept of property and reconstructed it as the natural right for the protection of any kind of market value."). Although the most well-known expression of this idea is found in Justice Holmes's opinion in *Herbert v. Shanley Co*., 242 U.S. 591, 594–95 (1917), the origins of the idea lie in the Nineteenth Century. *Shanley* presented the question whether a composer of a work is entitled to compensation for performance of the work when the work is performed in a restaurant, but no fee is charged specifically for the music. Justice Holmes articulates the right of the author to all value created by his work in this way:

> If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

Id.

155. *See generally* FONER, *supra* note 116. Treatise writers of the era made great use of the Lockean idea that an author is justly entitled to a property right in his or her work because of the labor expended in its production. *See supra* note 132 discussing Drone's argument that *Stowe v. Thomas* was wrongly decided. Even though in 1834 the Supreme Court denied the existence of a perpetual common law copyright after publication in *Wheaton v. Peters*, 33 U.S. (Pet. 8) 591 (1834), the force of the natural rights argument for authors' entitlement to the entire market value of their work survived. *See* Bracha, Owning Ideas, *supra* note 32, at 369:

The language of the Constitution also supports the use of strong property rights and markets to achieve the speech related goals of the Copyright Clause. The clause empowers Congress "[t]o promote the Progress of Science and useful Arts, *by* securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[156] The text of the clause shows that the framers and ratifiers contemplated creating a market for the works of authors by granting them economic rights in their creations.[157]

In sum, it is possible to draw together the natural rights thread with the Republican thread to make a compelling argument that the post Civil War copyright and First Amendment regimes did not conflict. These ideas share the common theme that the market mediates any conflict between the Copyright Clause and the First Amendment. The marketplace of ideas, conceived as an engine of free speech and created with content neutral property rights granted by the government, is the common ground of the First Amendment and copyright. On the one hand, the rise of minority authors producing controversial bestsellers strengthened the natural rights argument that these risk takers should receive the full economic value of their works. On the other hand, the Republican ideology of free labor and its implicit capitalist organization of the economy were favorable to the creation of the metaphor of the "marketplace of ideas." If the realm of culture and ideas was a marketplace, then how could the federal grant of property rights to authors, the basis for this market, be a violation of the First Amendment?

IV. LIMITS TO THE "ENGINE OF THE MARKETPLACE OF IDEAS" METAPHOR

Although the argument that copyright is an "engine of the marketplace of ideas" resolves many of its tensions with the First Amendment, it does not completely

> Nonetheless the dominant notion of copyright as protection of market value remained entangled with a conception of property as a pre-political naturally defined right. The rule that denied post publication common law copyright did not undermine such an understanding, but rather supported it. Its received form came to be that the statute preempted and took away common law protection from the moment of publication onwards. The historical inaccuracy notwithstanding, this further entrenched the idea that the origin of copyright was in a common law right, which in turn reflected a natural property right . . . the statute itself was often interpreted in light of the supposed prior common law right.

156. U.S. CONST. art. I, § 8 (emphasis added).

157. David Ladd pushes this textual argument further. He argues, in exactly the same vein as Nineteenth Century treatise writers Curtis and Drone, that the author is entitled to the entire economic value of a work because copyright is a property right. David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y 421, 422 (1983). Marshalling support for the argument, Ladd notes that the Copyright Clause includes the only use of the word "right" in the original Constitution. *Id.* at 422. While the use of the word "right" might not be enough by itself to support a perpetual common law copyright that peacefully coexists with the statutory copyright, as *Wheaton v. Peters* finds, in the post Fourteenth Amendment world, it does strengthen the case for a natural rights reading of the Copyright Clause in the same way that the rights language of the Bill of Rights supports a stronger reading of those Amendments than they received in the antebellum era. Wheaton v. Peters, 33 U.S. 591 (1834); AMAR, THE BILL OF RIGHTS, *supra* note 51, at 146–56 (discussing the "declaratory" reading of the Bill of Rights in the antebellum era).

account for the transformation the First Amendment underwent during the Civil War. The history of mob suppression of antislavery speech and the incorporation of the First Amendment against the States shows that private suppression of speech can violate the First Amendment. Recall the role antislavery mobs played in the free speech debate leading up to the passage of the Fourteenth Amendment. The murder of the Reverend Lovejoy was an important turning point in the development of a more libertarian attitude toward free speech.[158] Mob destruction of abolitionist presses sparked the idea that free speech has a positive component that can be infringed in addition to its traditional negative component—protection against government regulation of speech.[159] The mobs were viewed as dangerous because they functioned as censors, inhibiting public discussion of the issue of slavery, the burning issue of the day, and preventing individual citizens from expressing their opinions.[160]

The power to enjoin the use of an author's work, especially when the right infringed is one of the more expansive post Civil War rights (like the right to prepare derivative works), is analogous to the power of the antebellum mob to shut down the antislavery press. When authors who create works that become important parts of culture are given control over all potential markets for those works, such that they have the power to enjoin someone from writing a sequel or another work based off of their original work, they enjoin private parties from speaking, and they also enjoin the public at large from hearing dissenting versions of those cultural works.[161] For example, in *Suntrust v. Houghton Mifflin Co.*, a district court enjoined an author from publishing a retelling of *Gone with the Wind* called *The Wind Done Gone* because the holders of the copyright to *Gone with the Wind* would not authorize a derivative work.[162] Granted, mobs and copyright holders accomplish suppression through different means. Mobs use physical force whereas authors use injunctive force, but the effect is the same. Both methods prevent others from saying certain things anywhere.[163] Indeed, copyright injunctions, since they have the force of federal law, are more effective than mobs at preventing someone from speaking, since the coercive power of the federal government enjoys the legitimacy of that government.

A copyright regime that permits injunctions effectively empowers citizens to act as private censors of creative speech that they do not like. This danger is compounded when a relatively small number of large entities hold the copyright to a great deal of works.[164] Furthermore, mob and injunctive suppression of speech

158. *See* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1145.

159. *Id.* at 1180.

160. *See supra* Part II.A.

161. Note, *"Recoding" and the Derivative Works Entitlement: Addressing the First Amendment Challenge*, 119 HARV. L. REV. 1488, 1493–94 (2005) (discussing the First Amendment problems with "recoding" cultural works).

162. 136 F. Supp. 2d 1357, *injunction vacated*, 252 F.3d 1165 (11th Cir. 2001). For a detailed First Amendment critique of that district court holding, *see generally* Rubenfeld, *supra* note 3.

163. *See* Rubenfeld, *supra* note 3, at 29.

164. Professor Paul Goldstein has argued that there are serious First Amendment dangers when entities hold large numbers of copyrights, thus giving them a quasi-censorial power over culture in much

are both distinguishable from the situation where a private landowner kicks someone off her property for saying something she does not like, which is perfectly acceptable under First Amendment principles.[165] A copyright injunction prevents the enjoined speaker from using a particular form of expression anywhere. Similarly, the antiabolitionist mobs sought to keep abolitionists from speaking anywhere. When a dissenter is prevented from speaking anywhere, the public at large is effectively prevented from hearing his speech. In contrast, an owner of private property may remove a speaker from her property because of the content of his speech without preventing the public at large from hearing what he has to say. The principle that makes the distinction between these cases meaningful is the distinction between the public and the private. The struggle of abolitionist speech before the Civil War made this principle relevant to the First Amendment.[166] The post Civil War First Amendment abhors the silencing of public dissent.

An opponent of this view could also draw a distinction between copyright injunctions and mob suppression of abolitionist speech on the grounds that the antiabolitionist mobs silenced their foes with violence, whereas copyright enables rights holders to use the legitimate power of the state to silence infringers. Even the promoters of the strong natural rights conception of free speech during the press burning controversy contemplated that free speech could be abused and that its abuses could be remedied by legal process. For example, during the Lovejoy controversy, the Reverend Edward Beecher, Harriet Beecher Stowe's brother, proposed a series of resolutions, declaring:

> that the free communications of thoughts and opinions is one of the invaluable rights of man and every citizen may freely write, speak, and print on any subject, being responsible for the abuse of that liberty. The question of abuse must be decided solely by a regular civil court, and in accordance with the law and not by an irresponsible and unorganized portion of the community.[167]

Under this theory, the infringement of a copyright holder's derivative right would be an abuse of the right of free speech, and thus could be remedied by the appropriate copyright action. However, this theory discounts the importance of the struggle for free speech to the great national debate over the question of whether or not our country will permit slavery to exist. That struggle altered the concept of "the freedom of speech" to which the First Amendment refers. The violence with which Southern states and Southern mobs attacked those who spoke out against slavery spurred abolitionists and their friends to develop a stronger conception of free speech.[168] It is true that they sought to replace the violence directed toward

the same way that the Stationers' Company controlled the entire book trade before the Expiration of the Licensing act and the passage of the Statute of Anne. Goldstein, *Copyright and the First Amendment*, *supra* note 1. *See also* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (explaining the First Amendment dangers of concentration of copyrights in a small number of large holders).

165. *See* Rubenfeld, *supra* note 3, at 29.

166. *See* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1182.

167. *Id.* at 1141.

168. *Id.* at 1151–52.

them with principled discussion.[169] However, the devolution of Southern society as its public forum contracted also convinced them, and ultimately American society as a whole, that a stronger conception of the freedom of speech was required in order for a democracy like the United States to remain healthy—a concept of freedom of speech designed to keep the public forum open to dissent.[170] Thus, the First Amendment principle that emerged from that struggle, and that was embodied in the Fourteenth Amendment, is not merely that abuses of the freedom of speech must be dealt with through legal mechanisms, but also that dissenters must not be prevented from accessing the public forum, no matter whether they are prevented by legal process or by mob violence.

Still, some scholars and Justices argue that the expanded copyright regime does not pose large First Amendment problems because doctrines internal to copyright evolved during its expansion that prevent it from abridging the freedom of speech.[171] These two doctrines are the doctrine of fair use and the idea/expression dichotomy, and the argument is that they act as First Amendment safety valves.[172] Under the doctrine of the fair use defense, an otherwise infringing use of a copyrighted work will not be considered infringing if that use is "fair."[173] "Fair" use includes use "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research".[174] In determining fair use, the courts must consult the following four factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The first problem with substituting fair use doctrine for First Amendment analysis is that the four factor balancing test is notoriously difficult to apply. Multifactor balancing tests are a particular problem for the First Amendment because uncertainty about how courts will rule in free speech cases harms a number of first amendment values. The uncertainty caused by complex tests like the one

169. *Id.* at 1152.

170. *See* Curtis, *The 1837 Killing of Elijah Lovejoy*, *supra* note 5, at 1181–82.

171. *See* Eldred v. Ashcroft, 537 U.S. 186, 222 n.24 (2003). *See also* Robert Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 289–99 (1979) (arguing that the idea/expression dichotomy insulates copyright from First Amendment scrutiny). *Cf.* John Tehranian, *Et Tu Fair Use? The Triumph of Natural Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2004) (arguing that, as applied, the doctrine of fair use has strengthened rather than weakened copyright).

172. Joseph Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 429 (2007).

173. 17 U.S.C. § 107 (2006).

174. *Id.*

for fair use chills speech in normal times and gives courts too much leeway to capitulate to repressive public opinion in "pathological" times, that is, times where dissent is being stamped out by the majority of the public and the First Amendment is needed most.[175]

But, more fundamentally, the outcome of fair use analysis often turn on the factors in the fair use test that do not track First Amendment values. For example, the subtle distinction between parody and satire, important for fair use analysis, renders fair use decisions viewpoint discriminatory.[176] The amount of economic harm the copyright holder has suffered (the fourth factor), is often the most important part of the fair use analysis; but this factor does not advance First Amendment analysis at all, being narrowly concerned with the private economic interests of the copyright holder.[177] Since fair use analysis does not track First Amendment values, and at times actually contradicts First Amendment doctrine, it would be better to abandon the faith that fair use is coextensive with the First Amendment and develop new doctrine to deal with the conflict between copyright statutes and the First Amendment.

Similarly, the idea/expression dichotomy fails to adequately satisfy the First Amendment because the First Amendment is concerned with expression, not ideas.[178] As Professor Jed Rubenfeld explains, in *Cohan v. California* the Supreme Court overturned the conviction of a man who had "Fuck the Draft" written on the back of his jacket, holding that the government was not justified in regulating the way the man expressed his idea.[179] Cases overturning convictions for draft card and flag burning stand for the same principle.[180] This principle, that government restrictions on the way one expresses ideas will be given careful scrutiny, makes good sense. The persuasive force of many ideas depends on exactly how they are communicated, and therefore to limit the First Amendment solely to the protection of ideas, but not expression, would prevent it from effectively protecting the "freedom of speech." This fact is particularly important to the theory that the First Amendment must protect the right of the people to "check" the abuse of power of members of the government. If dissenting speech is to have any impact, it must be able to get the attention of the populace. As Vincent Blasi puts it:

> The checking process depends on the continuing capability of a populace generally inattentive of public affairs, engaged almost exclusively in the pursuit of private satisfaction, to be mobilized to resist government officials who are abusing their power. The kind of stimulus necessary to activate the political the United States

175. *See* Blasi, *The Pathological Perspective and the First Amendment*, *supra* note 74, at 472–74 (arguing that First Amendment reasoning must be expressed in the form of simple principles).

176. *See* Rubenfeld, *supra* note 3, at 17.

177. For a more detailed critique of the argument that fair use and First Amendment are coextensive, *see* Rubenfeld, *supra* note 3, at 16–22.

178. *Id.* at 14–16 ("Government cannot evade the First Amendment by claiming to regulate 'only the expression,' not the idea. Through its protection of art, symbolic speech like flag burning and offensive language, First Amendment law clearly and emphatically rejects this position.").

179. 403 U.S. 15, 19 (1971).

180. *See* Rubenfeld, *supra* note 3, at 14–16.

> involvement in Vietnam represents a paradigm example of the 'speech' with which the First Amendment is concerned.[181]

Furthermore, the fact that it is unquestioned now that the First Amendment protects art underscores the importance of expression to the First Amendment, since the way art expresses ideas—if art can even be said to have anything to do with ideas at all—is essential to what it is.[182]

In sum, the fact that a strong copyright regime promotes dissenting speech does not completely reconcile it to the post Civil War First Amendment. It also must not enable private parties to act as censors of public speech and contract the public forum available to dissenters.

V. CONCLUSION: A SHORT SKETCH OF DOCTRINAL IMPLICATIONS

A full elaboration of the doctrinal consequences of this history is beyond the scope of this Article, but a brief examination of its application to the question of remedies for the infringement of copyright will clarify how this Nineteenth Century history applies to present day copyright debates. Two principles emerge from this history: (1) a strengthened copyright regime actually serves the transformed First Amendment by encouraging dissenting speech; (2) the Constitution abhors the closing off of the public forum to dissenting speech. The ultimate question is how to read the Copyright Clause with the First Amendment today in a way that restores the harmony that existed at the founding. Answering this question involves reconciling the two principles mentioned above.

The Supreme Court has implicitly recognized that the metaphor of copyright as an engine for the "marketplace of ideas" does not by itself resolve the tension between the clauses by holding that copyright measures that go beyond the "traditional contours" of the copyright regime will receive First Amendment scrutiny, implying that Copyright is not immune from the First Amendment.[183] However, the transformation of the First Amendment during the Nineteenth Century shows that the "traditional contours" test is not adequate to the task of reharmonizing the two clauses since it ignores how the values underlying the Copyright Clause and the First Amendment diverged. While this Article does not aim to provide an exhaustive analysis of the doctrinal implications of this history, a few obvious consequences are apparent. This history supports the arguments of scholars who argue that First Amendment principles require that the ability to

181. Vincent Blasi, *The Checking Value in First Amendment Theory*, *supra* note 56, at 641.

182. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989):

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known [music's] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state . . . . The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment.

See also Rubenfeld, *supra* note 3, at 32.

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

obtain copyright injunctions must be limited in some way.[184]

The story of abolitionist speech shows both that the post Civil War First Amendment will not abide injunctions against public speech, especially when that speech is dissenting speech, but that important First Amendment values are vindicated when we ensure that authors are compensated for their works. However, if the ability for authors to collect damages for dissenting, but infringing, uses of their works were eliminated, then these authors would be disincentivized from creating these important works in the first place. Taking the incentives rationale for copyright seriously, Harriet Beecher Stowe would be less likely to write *Uncle Tom's Cabin* if she knew that she would not be able to win damages from infringers that used her work in politically important ways—say, illegally copying it and freely distributing it in the South. Thus, it is necessary to ensure the author some kind of compensation for political use of her work. Changing copyright's property rules into liability rules would appear to reconcile copyright's free speech role of incentivising risk taking creators with the negative free speech demand that a forum for public dissent be preserved.

Simply turning property rules into liability rules, however, is not an entirely satisfying solution, since imposing massive liability on someone who uses a copyrighted work publicly would chill their speech as much as an injunction would—perhaps more so. What is needed is a solution that spreads the cost of protected speech that infringes copyright across society, so that creators are still compensated but the public forum remains open and robust. This kind of loss spreading scheme, perhaps a tax of some sort, would likely have to be a legislative innovation. Thus, the history analysed in this Article suggests that the Constitutional Clause places a duty on lawmakers to use the copyright power in such a way that the public forum remains vibrant and open to dissent. Furthermore, given the difficulty of achieving this type of loss spreading within the existing copyright scheme, it is likely that lawmakers will have to stray outside the historical "core of copyright protection." Just as it is necessary to step outside the courtroom in order to understand the conflict between the Copyright Clause and the First Amendment, the resolution of that conflict will also require extrajudicial action.

184. Many scholars argue that preliminary injunctions in copyright infringement actions constitute prior restraint and that procedural First Amendment protections for infringers are appropriate because these potential infringers in fact represent the free speech rights of the public. *See e.g.*, Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1999); Rubenfeld, *supra* note 3 (arguing that the freedom of imagination granted by a First Amendment that prohibits both private and public suppression of speech requires that the remedies available to copyright infringers be limited).