

HAMILTON'S COPYRIGHT AND THE ELECTION OF 1800

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Copyright is, perhaps surprisingly, a regular fixture of electoral campaigns. Candidates deploy copyright to obscure prior policy statements. Local governments assert copyright over recordings of public meetings to protect incumbents. And campaign committees have used copyright to prevent counter-advertisements, which respond to (by embedding) their adversaries' ads. Are these examples of illegal copyright infringement or protected political speech?

The Supreme Court has balanced copyright and First Amendment interests by looking both to copyright law's internal doctrinal limits (*e.g.*, fair use) and to the "historical record." But, in political contexts, the doctrine is sparing: candidates for public office, weighing the pressures of campaigning against the costs of copyright litigation, tend to prefer self-censorship—undermining protections for political speech.

The historical record may help. This Article highlights an episode—overlooked until now—that sheds new light on the speech-copyright equilibrium. Drawing on a mix of primary and secondary sources outside the legal literature, it tells the story of Alexander Hamilton's secret, copyrighted pamphlet aimed at unseating John Adams from the top of the Federalist Party—secret, that is, until it leaked to Hamilton's political opposition. Viewed in its entirety, this episode may reflect a shared—shared by both Hamilton and his adversaries—if contested understanding that favors a full and fair discussion of such matters of public importance, even if copyright's rules might otherwise restrain such speech. This political precedent may thus have implications for the contemporary controversies in which candidates deploy copyright (and related speech restraints) to squelch public scrutiny

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over their prior statements regarding, say, abortion rights. And so this Article concludes by describing how the public governance interests in such political speech should trump copyright's restraints.

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INTRODUCTION

Justice William J. Brennan once identified a paradox in the Supreme Court's First Amendment jurisprudence: the Government could not "limi[t] the financial resources upon which a political speaker may draw," but it could, under cover of copyright law, "limit the intellectual resources upon which that speaker may draw."¹ In short, copyright laws may burden political speech in ways that other rules may not.²

1. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 582 & n.4 (1985) (Brennan, J., dissenting).

2. For example, states may not grant public campaign funding to an incumbent's publicly funded campaign in order to overcome the financial advantages of a wealthy challenger—even as the state might deploy a state-owned copyright interest in a lawsuit to protect the incumbent from that challenger. Compare *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734–35 (2011), with *infra* text accompanying notes 89–96 (describing a suit by a local government against a critic). Even if the government may lose the copyright case on the merits, the suit itself places substantial financial and time pressures on the candidate—pressures which take on added significance in the campaign context. See *infra* notes 88, 96, 99–100, 112–21 and accompanying text (describing these pragmatic concerns). See also *infra* notes 16, 87 and accompanying text (describing the special significance of the campaign context).

This contrast between copyright and, say, campaign finance regulation has since sharpened. Emphasizing that speech protections have their “fullest and most urgent application” during campaigns for political office, the Supreme Court has repeatedly struck down statutory limits on campaign contributions under stringent First Amendment scrutiny.³ But the Court has reviewed First Amendment challenges to copyright laws under its most lax standard of review.⁴

Why does copyright escape the rigorous First Amendment scrutiny that applies to other such limits on speech? The doctrinal answer to this question focuses on three features of copyright law: One, the Supreme Court has described “fair use”—the lawful use of a copyrighted work for criticism, comment, or news reporting, among other purposes—as a “built-in First Amendment accommodation,” a longstanding feature that obviates the need for close constitutional scrutiny.⁵ Two, the Court has noted that copyright does not restrain the dissemination of an idea, but rather only a particular expression of that underlying idea.⁶ And three, the Supreme Court has highlighted some limited aspects of the “historical record”—namely, the near-simultaneous ratification of the first copyright laws under the Constitution’s Intellectual Property Clause and the First Amendment—as evidence that “copyright’s limited monopolies are compatible with free speech principles.”⁸ In all, this abridged

3. See, e.g., *Ariz. Free Enter. Club*, 564 U.S. at 734–35 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010). See also *Davis v. FEC*, 554 U.S. 724, 739 (2008) (describing a “First Amendment right to engage in unfettered political speech”); *Buckley v. Valeo*, 424 U.S. 1, 39–45 (1976) (subjecting restrictions on “campaign speech” to “exacting scrutiny”).

4. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 208, 218–19 (2003) (applying rational basis review and rejecting calls to “impos[e] . . . uncommonly strict scrutiny” in First Amendment challenges to copyright law). See also *id.* at 244–45 (Breyer, J., dissenting) (“I would look harder than does the majority at the statute’s rationality . . .”).

5. *Id.* at 219 (majority opinion); *Golan v. Holder*, 565 U.S. 302, 328–29 (2012) (citing 17 U.S.C. § 107, which codifies fair use). In this way, the Court’s decisions in *Eldred* and *Golan* appear to transform fair use—a statutory defense with roots in the common law, compare 17 U.S.C. § 107, with *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901)—into a form of constitutional common law that is rooted in the First Amendment’s commands but that may be defined and edited by Congress. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975).

6. *Eldred*, 537 U.S. at 219; *Harper & Row*, 471 U.S. at 556.

7. *Golan*, 565 U.S. at 330.

8. *Eldred*, 537 U.S. at 219. Specifically, the nation’s first copyright act was signed into law by President George Washington in 1790. See Pub. L. No. 1-15, 1 Stat. 124 (1790); U.S. Copyright Off., *U.S. Copyright Beginnings*, COPYRIGHT.GOV, <https://www.copyright.gov/history/copyright-exhibit/beginnings/>

historical review, together with copyright's internal doctrinal limits, gives rise to a speech-copyright equilibrium that is characterized by a special First Amendment solicitude to Congress's enactments under the Constitution's Intellectual Property Clause.⁹

But the Supreme Court has not squarely said whether this same special solicitude applies to copyright claims affecting *political* or *campaign* speech in particular—speech that receives, both in doctrine and in practice, heightened protection.¹⁰

This uncertainty about the relationship between copyright law and the First Amendment's political speech protections is significant: copyright assertions have become a somewhat regular fixture of recent political campaigns, with the effect of stifling certain political speech.¹¹ Candidates for public office, for example, have asserted copyright over their previous policy statements to forestall their widespread dissemination and obscure them from the voting public.¹² Local governments have asserted copyright over video recordings of city council meetings to protect incumbent interests.¹³ And campaign committees have deployed copyright in attempts to prevent counter-advertisements, which respond to (sometimes by embedding) the ads of their opponents.¹⁴ In all, political campaigns and policy advocates, among others, have often copied each other's expression in the course of “the

[<https://perma.cc/8NCY-994P>]. The First Amendment was ratified about one year later, in 1791.

9. See *Golan*, 565 U.S. at 330; *Eldred*, 537 U.S. at 219.

10. See, e.g., *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734–35 (2011); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 604 (1990) (defining a category of “public discourse” which receives the most rigorous speech protections). See also Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353 (2022) (describing and criticizing political speech's favored status). But see *Harper & Row*, 471 U.S. at 545, 549 (copying a “politically significant” “copyrighted manuscript . . . was not a fair use within the meaning of the Copyright Act”).

11. See generally Cathay Y. N. Smith, *Political Fair Use*, 62 WM. & MARY L. REV. 2003 (2021); Deidre A. Keller, “What He Said.” *The Transformative Potential of the Use of Copyrighted Content in Political Campaigns—or—How a Win for Mitt Romney Might Have Been a Victory for Free Speech*, 16 VAND. J. ENT. & TECH. L. 497 (2014).

12. See *infra* notes 78–88 and accompanying text.

13. See *infra* notes 89–100 and accompanying text.

14. See *infra* notes 105–10 and accompanying text. See also FTC, Statement of the Federal Trade Commission on Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act: Access to the Broadcast Media as a Result of Carriage of Product Commercials (No. 19260), reprinted in Paul D. Scanlon, *The FTC, the FCC, and the ‘Counter-Ad’ Controversy: An Invitation to ‘Let’s You and Him Fight?’*, 5 ANTITRUST L. & ECON. REV. 43, 46–47 (1971) (defining and advocating for policy changes related to counter-advertising).

robust public debate . . . that [is] ‘the essence of self-government,’”¹⁵ causing some elected officials, candidates for public office, and political operatives to turn to copyright to forestall such political uses of their prior expression.

Such copyright assertions have had the practical effect of chilling political speech—keeping political ads off the air while forcing political candidates and commentators to the choice of settling a lawsuit (with self-censorship) or facing hundreds of thousands of dollars in potential liability and attorneys’ fees.¹⁶ And chilling political speech undermines our interests in democratic governance and political accountability.

Moreover, the features of copyright law which are said to mitigate and resolve any conflict with First Amendment principles apply with only limited force in political and campaign contexts. As noted, the Supreme Court has highlighted copyright’s internal doctrines—fair use and the idea-expression dichotomy—as well as the historical record to explain that copyright’s speech-restraining effects are consistent with First Amendment principles.

Fair use falls short as a fact-intensive inquiry that is mismatched to the time-sensitive nature of electoral politics.¹⁷ It is true that existing literature, especially work by Cathay Smith, finds that courts will often (but not always) decline to enforce copyrights over political works in political contexts,¹⁸ as the political nature of the work weighs in favor of excusing the alleged downstream infringement as a lawful fair use.¹⁹

15. *Harper & Row*, 471 U.S. at 582 (Brennan, J., dissenting) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)); *infra* Section I.B.

16. *See infra* Section I.B. *See also* Keller, *supra* note 11, at 506–07.

17. *See Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020) (“But [fair use], designed to accommodate First Amendment concerns, is notoriously fact sensitive and often cannot be resolved without a trial.”). *See also* Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1782–83 (2010); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 972–73 (2007) (describing problems with prevailing approaches to fair use, including that “it is very difficult for courts to engage in open-ended balancing of the values involved in copyright infringement cases”). *Compare, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 & n.10 (1994) (“[T]he fair use enquiry often requires close questions of judgment.”), and *Salinger v. Colting*, 607 F.3d 68, 80–81 (2d Cir. 2010), with *Norman v. Reed*, 502 U.S. 279, 288 (1992) (noting the “time constraints” that pertain to election-related litigation), and *Ark. AFL-CIO v. FCC*, 11 F.3d 1430, 1436 (8th Cir. 1993). *Cf. also Purcell v. Gonzalez*, 549 U.S. 1, 3–5 (2006) (per curiam) (noting “considerations specific to election cases” including “the time-sensitive nature of the proceedings” and a need for “clear guidance” to avoid “voter confusion”).

18. *See generally* Smith, *supra* note 11. *Cf.* Keller, *supra* note 11.

19. *See* Smith, *supra* note 11. *But see Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347, 1358–60 (D. Colo. 2014) (finding fair use does not apply to the use of a commercial photograph in a political mailing).

Speech interests—and, importantly, the democratic governance concerns on which those speech interests are founded—rightfully outweigh copyright interests in these cases.²⁰ But the Supreme Court’s opinion in *Harper & Row v. The Nation*²¹ (regarding *The Nation*’s reporting on former President Gerald Ford’s memoirs) is far less solicitous of such downstream speech interests.²² And even if *Harper & Row* is best understood as about a publisher’s right of first publication (rather than political speech), the Court’s decision appears to cast a long shadow. Political actors often engage in self-censorship, preferring to preserve campaign resources for, well, campaigning (rather than copyright litigation).²³ Hence, the amount of political speech that is in fact stifled by copyright seems quite larger than the limited universe of litigated cases may suggest.²⁴ This is so even as the bounds of fair use seem to have incrementally expanded over time,²⁵ giving rise to a generally less strict regime of copyright infringement.

Likewise, the dichotomy between idea and expression has only limited utility when the very manner of expression captures important information. Copied expression conveys information about the expressor—tone and demeanor, for example—that may be valuable when the expressor is a candidate for political office, and that may be lost when those thoughts are merely summarized or described.²⁶ It matters when

20. See, e.g., Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347–64 (1996) (setting out such a theory of copyright). See also Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L. REV. 229, 252–53 (2014) (describing this consequential theory of copyright aimed at fostering our “political democracy”). But cf. Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1202–04 (1970) (contending that “free speech” for those “contributing to the democratic dialogue” generally does not encompass “free use of the expression of others,” except where the expression itself—rather than merely the idea subsumed in such expression—is essential to public understanding). As described below, I suspect that much political expression satisfies this essentiality test, given, say, the expressive power of quotation. See *infra* note 26 and accompanying text.

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

22. *Id.* at 546. See also *infra* notes 64–67, 71–77 (describing *Harper & Row* in more detail).

23. See Keller, *supra* note 11, at 507. See also *infra* notes 111–16 and accompanying text (noting several instances in which politicians preferred to settle copyright infringement claims).

24. See *infra* notes 112–21 and accompanying text (discussing examples).

25. See *infra* notes 69–72 and accompanying text (discussing examples). But see *infra* notes 73–74 and accompanying text (discussing *Goldsmith*, a possible counterexample).

26. See *Maxtone-Graham v. Burtchae*, 631 F. Supp. 1432, 1437 (S.D.N.Y. 1986) (explaining that quoting, rather than paraphrasing, allows one to “to analyze . . . personal accounts in the most effective and persuasive manner”); Kate O’Neill, *Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First*

we quote Donald Trump (or Joe Biden) rather than merely describe his speeches.

Copyright's internal doctrines thus do little to clarify whether and when the First Amendment's protections for political speech overcome copyright law's speech-restraining effects—and such legal ambiguity may undermine protections for political speech by, for example, inducing self-censorship.²⁷ Candidates, campaigns, and citizens, among others, need better guidance on which political uses of copyrighted expression the First Amendment protects, and which uses may give rise to infringement liability. A closer examination of the historical record may help. Indeed, as described below, the historical record is more complicated than the Supreme Court has so far suggested—at least with respect to political and campaign speech.

This Article elaborates on these contours, past and present, of the speech-copyright equilibrium. Its primary contribution is to expand the legal literature's view of the historical record regarding copyright's relationship to the First Amendment's political speech protections. Specifically, it describes a copyright controversy, overlooked by legal scholars until now,²⁸ that may reflect a shared (if contested) understanding that prioritizes our democratic governance interests in political speech over copyright. Given the scope of this episode, this Article focuses on disputes over a politician's copyrighted speech (*e.g.*, a candidate's own prior policy statement that an opponent tries to copy and publicize), setting aside for now the complications presented by

Publication, 88 CALIF. L. REV. 369, 414–15 (2001) (describing the expressive value of quoting another, noting that quoting original expression not only conveys historical fact but is also “suggestive of the expressor’s personality,” and hence quotation enables analysis of “the expressor’s reactions” to those facts); Eugene Volokh, *The Trouble with “Public Discourse” as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 569 n.7 (“[U]sing others’ expression is often the best way of conveying one’s point.”). See also RUTH FINNEGAN, *WHY DO WE QUOTE?: THE CULTURE AND HISTORY OF QUOTATION* 255–65 (2011). Cf. FCC, NO. 14-12, REPORT AND ORDER, DECLARATORY RULING, AND FURTHER NOTICE OF PROPOSED RULEMAKING 15–26 (2014) (describing the importance of exact transcription for closed captioning purposes and the limits of paraphrasing).

27. See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”).

28. Searching for “Letter from Alexander Hamilton Concerning the Public Conduct and Character of John Adams” in Westlaw and LexisNexis suggests that the *Letter* has been cited in zero federal appellate decisions (including the Supreme Court) and only six law review articles. Some others may discuss the episode surrounding the *Letter* glancingly or in the larger context of the election of 1800. See, *e.g.*, Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 YALE L.J. 1959, 1983 (1999). See also *infra* note 181 (citing one of the sources returned in the Westlaw search). However, the *Letter* has never been discussed in the copyright context, and similar results attend to searches in other databases, including, for example, Google Scholar. In short, I can find no reference to the copyright law implications of this episode.

commercial or artistic speech that is later deployed (or parodied, or satired) in political settings.²⁹ And while this episode centers on the traditional contours of copyright law, this Article also considers the episode's implications for analogous modern restraints, including, for example, technical measures that prevent the archival of a politician's internet presence.

This Article proceeds in three parts: Part I begins with a brief description of the First Amendment's modern and robust protections for political speech³⁰—robust, that is, except when it comes to copyright law. Copyright's protections are sometimes invoked in attempts to frustrate the speech of an ideological adversary.³¹ In one example, a U.S. Senate candidate deployed copyright to obscure her prior (more extreme) policy positions. In another, a city council sought to enjoin a citizen from distributing council meeting recordings that featured his critical commentary. And in a third, one gubernatorial campaign sued another in an attempt to squelch a counter-advertisement. There are more examples, too.

Part II then describes the overlooked copyright controversy of the election of 1800.³² In the midst of that heated campaign, Alexander Hamilton authored a confidential—and copyrighted—pamphlet aimed at unseating President John Adams from the top of the Federalist Party. He planned to distribute it discreetly to a small audience. The document, however, leaked. Newspapers reprinted its most salacious excerpts, openly flouting its copyrighted status and even mocking Hamilton for attempting to shield the document from review under the cover of copyright. Hamilton's response to this willful infringement was muted: rather than seek legal recourse (as some candidates do today), Hamilton seemed to consent—and even eventually contributed—to the document's wider distribution. Hamilton, that is, invited a more open and public discussion of his copyrighted pamphlet. Viewed as a whole, this episode might be understood to reflect a practice of admitting political speech into copyright's domain, while also setting a precedent for the acceptable boundaries for enforcing such a copyright against political opponents. In sum, both Hamilton and his ideological adversaries seemed, eventually, to agree that an open debate was better than (partial) obscurity by copyright.

Finally, Part III describes what this episode from the election of 1800 might mean for copyright doctrine—and for questions of legal

29. See *infra* note 116 (discussing examples and citing other work bearing on the special complications raised by such claims).

30. See *infra* Section I.A.

31. See *infra* Section I.B.

32. See *infra* Part II.

interpretation—today.³³ On copyright, this Article contends that, when faced with copyright claims such as those described above (*e.g.*, a U.S. Senate candidate who tries to obscure her record, or an incumbent who seeks to avoid criticism), courts should find that our collective interests in political speech outweigh a candidate's individual copyright interests. In short, we need a limited presumptive political speech exception to copyright, one that does not require recourse to such fact- and cost-intensive doctrines as fair use. Copyright's rules can and should promote, rather than stifle, "the robust public debate . . . that [is] 'the essence of self-government.'"³⁴ Both the historical record and, more importantly, common sense suggest as much.

I. POLITICAL SPEECH AND POLITICAL COPYRIGHT

As many lawyers and law students well know, the First Amendment proscribes acts of Congress that "abridg[e] the freedom of speech," including—especially—political speech.³⁵ But, as several scholars have long established, copyright law is a quintessential speech restraint³⁶: it allows private individuals to use the federal government's criminal and civil apparatuses to control the dissemination of certain (copyrighted) speech.³⁷ How do these seemingly dueling provisions of the Constitution coexist, particularly in political contexts?

This Part begins with a very brief description of the Supreme Court's elaboration of the First Amendment's political speech protections, and then compares and contrasts those precedents to copyright law's threats to political speech.

33. See *infra* Part III.

34. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 582 (1985) (Brennan, J., dissenting) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)). See *infra* notes 251–67 and accompanying text.

35. U.S. CONST. amend. I.

36. See, *e.g.*, Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 983 (1970) ("Copyright is the uniquely legitimate offspring of censorship."); Netanel, *supra* note 20, at 285 ("If copyright extends too broadly, copyright owners will be able to exert censorial control over critical uses of existing works . . . thereby chilling discourse . . .").

37. See, *e.g.*, 17 U.S.C. § 106 (enumerating the "exclusive rights" of a copyright holder); 17 U.S.C. § 504 (describing the potential civil liability for copyright infringement); 17 U.S.C. § 506 (describing the potential criminal liability for copyright infringement).

A. Political Speech

Jurists and scholars have long noted that political speech—speech that is “intended and received as a contribution to public deliberation about some issue”—requires unique safeguards.³⁸ Zechariah Chafee, Jr., for example, famously denounced federal initiatives—enacted during World War I and justified by reference to national security interests—aimed at stifling dissident speech. In his view, such limits on political speech not only were antithetical to the view, ascribed to the Founding generation, that an open debate of political ideas was fundamental to self-government but also presented an existential threat to American democracy itself.³⁹ Justice Holmes agreed. In his famous dissent from the decision in *Abrams v. United States*,⁴⁰ Justice Holmes advanced a “theory of [the] Constitution” (and, specifically, the First Amendment) that idealized a “free trade in ideas” through open debate and discussion.⁴¹

Since Justice Holmes’s opinion in *Abrams*, the Supreme Court has adopted special protections for political speech, elaborating on the First Amendment’s role in safeguarding political debate. In *Whitney v. California*,⁴² regarding personal political association with the Communist Labor Party, Justice Brandeis wrote that the First Amendment protects speech because “public discussion is a political duty” and a “fundamental principle of the American government.”⁴³ Likewise, in *Mills v. Alabama*,⁴⁴ the Court affirmed the press’s right to publish editorials regarding specific political initiatives, explaining that the First Amendment protects the free discussion of governmental affairs, including “discussions of candidates, structures and forms of

38. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 130 (1993) (emphasis omitted). See also James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493, 495, 499 (2011). I recognize that defining this category of speech is troublesome and has generated a vast literature rife with debates (including, for example, the symposium issue of the *Virginia Law Review* cited here). I set these debates to one side for the moment, noting only that this distinction, however defined, may have had some purchase in the Founding Era’s treatment of certain “literary property.” See *infra* note 205–09 and accompanying text.

39. See Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 935–37, 956–58 (1919).

40. 250 U.S. 616 (1919).

41. *Id.* at 630 (Holmes, J., dissenting).

42. 274 U.S. 357 (1927).

43. *Id.* at 375 (Brandeis, J., concurring). See also *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“[F]ree political discussion . . . is a fundamental principle of our constitutional system.”).

44. 384 U.S. 214 (1966).

government,” alongside other “matters relating to political processes.”⁴⁵ And finally, in the 1980s, the Court expressly conferred heightened protections on campaign speech—political speech made during the course of political campaigns. In *Buckley v. Valeo*,⁴⁶ for example, the Court highlighted the “particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates’ personal qualities and their positions on vital public issues.”⁴⁷

In recent years, the Court has sacrificed several campaign finance reforms at the altar of the First Amendment, reasoning that “political speech must prevail against laws that would suppress it, whether by design or inadvertence,” and concluding (correctly or not) that that maxim applies to campaign finance rules.⁴⁸ Moreover, the Court has noted that any uncertainty about the scope of a campaign regulation’s application can give rise to litigation—and that litigation conducted in the “heat of political campaigns” can “stifle[]” speech.⁴⁹ Hence, the Court has repeatedly voided limits on campaign contributions and expenditures

45. *Id.* at 218–19. *Mills* is, I concede, primarily a case about freedom of the press rather than freedom of speech. But the two rights are closely related, and cases in either strand freely cite cases in the other, particularly in political contexts. *See infra* note 270.

46. 424 U.S. 1 (1976) (per curiam).

47. *Id.* at 52–53. *See also* *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). Specifically, in *Buckley*, the Court evaluated limits on campaign expenditures under strict scrutiny, while assessing whether limits on campaign contributions were “closely drawn” to the government’s “sufficiently important interest” in campaign finance regulation. 424 U.S. at 24–25. The Court has since suggested—but never squarely held—that the two tests are quite similar, if not now the same. *See McCutcheon v. FEC*, 572 U.S. 185, 199 (2014). *Cf. id.* at 228–32 (Thomas, J., concurring) (contending that *Buckley* adopted a “bifurcated” approach to contribution and expenditure limits that should be abandoned).

48. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). As suggested above, I take no position on whether the principles undergirding the Court’s First Amendment jurisprudence are empirically correct or whether they have been correctly or appropriately applied to Congress’s enactments regulating campaign contributions and expenditures. For now, at least, I take them as given and attempt to assess whether our approach for related copyright questions is consistent with these ideals. It is possible, of course, to think that similar principles, when applied to different areas of law, would give rise to different effects: *i.e.*, to think that the First Amendment’s principles could permit certain types of speech regulations while prohibiting others. Indeed, one might even hold a view of the First Amendment that, applied consistently, would give rise to results that are opposite the Court’s decisions so far: allowing certain campaign finance regulations while prohibiting certain copyright claims in campaign contexts. But it is far from clear that the Court’s decisions in this context involve the consistent application of principles to different areas of law; rather, the Court’s treatment of copyright seems exceptional. *See infra* Section I.B.

49. *Citizens United*, 558 U.S. at 334.

in order to clear doubts about the legality of putative political or campaign speech and thereby vindicate its long held view that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.”⁵⁰ And the Court’s focus on promoting such discourse has ranged from the contributions and expenditures that support such campaign speech (*e.g.*, funding for advertisements, speeches, and rallies⁵¹) to citizens’ attire in the voting booth.⁵²

B. Political Copyright

As noted, the Supreme Court’s special protections for political speech spring from a longstanding view—empirically correct or not⁵³—on the marginal value of political discourse: more speech is better. This calculus derives from the notion that the more the public is free to speak on matters of political importance, the more likely our systems of governance will reflect a popular will that has tested and examined competing ideologies in an idealized marketplace of ideas.⁵⁴ And the Court has been especially active in advancing this vision of the First Amendment in, say, the context of campaign finance regulation.

Meanwhile, the Court has largely overlooked an important restraint on political speech: copyright. Copyright restrains speech.⁵⁵ It gives original expressors significant control over the reuse of their original expression.⁵⁶

50. *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1650 (2022) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). *See also McCutcheon*, 572 U.S. at 191 (“There is no right more basic in our democracy than the right to participate in electing our political leaders.”).

51. *See, e.g., Cruz*, 142 S. Ct. at 1645; *Buckley*, 424 U.S. at 58–59.

52. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1884, 1888 (2018).

53. *See, e.g., Tim Wu, Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547 (2018) (describing concerns regarding “flooding,” in which *too much* political (counter-)speech overwhelms other speakers or putative listeners).

54. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). I reiterate that I take no position on whether the principles undergirding the Court’s First Amendment jurisprudence are correct. *See supra* note 48 and accompanying text.

55. *See Goldstein, supra* note 36, at 983 (describing copyright as the “uniquely legitimate offspring of censorship”); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 322 (2003) (noting copyright’s long “history of being indifferent or hostile to freedom of expression values”).

56. *See, e.g., 17 U.S.C. § 106* (enumerating the “exclusive rights” of a copyright holder).

This “limited monopoly” is most typically justified as an inducement to invest in the creative arts.⁵⁷ An author will not, the story goes, bother to write a book if they cannot bargain over the right to reprint and sell it.⁵⁸ Hence, the Supreme Court has repeatedly said that copyright laws are consistent with the First Amendment, given its view that copyright’s incentive operates primarily to induce, rather than restrain, speech. Indeed, the Court has viewed the “historical record”—namely, the contemporaneous ratification of the first copyright laws and the First Amendment—as evidence that “copyright’s limited monopolies are compatible with free speech principles.”⁵⁹

Moreover, the Court has further explained that copyright law’s own internal limits buttress the conclusion that copyright comports with First Amendment free speech values, pointing to two doctrinal safety valves in particular.⁶⁰ One, the Court has described “fair use” as a “built-in First Amendment accommodation,” given that it authorizes the use of a copyrighted work for criticism and news reporting (among other purposes), no matter whether the copyright owner consents to such critique or reporting.⁶¹ Specifically, whether a particular use of a copyrighted work is “fair,” regardless of the copyright owner’s consent, depends on four factors: (1) the purpose and character of the use (*e.g.*, whether the use is commercial); (2) the nature of the copyrighted work; (3) the amount and substantiality of the work used in relation to the work

57. See, *e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

58. But see *Eldred v. Ashcroft*, 537 U.S. 186, 254–55 (2003) (Breyer, J., dissenting). A copyright “extension will not act as an economic spur encouraging authors to create new works.” *Id.* at 254 (Breyer, J., dissenting). Due to the time value of money and the tiny percentage of creative works remaining commercially viable after seventy-five years, a copyright extension

starting 75 years into the future, is worth less than seven cents today. . . . What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum? What monetarily motivated Melville would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account?

Id. at 255 (Breyer, J., dissenting).

59. *Id.* at 219 (majority opinion).

60. See Samuelson, *supra* note 55, at 319–20 (describing the “mainstream view” that fair use doctrine and the distinction between expression and ideas harmonize copyright with the First Amendment’s guarantees).

61. *Golan v. Holder*, 565 U.S. 302, 328–29 (2012) (quoting *Eldred*, 537 U.S. at 219). Fair use is a statutory defense with common law roots. Compare 17 U.S.C. § 107, with *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901). The Court’s decisions in *Eldred* and *Golan* appear to transform fair use into a form of constitutional common law, rooted in the First Amendment’s commands and defined by Congress. See Monaghan, *supra* note 5, at 2–3.

as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶²

And, two, the Court has also noted that copyright protects only a specific expression of an idea, but not the underlying idea itself.⁶³ Hence, others are relatively free to offer their own versions of the same idea—versions which are themselves subject to copyright protection—induced by copyright’s incentive.

The Supreme Court has applied copyright’s utilitarian rationale even to forms of political speech. In *Harper & Row*, for example, the Court considered whether *The Nation*’s scoop—excerpts of former President Ford’s (as-of-then) unpublished memoirs—was protected by either copyright’s fair use doctrine or the First Amendment.⁶⁴ It concluded that *The Nation* had unlawfully and inexcusably infringed President Ford’s copyright in his soon-to-be-published book.⁶⁵ Importantly, the Court concluded that the copyright incentive had worked according to the legislative plan: in the Court’s view, it was “evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value.”⁶⁶

But even where the Court has emphasized the importance of copyright’s role in inducing certain political speech, it has simultaneously deemphasized the value of other sorts of political speech, including the very downstream comment, criticism, and reporting on such speech that fair use is meant to protect. Indeed, as noted, the Court’s decisions in its campaign finance cases seem to reflect a view that the marginal value of political speech is always, on net, positive—even where the incremental speech comes from a single source.⁶⁷ But in copyright contexts, the Court’s opinions seem to devalue additional political speech, even where that downstream speech comes from a different source and is thus more likely to represent a different viewpoint.⁶⁸

It is true that some of the Court’s more recent fair use decisions have been more forgiving of downstream speech. In *Campbell*,⁶⁹ for

62. 17 U.S.C. § 107.

63. *Eldred*, 537 U.S. at 219; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

64. *Harper & Row*, 471 U.S. at 541–42.

65. *Id.* at 569.

66. *Id.* at 546. *But see* Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1192–93 (2007) (suggesting that we should have a “more modest conception of the role that copyright plays in stimulating creative processes”).

67. *See supra* notes 48–52 and accompanying text.

68. *See, e.g., Harper & Row*, 471 U.S. at 541–42, 569.

69. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

example, the Court excused an allegedly infringing parody as fair use.⁷⁰ The Court's decision in *Google v. Oracle*⁷¹ similarly excused the alleged infringement by a transformative application of certain code that facilitated interoperability across computer systems.⁷² But it is also true that some other recent decisions have had the effect of narrowing fair use, as in *Goldsmith*,⁷³ a case regarding *Vanity Fair*'s use of an Andy Warhol silkscreen that was itself based on a photograph of Prince by Lynn Goldsmith.⁷⁴

Amidst these shifts across sectors—music, software, art—the Court's decision in *Harper & Row* continues to cast a long shadow in political contexts. Even if *Harper & Row* is best understood as a precedent protecting a publisher's right of first publication—or merely about book sales—cautious campaign lawyers may have implicitly expanded its scope. Deidré Keller, for example, has explained that political candidates faced with accusations of infringement will tend to prefer self-censorship, thereby stifling downstream political speech and commentary.⁷⁵ This may be especially true given the frequency with which courts historically granted preliminary injunctions to copyright owners.⁷⁶ Indeed, by noting that thirteen percent of *The Nation*'s

70. *Id.* at 571–72.

71. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

72. *Id.* at 1190.

73. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

74. *Id.* at 1287. On the other hand, the Court's decision in *Goldsmith* emphasizes the justifications for a downstream use. Hence, where one candidate aims to respond to another, the response is more likely to be deemed a fair use—assuming, of course, that the candidate is willing to sustain the time and expense that comes with copyright litigation. *See also Campbell*, 510 U.S. at 592–93 (similarly noting that a copyright owner's likely unwillingness to license a work for a downstream use counsels in favor of finding fair use); *Google*, 141 S. Ct. at 1208 (explaining that, when evaluating whether a downstream use of a copyrighted work is a fair use, courts should look to the effect of the use on the market for the work, including any positive spillover effects on the market for that work; in short, the focus is on the entire market and not merely individual market participants).

75. *See Keller*, *supra* note 11, at 511; *infra* notes 113–16 and accompanying text.

76. *See Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 162, 174–75, 187 (1998) (noting that defendants generally do not succeed in asserting a “competing public interest” in order to dissuade a court from issuing preliminary injunctions in copyright cases, even in cases involving “political or other socially significant speech,” and so courts often—unconstitutionally in their view—enjoin protected speech). It is true that Lemley and Volokh's article predates *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), which worked a sea change in the law of preliminary injunctions, including in copyright cases. *See Matthew Sag & Pamela Samuelson, Discovering eBay's Impact on Copyright Injunctions Through Empirical Evidence*, 64 WM & MARY L. REV. 1447, 1450 (2023).

publication was “lift[ed] verbatim” from President Ford’s manuscript, the Court overlooks the eighty-seven percent that reports on and editorializes about the material copied (which covered Ford’s decision to pardon former President Richard Nixon, among other topics). And Justice Brennan, in dissent, highlighted this concern:

Our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” leaves no room for a statutory monopoly over information and ideas. “The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained.” A broad dissemination of principles, ideas, and factual information is crucial to the robust public debate and informed citizenry that are the “essence of self-government.” And every citizen must be permitted freely to marshal ideas and facts in the advocacy of particular political choices.⁷⁷

Justice Brennan thus contends that copyright ought not protect a politician’s political speech at all, in order to ensure that those views (and any consequent debate) are broadcast far and wide.

Justice Brennan’s dissent, however, offered a prescient warning to campaign lawyers and advocates who now find themselves on the receiving end of copyright complaints from fellow politicians who seek to protect their prior speeches and forestall their dissemination.

Consider Sharron Angle, a former U.S. Senate candidate who threatened to sue her general election opponent for copyright infringement—presumably to prevent the dissemination of the policy positions she espoused during her primary campaign.⁷⁸ Why? Angle

But, as noted, even more recent decisions confirm that politicians and advocates, making decisions in the shadow of precedents such as *Harper & Row* and other cases, often prefer self-censorship to protracted litigation. See sources cited *supra* note 75. At minimum, *Harper & Row* introduced substantial confusion regarding the appropriate speech-copyright equilibrium in political speech contexts, thus chilling some political speech. See Keller, *supra* note 11, at 506–07.

77. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 582 (1985) (Brennan, J., dissenting) (citations omitted) (first quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); then quoting *Lee v. Runge*, 404 U.S. 887, 893 (1971) (Douglas, J., dissenting); and then quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

78. See Letter from Cleta Mitchell, Couns., Friends of Sharron Angle, to Marc E. Elias, Perkins Coie (July 2, 2010), <https://www.scribd.com/document/33939184/Sharron-Angle-Campaign-Cease-and-Desist-Letter>. See also Eduardo M. Peñalver & Sonia K. Katyal, *The Fair Use Senator*, SLATE (July 9, 2010, 3:02 PM), <https://slate.com/news-and-politics/2010/07/can-harry->

advocated for one, more extreme, set of positions during the primary campaign (during the ascendancy of the so-called “Tea Party”⁷⁹), and then, as candidates often do, “tack[ed] to the center” during the general election.⁸⁰ Her opponent, then-Majority Leader Harry Reid, tried to blunt the effectiveness of this strategy by capturing, redistributing, and highlighting Angle’s more extreme primary positions.⁸¹ Specifically, Reid’s campaign made an exact copy of Angle’s primary-stage campaign website, which described her views on Yucca Mountain (an abandoned nuclear waste repository project) and on the U.S. Department of Education (which she regarded as unconstitutional), and hosted that replica at a new domain name: www.therealsharronangle.com.⁸² Angle responded with a cease-and-desist letter, contending that the site’s “design and information . . . are copyrighted” and that the Reid campaign had “clearly misappropriated [Angle’s] copyrighted materials.”⁸³ In response, Reid’s campaign temporarily took the site down.⁸⁴ Angle’s campaign quickly claimed victory: “Make no mistake, the Reid campaign was forced to take this site down because they were breaking several laws. . . .”⁸⁵ Reid’s campaign eventually put the site back up, citing a “nearly absolute” speech right under the First Amendment,⁸⁶ but only after Sharron Angle’s campaign succeeded in obscuring her own prior

reid-post-sharron-angle-s-old-web-site.html [<https://perma.cc/5JU3-LVDU>] (explaining that Angle “replaced [her old website] with a more polished version that finesse[d] her harder-line views,” but Senator Harry Reid “reposted a copy” of the old website and then received a cease-and-desist letter from Angle’s counsel).

79. E.g., Chris Good, *Sharron Angle Gets a Tea Party Bump*, ATLANTIC (May 14, 2010), <https://www.theatlantic.com/politics/archive/2010/05/sharron-angle-gets-a-tea-party-bump/56741/> [<https://perma.cc/C7JR-8E4T>].

80. E.g., Holly A. Heyser, *Minnesota Governor: The End of the Ventura Interlude*, in MIDTERM MADNESS: THE ELECTIONS OF 2002, at 233, 244 (Larry J. Sabato ed., 2003) (“The typical election calculus requires Republicans and Democrats to appeal to their extreme elements in primaries, then tack to the center in the general election.”).

81. Peñalver & Katyal, *supra* note 78.

82. *See id.*

83. Letter from Cleta Mitchell to Marc E. Elias, *supra* note 78.

84. Laura Myers, *Angle Accuses Reid’s Campaign of Dirty Tricks over Old Website*, L.V. REV. J. (July 5, 2010, 7:32 PM), <https://www.reviewjournal.com/news/angle-accuses-reids-campaign-of-dirty-tricks-over-old-website/> [<https://perma.cc/6ELX-CTDB>].

85. *Id.* (quoting Angle spokesman Jerry Stacy).

86. Peñalver & Katyal, *supra* note 78. Cf. Goldstein, *supra* note 36, at 1056 (noting that copyright infringers stand in for the “generalized interest in access”).

policy views for at least several days⁸⁷ (and days may be precious in a heated electoral campaign⁸⁸).

Similarly, in an effort to protect incumbent interests,⁸⁹ the City of Inglewood, California, alleged that Joseph Teixeira, a city resident, infringed the city's copyright interests by redistributing video recordings of city council meetings appended with Teixeira's commentary.⁹⁰ Notably, works of the federal government may not, by statute, obtain copyright protection.⁹¹ Indeed, the statute was enacted, in part, to address concerns about government censorship.⁹² But state and local governments like the City of Inglewood may (and do) own copyrights in their works. Hence, Inglewood sued Teixeira over his series of videos, ranging from "3 minutes and 43 second[s] to 15 minutes long," regarding local politics in the city.⁹³ Those videos incorporated several clips from official recordings of city council meetings—some "unadorned," others layered with music or other audio and visual commentary.⁹⁴ Teixeira eventually won the suit,⁹⁵ but not without first incurring over \$100,000 in attorneys' fees.⁹⁶

And while Inglewood was made to pay those fees to Teixeira's attorneys, other defendants in similar cases have been less lucky. For example, Harmeet Dhillon (who was then the vice chair of California's

87. It is true that Angle's copyright suit may have had a bit of a "Streisand Effect," in which her over-the-top legal attempt to obfuscate had the ironic effect of drawing extra attention to her prior website, thus frustrating her efforts to obscure her prior policy positions. *See, e.g.,* Mike Masnick, *Since When Is It Illegal To Just Mention a Trademark Online?*, TECHDIRT (Jan. 5, 2005, 1:36 AM), <https://www.techdirt.com/2005/01/05/since-when-is-it-illegal-to-just-mention-a-trademark-online/> [<https://perma.cc/8T5T-TUNC>] (originating and defining the term "Streisand Effect"). That said, it is unlikely that the universe of citizens who are carefully watching copyright litigation between political candidates is larger than the universe of citizens who are simply trying to follow the party, political, and policy differences among those candidates.

88. *See, e.g., Norman v. Reed*, 502 U.S. 279, 288 (1992).

89. *See City of Inglewood v. Teixeira*, No. CV-15-01815, 2015 WL 6146269, at *3 (C.D. Cal. Oct. 8, 2015) (order granting defendant's motion to recover attorney's fees).

90. *Id.* at *1.

91. 17 U.S.C. § 105.

92. Andrea Simon, *A Constitutional Analysis of Copyrighting Government-Commissioned Work*, 84 COLUM. L. REV. 425, 431-33 (1984) (describing the legislative history of 17 U.S.C. § 105).

93. *Teixeira*, No. CV-15-01815, 2015 WL 5025839, at *8 (order granting motion to dismiss and motion to strike).

94. *Id.*

95. *Id.* at *1.

96. *Teixeira*, No. CV-15-01815, 2015 WL 6146269, at *1 (order granting defendant's motion to recover attorney's fees).

Republican Party) sued an anonymous blog, alleging that it illegally used her official campaign photograph in connection with a critical review of Dhillon's political views.⁹⁷ Again, the blog won on the merits, as the court found the blog's use of the photograph to be fair use.⁹⁸ But the blog's victory was not, in the district court's view, clear cut. Dhillon prevailed on one of the four fair use factors—the nature of the copyrighted work—because the copyrighted work evinced the creative choices of Dhillon's photographer. And the court found another factor—the amount and substantiality used—to be neutral between the parties, since the blog copied the whole photo but using any less would have been infeasible. Litigating these facts cost the blog more than \$200,000 in costs and fees⁹⁹—costs which it did *not* recover because the district court found Dhillon's suit reasonable (even if ultimately unmeritorious).¹⁰⁰ Indeed, that courts find these suits to be reasonable at all encourages more copyright litigation in political contexts, often at the expense of core political speech.

More recently, for example, Idaho State Representative Heather Scott sued several local newspapers, alleging copyright violations in connection with the publication of a photograph that featured her “standing on a parade float with her campaign sign, smiling and holding . . . the Confederate battle flag.”¹⁰¹ In 2016, the City of Phoenix sent then-candidate Donald Trump a cease-and-desist letter, alleging that a political advertisement featuring Trump shaking hands with local police officers improperly appropriates the city's copyrighted police badges and insignia (while falsely implying an endorsement from the city).¹⁰²

97. *Dhillon v. Doe*, No. 13-cv-01465, 2014 WL 722592, at *1 (N.D. Cal. Feb. 25, 2014) (order granting defendant's motion for summary judgment).

98. *Id.* at *6.

99. Defendant Doe 1's Notice of Motion & Motion for Sanctions Pursuant to FRCP 11 at 8, *Dhillon*, No. 13-cv-01465, 2014 WL 10915549.

100. *Dhillon*, 2014 WL 722592, at *7 (order granting defendant's motion for summary judgment) (declining to award costs and fees because Dhillon's suit was “not completely unreasonable”).

101. Daniel Walters, *Idaho State Rep. Heather Scott Held a Confederate Flag for a Photo and Shared It Online — Her Husband Just Didn't Want Us To Do the Same*, INLANDER (Mar. 16, 2023), <https://www.inlander.com/spokane/idaho-state-rep-heather-scott-held-a-confederate-flag-for-a-photo-and-shared-it-online-her-husband-just-didnt-want-us-to-do-the-same/Content?oid=25620482> [<https://perma.cc/8BQW-7QRC>].

102. Letter from Brad Holm, City Att'y, City of Phx., to Timothy Jost, Treasurer, Donald J. Trump for President, Inc. (Sept. 29, 2016), <https://meredithaz.images.worldnow.com/library/17cb43e0-5ba4-4c34-af8f-dc45266a1f6b.pdf> [<https://perma.cc/88AQ-43KW>]. See also Max Walker, *Phoenix City Attorney Sends Cease-and-Desist Letter to Trump Campaign Over Ad with Police Officers*, ABC15, <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/phoenix-city-attorney-sends-cease-and-desist-letter-to-trump-campaign-over-ad-with-police-officers> [<https://perma.cc/4WV6-TMBU>] (Oct. 1, 2016, 12:53 AM).

Commentators likewise have raised similar questions about the alleged “plagiarism” by Melania Trump of an earlier Michelle Obama speech or the ownership of private, paid speeches delivered by Hillary Clinton¹⁰³ and plans by former President Trump to publish a book of letters addressed to him from other famous and notable individuals.¹⁰⁴

Such conflicts have persisted for nearly a half-century. In 1978, the Keep Thomson Governor Committee (supporting the incumbent Republican governor of New Hampshire) sued the Citizens for Gallen Committee (supporting the Democratic challenger).¹⁰⁵ Here, the Thomson Committee acquired the rights to a song, “Live Free or Die,” which it used in its own political advertisement.¹⁰⁶ The Gallen Committee prepared a counter-advertisement, which embedded and responded to about fifteen seconds of the Thomson Committee’s original ad.¹⁰⁷ The embedded excerpt included a portion of “Live Free or Die,” precipitating a copyright lawsuit against Gallen’s group.¹⁰⁸ In that suit, the Thomson Committee demanded that the Gallen Committee “cease use of [its] political advertisement.”¹⁰⁹ Gallen’s supporters wisely declined to do so, as the district court ruled that the political context of the lawsuit counseled in favor of finding fair use.¹¹⁰

(providing additional context for the City of Phoenix’s letter to the Trump campaign); *infra* note 116 (elaborating on the false endorsement implications).

103. See, e.g., Tyler Ochoa, *Was Melania Trump’s Plagiarism Also Copyright Infringement?*, TECH. & MKTG. L. BLOG (July 20, 2016), <https://blog.ericgoldman.org/archives/2016/07/was-melania-trumps-plagiarism-also-copyright-infringement-guest-blog-post.htm> [https://perma.cc/Y9DB-U3JU]; Ben White, *What Clinton Said in Her Paid Speeches*, POLITICO (Feb. 9, 2016, 5:15 AM), <https://www.politico.com/story/2016/02/clinton-speeches-218969>. See also Daniel L. Kegan, *First Copyright Principles for the First Lady’s Speech*, 65 J. COPYRIGHT SOC’Y U.S.A. 123, 126–27 (2018) (discussing the copyright implications of first lady speeches).

104. Alison Durkee, *Trump Plans Book with Letters Celebrities—including Oprah, Hillary Clinton, Nixon, Kim Jong-Un—Sent Him*, FORBES (Mar. 9, 2023, 9:27 AM), <https://www.forbes.com/sites/alisondurkee/2023/03/09/trump-plans-book-with-letters-celebrities-including-oprah-hillary-clinton-nixon-kim-jong-un-sent-him/?sh=6cd35c736d77> [https://perma.cc/F9KC-XQDN] (quoting Jeanne Fromer, NYU School of Law, on the copyright questions that such a book implicates).

105. *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957, 958 (D.N.H. 1978).

106. *Id.*

107. *Id.* at 959.

108. *Id.* at 958–59.

109. *Id.* at 959.

110. *Id.* at 960–61.

But not all such defendants are so bold as to persist in the face of copyright litigation.¹¹¹ Deidré Keller, for example, has explained that for political candidates faced with accusations of unlawful copyright infringement, “capitulation is the rule rather than the exception.”¹¹² As noted, Senator Reid’s first impulse, for example, was to take down his replica of Sharron Angle’s website before, eventually, putting it back up.¹¹³ Likewise, faced with closely related allegations, other candidates have often stifled their own political speech. Mitt Romney, who ran for president in 2012, pulled a campaign ad after NBC News complained that the ad used its copyrighted footage without permission.¹¹⁴ Democratic Senate candidate Robin Carnahan similarly took down a campaign ad after Fox News sued her for using footage of Fox’s interview with her opponent, Republican Senator Roy Blunt.¹¹⁵ Several other politicians have pulled ads and issued public apologies for using

111. Cf. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020) (noting that the “less bold among us would have to think twice” before relying on fair use to vindicate First Amendment interests).

112. Keller, *supra* note 11, at 502.

113. See *supra* note 85–86 and accompanying text.

114. Keller, *supra* note 11, at 502.

115. Complaint at 1, *Fox News Network, LLC v. Robin Carnahan for Senate, Inc.*, No. 10-CV-00906, 2010 WL 3805284 (W.D. Mo. Sept. 15, 2010). See also Ben Sheffner, *Fox News and Correspondent Sue Senate Candidate over Use of News Footage in Ad*, COPYRIGHTS & CAMPAIGNS BLOG (Sept. 16, 2010, 8:27 AM), <https://copyrightsandcampaigns.blogspot.com/2010/09/fox-news-and-correspondent-sue-senate.html> [<https://perma.cc/5672-G4NN>] (indicating Carnahan’s campaign removed the video from its campaign website and YouTube after the complaint was filed).

copyrighted songs and artworks without permission.¹¹⁶ And copyright has also prevented historians from cataloging campaign materials.¹¹⁷

116. One example found political satires, based on the songs of Don Henley, to infringe that source material. See *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1163–64 (C.D. Cal. 2010). In another, Senator John McCain settled a lawsuit with a public apology for using Jackson Browne’s song, “Running on Empty,” in campaign events without permission. *Jackson Browne Settles Dispute with McCain, Republicans*, KHIKS (July 23, 2009), <https://khiks.com/news/kwika-newsjackson-browne-settles-dispute-with-mccain-republicans/> [https://perma.cc/L9UZ-APB2]. Likewise, Charlie Crist, a candidate for the U.S. Senate, issued an apology video for the unlicensed use of the song “Road to Nowhere” by Talking Heads. *Crist Apologizes for Using Talking Heads Song*, NPR (Apr. 13, 2011, 3:00 PM), <https://www.npr.org/2011/04/13/135386575/crist-apologizes-for-using-talking-heads-song> [https://perma.cc/7J7A-85B4]. For a comprehensive review of many cases asking whether political uses of copyrighted material are fair use, see Smith, *supra* note 11, at 2040–45.

As noted above, this Article primarily focuses on disputes over politicians’ own copyrighted political speech, largely setting to one side disputes over commercial or artistic speech that is later deployed in political settings. It does so in significant part to align the scope of its examples with the scope of the new historical episode uncovered and elaborated in Part II. Other categories of disputes, such as those involving songs and celebrities, may give rise to more complicated claims—for example, false endorsement implications that, while outside of copyright’s traditional ambit, merit consideration. Compare Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 151 (2020) (“It serves no one’s interest if a political candidate can with impunity mislead the public into thinking that he has been endorsed by a particular celebrity.”), with Cathay Y. N. Smith, *Weaponizing Copyright*, 35 HARV. J. L. & TECH. 193, 243–44, 257 (2021) (describing “an example of how copyright owners succeed in weaponizing copyright to protect their reputational interests” and expressing some skepticism over whether copyright ought to be used in such ways). See also Jake Linford & Aaron Perzanowski, *Calculating the Harms of Political Use of Popular Music* (Apr. 5, 2023) (unpublished manuscript), <https://deliverypdf.ssrn.com/delivery.php?ID=269126002097089118104109071099083068122032049015054052117085116094066069121117119101033022034012040098112087069105125124118118111029057079021089021065071067121069033075035123001071018076016084026115065026107090116090009116077022112106119126119103017&EXT=pdf&INDEX=TRUE> (empirically “test[ing] the endorsement and tarnishment theories through an experimental design that measures consumer reactions to a set of hypothetical campaign uses” to mixed results). Cf. Complaint at 1–5, 7, *Ron Paul 2012 Presidential Campaign Comm. V. Doe*, No. 12-CV-00240 (N.D. Cal. Mar. 26, 2012) (alleging “false designation of origin” under the Lanham Act for an online and anonymously produced video using Ron Paul’s campaign logos to attack primary rival Jon Huntsman and to urge voters to elect Ron Paul). The purpose here is simply to highlight these examples to demonstrate that copyright assertions in campaign contexts have the practical effect of chilling political speech. See *Hill v. Pub. Advoc. of the U.S.*, 35 F. Supp. 3d 1347, 1360 (D. Colo. 2014) (finding fair use does not apply to the use of a commercial photograph in a political mailing). See also John Schwartz, *File Sharing Pits Copyright Against Free Speech*, N.Y. TIMES (Nov. 3, 2003), <https://www.nytimes.com/2003/11/03/business/file-sharing-pits-copyright-against-free-speech.html> (noting that Diebold, a manufacturer of voting machines, used the Digital Millennium Copyright Act to undermine the dissemination of internal company memos and emails that described security risks in its election software).

Moreover, the streamlined and automated processes for moderating copyrighted content on internet platforms have made it easier to block candidate speech. The Digital Millennium Copyright Act offers internet platforms a safe harbor from infringement liability, but only if they take certain steps to guard against infringement, including steps to respond expeditiously to reports of allegedly infringing content.¹¹⁸ The upshot of these provisions is that a simple “takedown notice”—a mere assertion of alleged infringement by a copyright-holding politician—directed to a website like YouTube can cause a candidate’s counter-advertisement to disappear for long periods of time. In 2008, for example, news organizations caused campaign ads by both major presidential candidates—Barack Obama and John McCain—to become unavailable online for extended times.¹¹⁹ Indeed, such allegedly infringing content will be deplatformed for weeks, even before any substantive consideration of whether the use of the protected material was fair and thus allowable under copyright law.¹²⁰ This is so even when a candidate is willing to expend campaign resources to challenge the copyright assertion.¹²¹

In sum, copyright’s speech-restraining effects extend to political and campaign speech, as politicians and advocates are frequently put to the uncomfortable choice of stifling their own political speech or dedicating

117. Brief of College Art Ass’n, Visual Resources Ass’n et al. as Amici Curiae in Support of Petitioners at 7, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041813 (scholars building a database of “many primary sources from the Depression Era . . . were forced to leave out works entirely - Huey Long’s 1935 campaign song, ‘Every Man a King’ . . . because copyright owners” sought licenses).

118. 17 U.S.C. § 512(c).

119. See Fred von Lohmann, *McCain Campaign Feels DMCA Sting*, ELEC. FRONTIER FOUND. (Oct. 14, 2008), <https://www.eff.org/deeplinks/2008/10/mccain-campaign-feels-dmca-sting> [<https://perma.cc/W5TW-QAEF>] (noting that CBS, the Christian Broadcasting Network, Fox News, and NBC all caused campaign ads by both the McCain and Obama campaigns to be removed from internet platforms); Letter from Trevor Potter, Gen. Couns., McCain Palin, to Chad Hurley, CEO, YouTube, Zahavah Levine, Gen. Couns., YouTube, & William Patry, Senior Copyright Couns., Google (Oct. 13, 2008), https://www.eff.org/files/mccain_youtube_copyright_letter_10.13.08.pdf [<https://perma.cc/F882-U3BS>].

120. See, e.g., CTR. FOR DEMOCRACY & TECH., CAMPAIGN TAKEDOWN TROUBLES: HOW MERITLESS COPYRIGHT CLAIMS THREATEN ONLINE POLITICAL SPEECH 4, 15 (2010) (describing the effects of 17 U.S.C. § 512(g)(2)(C), which allows internet platforms to limit their own copyright liability for hosting allegedly infringing content but only if they keep allegedly infringing content offline for ten to fourteen business days).

121. Cf. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020) (noting that the “less bold among us would have to think twice” before relying on fair use to vindicate First Amendment interests).

limited resources (not to mention time on the electoral calendar) to copyright litigation. And in some instances, campaigns do not even have the choice: political speech is deplatformed under the auspices of copyright protection. When copyright limits how electoral candidates and political actors speak on matters of public concern, it undermines our collective interests in democratic governance and political accountability.

* * *

The Supreme Court has, for at least a century, zealously guarded political speech, deploying the First Amendment to strike down a varied set of laws ranging from rules stifling dissident speech in wartime to campaign finance regulations. But the Court has suggested that copyright law is consistent with the First Amendment's guarantees, as the copyright incentive induces speech of political and historical value.¹²² Moreover, the Court has explained that the contemporaneous ratification of the first copyright laws and the First Amendment offer historical support for the view that the two are compatible.¹²³ And, to the extent conflicts may arise, the Court has suggested that copyright's fair use and idea-expression doctrines mitigate any threats to First Amendment values.¹²⁴

Maybe. It may be true that copyright has helped to induce the creation of some campaign speech, but a candidate's or committee's desire to win or influence an election seems to provide incentive enough.¹²⁵ And so the examples and cases described above are, at best, an awkward fit for copyright's core utilitarian rationale. Instead, they

122. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545–46 (1985).

123. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (“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.”).

124. *Id.* at 219–20.

125. *See Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 857 n.8 (5th Cir. 1979) (“All distribution of expression would not cease in the absence of copyright. An author or other person with beneficent motives might pay for the distribution, at little or no cost to the recipient. This sort of largesse is routinely inflicted on the public during political campaigns.” (quoting Leonard W. Wang, Comment, *The First Amendment Exception to Copyright: A Proposed Test*, 1977 WIS. L. REV. 1158, 1178)). *See also* Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 973–74 (2007) (suggesting that fair use accounts for the possibility of “copyright harm,” namely, a copyright violation that is likely to have an effect on an ex ante decision to create the copyrighted work). In these contexts, however, the incentive to win or influence an election would seem to offer incentive enough. *See infra* text accompanying note 256.

seem to offer such copyright owners some control over the path of political commentary.¹²⁶ Moreover, fair use and related doctrines have frequently proved insufficient to fully protect against these threats to downstream speech or commentary—critiques, say, of a local government or counter-advertisements among competing campaigns—particularly in view of the large scope of potential liability summed across damages, fees, and costs. In short, in political and campaign contexts, copyright's balance between incentives for and access to new speech should favor access.

II. COPYRIGHT IN THE ELECTION OF 1800

Copyright's speech-restraining effects can and have stifled political and campaign speech. But was that always so? This Part offers a renewed look at the historical record—specifically, the nation's "first presidential campaign" in 1800¹²⁷—to describe how copyright's protections have been, and perhaps ought to be, more forgiving of political speech than the more recent examples described above.

A. The Election of 1800

In 1800, John Adams, incumbent president and de facto leader of the Federalist Party, sought reelection over Thomas Jefferson, the Democratic-Republican challenger. This election "capped a period of intense partisan rivalry" during which the two political parties were bitterly opposed.¹²⁸ Democratic-Republicans decried the imprisonment of several of their party's leaders under the Sedition Act (which outlawed "seditious libel"), referring to the law as a "palpable and alarming infraction of the constitution," namely, the First Amendment's speech and press guarantees.¹²⁹ Democratic-Republicans feared that a continuing

126. Smith, *supra* note 11, at 207, 209–10 ("Copyright is . . . weaponized to erase facts and bury information. . . . Politicians assert copyright to hide their politically extremist views.").

127. EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN* (2007). *See also* Joanne B. Freeman, *Corruption and Compromise in the Election of 1800: The Process of Politics on the National Stage*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC* 87, 87 (James Horn, Jan Ellen Lewis & Peter S. Onuf eds., 2002) (describing the election of 1800 as a "defining moment of epic proportions" and a "hotly contested campaign for the soul of the Republic").

128. James E. Lewis Jr., "What Is To Become of Our Government?": *The Revolutionary Potential of the Election of 1800*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC*, *supra* note 127, at 3, 8.

129. SUSAN DUNN, *JEFFERSON'S SECOND REVOLUTION: THE ELECTION CRISIS OF 1800 AND THE TRIUMPH OF REPUBLICANISM* 167 (2004) (quoting James Madison).

Federalist administration would bring about “a monarchical government and a return—in form, if not in name—to British subjugation.”¹³⁰ Federalists, by contrast, feared that a Democratic-Republican victory would renew class war, and worried that Jefferson would both ally with France and war with Great Britain.¹³¹

The conflict, however, was not merely between parties. The Federalist Party itself was deeply divided. Some Federalists saw Adams as a disqualifyingly weak leader.¹³² Hamilton in particular characterized Adams as a “capriciou[s]” president, one whose policy decisions were the “effect of momentary impulse.”¹³³ Adams, in turn, cast Hamilton as the leader of a “British Faction” of the party.¹³⁴ Hamilton was deeply offended by this insinuation of disloyalty and consequently, but “implausibly, commenced an affair of honor with the president of the United States.”¹³⁵

Consistent with this growing feud, Hamilton concluded that he could not support Adams’s candidacy, declaring that if the Federalist Party “must have an enemy at the head of the Government,” it should “be one whom [they] can oppose [and] for whom [they] are not responsible.”¹³⁶ And so Hamilton sought to have Charles Cotesworth Pinckney replace Adams as the party’s leader.¹³⁷

But how does one topple a sitting president from the head of a political party? Hamilton began by collecting evidence of the president’s (apparent) unfitness for office from disaffected members of the Adams

130. Lewis, *supra* note 128, at 10.

131. *Id.* at 9.

132. LARSON, *supra* note 127, at 213.

133. DUNN, *supra* note 129, at 161.

134. Letter from Alexander Hamilton to John Adams (Aug. 1, 1800), in *THE ESSENTIAL HAMILTON: LETTERS & OTHER WRITINGS* 328, 328 (Joanne B. Freeman ed., 2017) (emphasis omitted); JOHN C. MILLER, *THE FEDERALIST ERA 1789–1801*, at 262 (1960). *See also* RON CHERNOW, *ALEXANDER HAMILTON* 620 (2004) (discussing Hamilton’s reaction towards his reputation as a “British lackey”).

135. CHERNOW, *supra* note 134, at 621. *See* DUNN, *supra* note 129, at 161; LARSON, *supra* note 127, at 214–15.

136. Letter from Alexander Hamilton to Theodore Sedgwick (May 10, 1800), in *THE ESSENTIAL HAMILTON: LETTERS & OTHER WRITINGS*, *supra* note 135, at 327 (emphasis omitted).

137. *Id.* *See also* JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800*, at 142–43 (2004) (discussing Hamilton’s support for Pinckney in the election of 1800); CHERNOW, *supra* note 134, at 621 (explaining that Hamilton “hoped electors might give the edge to Pinckney over Adams”); DUNN, *supra* note 129, at 164 (explaining that Hamilton bet that he could “swing electoral votes to Charles Cotesworth Pinckney and away from Adams”); LARSON, *supra* note 127, at 222 (“[V]irtually everyone assumed that the real purpose of Hamilton’s letter was to boost Pinckney at Adams’s expense . . .”).

Administration.¹³⁸ Using that evidence, Hamilton then drafted a pamphlet entitled *Letter from Alexander Hamilton Concerning the Public Conduct and Character of John Adams*¹³⁹ (seen now as a cousin to the better known *Reynolds Pamphlet*¹⁴⁰), which has been described as “fifty-four pages of unremitting vilification”¹⁴¹ and that some historians suggest helped “to prevent Adams’s re-election, to widen the division among Federalists, and to destroy the party as a national political organization.”¹⁴²

The *Letter* begins by describing Hamilton’s view that Adams “d[id] not possess the talents adapted to the Administration of Government, and that there [were] great and intrinsic defects in his character, which unfit him for the office of Chief Magistrate.”¹⁴³ Among the things that had “come to light since the election of Mr. Adams to the Presidency, confirming [Hamilton’s] unfavorable foreboding of his character, [giving] new and decisive energy . . . to [Hamilton’s] sentiment of his

138. MILLER, *supra* note 134, at 261–62. *See also* CHERNOW, *supra* note 134, at 619–20 (explaining that Hamilton had “the cooperation of the discontented cabinet members,” including Oliver Wolcott, Jr.).

139. Letter from Alexander Hamilton, Concerning the Public Conduct and Character of John Adams, Esq. President of the United States (Oct. 24, 1800), in 25 THE PAPERS OF ALEXANDER HAMILTON 169, 186 (Harold C. Syrett ed., 1977) [hereinafter *Letter*]. *See also* LIN-MANUEL MIRANDA, *The Adams Administration*, on HAMILTON: AN AMERICAN MUSICAL (Original Broadway Cast Recording) (Warner Music 2015); LIN-MANUEL MIRANDA & JEREMY MCCARTER, HAMILTON: THE REVOLUTION 222–24 (2016) (noting that the original version of “The Adams Administration” reflected more of the *Letter*’s substantive content, but those lyrics were ultimately left “on the cutting room floor”).

140. ALEXANDER HAMILTON, OBSERVATIONS ON CERTAIN DOCUMENTS CONTAINED IN NO. V & VI OF “THE HISTORY OF THE UNITED STATES FOR THE YEAR 1796” IN WHICH THE CHARGE OF SPECULATION AGAINST ALEXANDER HAMILTON, LATE SECRETARY OF THE TREASURY, IS FULLY REFUTED (Aug. 25, 1797), reprinted in 21 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 139. *See also* MIRANDA, *The Reynolds Pamphlet*, on HAMILTON: AN AMERICAN MUSICAL, *supra* note 139; *Copy-Right Secured.*, AURORA GEN. ADVERTISER (Phila.), Oct. 31, 1800 (treating the two pamphlets as related, not least because both exemplified Duane’s view that “excess of [F]ederalism, and excess of impudence can reside together”).

141. FERLING, *supra* note 137, at 140.

142. Harold C. Syrett, *Introductory Note* to *Letter*, *supra* note 139, at 170 [hereinafter *Introductory Note*]. *See also* Michael A. Bellesiles, “The Soil Will Be Soaked with Blood”: Taking the Revolution of 1800 Seriously, in THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC, *supra* note 127, at 59, 67 (explaining that the *Letter* “may have cost Adams the election”). *But see Introductory Note*, *supra*, at 185 (“Hamilton’s *Letter* probably had little effect on the outcome of the election of 1800.”); MILLER, *supra* note 134, at 263 (same).

143. *Letter*, *supra* note 139, at 186 (emphasis omitted).

unfitness for the station” was a more complete view of “the ungovernable temper of Mr. Adams.”¹⁴⁴ Specifically, Hamilton wrote that Adams

is often liable to paroxisms . . . which deprive him of self command, and produce very outrageous behaviour to those who approach him. Most, if not all his Ministers, and several distinguished Members of the two Houses of Congress, have been humiliated by the effects of these gusts of passion.¹⁴⁵

In short, the *Letter* showcases and attempts to substantiate Hamilton’s own untempered criticism of Adams, drawing from examples regarding private incidents or deliberations that were leaked to Hamilton from inside the Adams Administration. And given Hamilton’s dual motives—to unseat Adams from the head of the party while also ensuring that the Federalists would retain the presidency—it is plain to see why Hamilton would want, and in fact tried, to keep the *Letter* inside the party.

B. The Letter’s Copyright

By most accounts, Hamilton did not intend for the *Letter* to become a public document. The *Letter* itself notes Hamilton’s “wish that its circulation could forever be confined within narrow limits.”¹⁴⁶ Other contemporaries, including the *Letter*’s printer,¹⁴⁷ described Hamilton’s intent to “confine the circulation of it under his own direction . . . to confidential persons,”¹⁴⁸ explaining that “it was not to be made public,” but rather, “copies were to be sent” to the select set of “electors [that] were chosen” to help replace Adams with Pinckney.¹⁴⁹ Hamilton’s co-conspirators—who included current and former cabinet secretaries in the Adams Administration—urged Hamilton to “be discreet,” in order to “avoid any suggestion that [his authorship of the *Letter*] had been motivated by political ambition or personal pique.”¹⁵⁰ Other Federalists anticipated that widespread dissemination of such a document could

144. *Id.* at 198, 222.

145. *Id.* at 222.

146. *Id.* at 234. *See also* *Introductory Note*, *supra* note 142, at 178.

147. John Lang, Editorial, N.Y. GAZETTE & GEN. ADVERTISER, Nov. 27, 1800 (noting that Hamilton intended for circulation to be “restricted to particular quarters”).

148. Tench Coxe, *To the Public*, AURORA GEN. ADVERTISER (Phila.), Oct. 30, 1800.

149. *Introductory Note*, *supra* note 142, at 177 (quoting a letter from William Shaw, President Adams’s private secretary, to William S. Smith).

150. *Id.* at 172.

damage the party.¹⁵¹ Hence, Hamilton seems to have expected that the *Letter* would only circulate among selected influential Federalists whom he hoped would elevate Pinckney over Adams at the top of the party.¹⁵²

Hamilton took several precautions to ensure the *Letter*'s limited circulation. For one, Hamilton had only a limited run of the *Letter* printed.¹⁵³ More importantly, Hamilton took the "extraordinary step" (for the period) of having the *Letter* copyrighted¹⁵⁴: Between 1795 and 1800, fewer than one hundred copyrights were registered annually.¹⁵⁵ Of

151. See CHERNOW, *supra* note 134, at 621; DUNN, *supra* note 129, at 162 ("Arrogant, impetuous, and self-destructive, [Hamilton] had made up his mind to fracture the Federalist party by publicly denouncing its leader in the middle of a presidential campaign against a unified and hungry opposition party. Now Hamilton's Adams-bashing, vitriol spewing Federalist allies wanted to rein him in.").

152. CHERNOW, *supra* note 134, at 621. See also DUNN, *supra* note 129, at 163 (the *Letter* was "for the eyes only of Federalist leaders" rather than "the general public"); MILLER, *supra* note 134, at 263; LARSON, *supra* note 127, at 218 ("Hamilton may have wanted the letter to circulate only among discreet Federalists . . ."). But see *Introductory Note*, *supra* note 142, at 178 ("[Hamilton's] plans concerning the distribution of the pamphlet cannot be stated with certainty.").

153. See *Introductory Note*, *supra* note 142, at 176 (quoting AURORA GEN. ADVERTISER (Phila.), Oct. 21, 1800); Coxe, *supra* note 148 (noting that Hamilton had prepared only a "few copies"). Compare *Introductory Note*, *supra* note 142, at 178 (noting that Hamilton's plan had been to circulate 200 copies), with Trish Loughran, *Disseminating Common Sense: Thomas Paine and the Problem of the Early National Bestseller*, 78 AM. LITERATURE 1, 6 (2006) (estimating a total circulation for Thomas Paine's *Common Sense*, an outlying example to be sure, of between 100,000 and 150,000).

154. FERLING, *supra* note 137, at 140–41. See Oren Bracha, *Commentary on the U.S. Copyright Act 1790*, in PRIMARY SOURCES ON COPYRIGHT (1450–1900) § 6 (L. Bently & M. Kretschmer eds., 2008), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_us_1790 [<https://perma.cc/5XHR-6CA6>] (noting "the small relative share of printed works that were registered and therefore protected by copyright," and that "[o]ut of more than fifteen thousand printed works published in the United States between 1790 and 1800 less than eight hundred were copyrighted"). See also FEDERAL COPYRIGHT RECORDS: 1790–1800, at 114 (James Gilreath & Elizabeth Carter Wills eds., 1987) (recording the copyright of the *Letter* on October 22, 1800, in the district court ledger); LARSON, *supra* note 127, at 219 (noting the *Letter*'s copyright).

Importantly, securing copyright protection in 1800 was far more complicated than it is today. Thanks to the Berne Convention, authors no longer need to conform to certain complicated "formalities" to obtain protection. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. See also Jane C. Ginsburg, *Berne-Forbidden Formalities and Mass Digitization*, 96 B.U. L. REV. 745, 746 (2016) (addressing "the Berne Convention's prohibition on the imposition of 'formalities' on the 'enjoyment and the exercise' of copyright"). But, in 1800, authors faced various hurdles to copyright protection. Hamilton seems to have successfully navigated this process (further evidence of Hamilton's desire to ensure the *Letter*'s confidentiality), as evidenced by the *Letter*'s copyright registration certificate. See *infra* Appendix C. See also *infra* Appendix A (reproducing the *Letter*'s title page, including its copyright notice).

155. Bracha, *supra* note 154, § 6.

those, less than thirteen, on average, were political or social works of authorship.¹⁵⁶ Notably, Hamilton's printer, among other fellow Federalists, explained that he took the unusual step of "secur[ing] the copy-right of [the *Letter*] so as to prevent a re-publication in the newspapers," and thereby ensure limited "circulation of [the *Letter*] under his own direction."¹⁵⁷

These prophylactic measures, however, proved insufficient: the *Letter* fell into the hands of a Democratic-Republican (possibly, though far from certainly, Aaron Burr).¹⁵⁸ Democratic-Republicans immediately recognized the *Letter*'s potential to "deepen the rift in the Federalist party,"¹⁵⁹ and they forwarded excerpts to Democratic-Republican-leaning newspapers,¹⁶⁰ including the *New London Bee* in Connecticut and, perhaps most importantly, the *Aurora General Advertiser* in

156. B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790–1920*, at 236 tbl.8.1 (2005). By contrast, the Copyright Office processed more than 450,000 claims for registration in the 2017 fiscal year. U.S. COPYRIGHT OFF., *FISCAL 2017 ANNUAL REPORT* 2, 5 (2017), <https://www.copyright.gov/reports/annual/2017/ar2017.pdf> [<https://perma.cc/JV39-GCQB>].

157. Coxe, *supra* note 148. See also Lang, *supra* note 147. Notably, Tench Coxe is credited with having had a unique influence on the development of the Constitution's Intellectual Property Clause. See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTEL. PROP. L. 1, 39–40 (1994).

158. Compare DUNN, *supra* note 129, at 164 ("Hamilton's [*Letter*] fell into the hands of Aaron Burr, who leaked it to the press."), and MILLER, *supra* note 134, at 263 ("Aaron Burr took an unexpected hand at the proceedings: having procured a copy of Hamilton's [*Letter*], he gave it to the newspapers."), and *Introductory Note*, *supra* note 142, at 173–74 (relaying the account of Matthew L. Davis, Aaron Burr's biographer, crediting Burr with leaking the *Letter*), with CHERNOW, *supra* note 134, at 621–22 (suggesting that John Beckley leaked the *Letter*), and *Introductory Note*, *supra* note 142, at 174, 177 (expressing some skepticism at Davis's account crediting Burr with the leak and suggesting that John Beckley may in fact have been the source). See also LARSON, *supra* note 127, at 218–19 (noting "discrepancies" in both accounts).

The uncertainty among historians over *who* made Hamilton's *Letter* public is beside the point. The facts that Hamilton sought copyright protection for the *Letter*, that the *Letter* was leaked to the press, and that the *Letter* was republished (as excerpts and in its entirety) are all undisputed. The possibility that Burr was a source of the leak adds to the story's intrigue but is ultimately irrelevant to the copyright questions at issue here.

159. CHERNOW, *supra* note 134, at 622. See also *Introductory Note*, *supra* note 142, at 173 (quoting Aaron Burr's biographer, Matthew L. Davis, as stating that Burr recognized that the *Letter* would "distract the [Federalist] party, and thus promote the [R]epublican cause").

160. Jeffery L. Pasley, *1800 as a Revolution in Political Culture: Newspapers, Celebrations, Voting, and Democratization in the Early Republic*, in *THE REVOLUTION OF 1800: DEMOCRACY, RACE, AND THE NEW REPUBLIC*, *supra* note 127, at 121, 134 ("Newspaper offices were unofficial clubhouses and reading rooms of local parties, and newspaper columns were the major source of party doctrine . . .").

Philadelphia—the “best-known” and “ablest-edited” Democratic-Republican paper,¹⁶¹ with a circulation that claimed to be “more extensive . . . than any other paper in the Union.”¹⁶²

The *Letter*'s copyright was not unnoticed by the editors of these newspapers. In an editorial and a published letter by a contemporary, the *Aurora* noted that Hamilton's copyright was intended to prevent precisely this sort of leak.¹⁶³ That copyright protection, however, did not prevent these press outlets from exhibiting this intraparty critique in the most compelling and persuasive ways possible¹⁶⁴: by republishing excerpts of the *Letter*.¹⁶⁵

On October 21, 1800,¹⁶⁶ the *Aurora* first noted the existence of the *Letter* in a short column, acknowledging the legal and practical precautions Hamilton had undertaken to limit its distribution but promising nevertheless to “exhibit this secret *curiosity pro bono publico!*”¹⁶⁷ The next day, the *Bee* similarly noted that it had acquired the *Letter* and explained that “[w]ant of time will not permit us to make any extracts until next week.”¹⁶⁸ The following week's edition of the *Bee* dedicated over an entire quarter of its total publication—practically the entire cover page—to excerpts of the *Letter*.¹⁶⁹ The *Aurora* likewise published excerpts of the *Letter* on October 22 and October 25, and on October 27, it “republished” those excerpts due to the “uncommon demand” for those two editions of the paper.¹⁷⁰

Notably, the excerpts printed in the October 22 edition of the *Aurora* included a reprint of the *Letter*'s title page, including the *Letter*'s original copyright notice.¹⁷¹ On October 31, the editor of the *Aurora*, William Duane, defended the newspaper's decision to publish excerpts of the

161. See Worthington C. Ford, *Introductory Note: Letters of William Duane*, in 20 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 257, 257 (1906) (categorizing the *Aurora* as such).

162. Letter from William Duane to James Madison (May 10, 1801), in 20 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY, *supra* note 161, at 263, 263.

163. See Lang, *supra* note 147.

164. See *supra* note 26 and accompanying text (describing the expressive value of quoting rather than paraphrasing).

165. See *Introductory Note*, *supra* note 142, at 176–77.

166. This is actually one day before Hamilton's copyright was registered on October 22. See *infra* Appendix C.

167. AURORA GEN. ADVERTISER (Phila.), Oct. 21, 1800.

168. *Alexander Hamilton Versus John Adams*, NEW LONDON BEE (Conn.), Oct. 22, 1800.

169. *Alexander Hamilton Versus John Adams*, NEW LONDON BEE (Conn.), Oct. 29, 1800 (referring to this issue as an “extraordinary production”).

170. AURORA GEN. ADVERTISER (Phila.), Oct. 27, 1800.

171. AURORA GEN. ADVERTISER (Phila.), Oct. 22, 1800.

Letter, notwithstanding Hamilton's copyright.¹⁷² No other scholarship seems to have examined this editorial; indeed, no other scholarship seems to have considered this episode's implications for copyright doctrine (either in 1800 or today).¹⁷³ Indeed, the editorial reprints the copyright notice for the purpose of mocking it, daring Hamilton to sue for copyright infringement and contending that the *Letter* should be deemed ineligible for copyright protection given its libelous and seditious nature:

[The *Letter*] is a violent libel on the President of the United States.

COPY-RIGHT SECURED.

General Hamilton does not believe that these publications can be privileged under a law for the encouragement of learning. Nothing is learnt by them except that excess of [F]ederalism and excess of impudence can reside together

Do the printers [of the *Letter*] believe that violations of all laws, human and divine, can be protected and encouraged by our laws? Do they believe that seditious libels on the President of the United States can be secured by copyright?

They are not so ignorant. They dare not; and General Hamilton dare not lead up a question before any court in the United States, whether his . . . sedition shall be protected by a law of the United States, enacted for the express encouragement of literature.¹⁷⁴

It is likely that Duane's decision to frame his defense of this apparent infringement in this way is meant, at least in part, to protest the Sedition Act,¹⁷⁵ a statute of substantial concern for the Democratic-Republican Party.¹⁷⁶ The act criminalized "seditious libel," leading to the imprisonment of some of Duane's compatriots—other

172. AURORA GEN. ADVERTISER (Phila.), Oct. 31, 1800.

173. See *supra* note 28 and accompanying text. The *Letter*, to be sure, is discussed in history texts about Alexander Hamilton or the election of 1800, and some of these secondary sources glancingly note that Hamilton sought copyright protection for the *Letter* to help ensure confidentiality. But none seem to go any further.

174. AURORA GEN. ADVERTISER (Phila.), Oct. 31, 1800. The portions omitted from the editorial regard the *Reynolds Pamphlet*, another notorious work by Hamilton made more famous by the eponymous musical. See MIRANDA, *supra* note 140. The editorial is reprinted in its entirety *infra* Appendix D.

175. See generally GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 29–77 (2004) (providing background on the Alien and Sedition Acts and some notable controversies arising under the Acts).

176. See Pasley, *supra* note 160, at 134 (noting the tight relationship between party and press).

Democratic-Republican printers, such as James Callender.¹⁷⁷ Indeed, Duane himself was charged with violating the Acts at least four times.¹⁷⁸ But these protests are themselves rooted in First Amendment concerns, as the Democratic-Republican objections to the Alien and Sedition Acts were,¹⁷⁹ that those acts undermined First Amendment values by stifling speech and suppressing participation by Democratic-Republican voters.¹⁸⁰ How, then, could Hamilton publish and protect from public scrutiny his own “seditious libel” regarding the incumbent Federalist president, if Democratic-Republicans were to be imprisoned for theirs?¹⁸¹

177. See STONE, *supra* note 175, at 61–63; FERLING, *supra* note 137, at 140 (“The Federalists had frightened [Jefferson] badly during recent years, most especially by their Sedition Act, and that summer he watched helplessly as Callender was convicted and sentenced to nine months in jail and a fine of \$200 in a trial that Jefferson saw as a political action and judicial mockery.”). Interestingly, Callender’s own actions seem to have precipitated Hamilton’s *Reynolds Pamphlet*. See, e.g., JOHN DICKERSON, WHISTLESTOP: MY FAVORITE STORIES FROM PRESIDENTIAL CAMPAIGN HISTORY 263–86 (2016). Relatedly, unlawful content was thought to be uncopyrightable.

178. Gerald F. Uelmen, Book Review, 31 W. LEGAL HIST. 177 (2021) (reviewing WENDELL BIRD, CRIMINAL DISSENT: PROSECUTIONS UNDER THE ALIEN AND SEDITION ACTS OF 1798 (2020)).

179. See STONE, *supra* note 175, at 73–76. Notably, Duane’s contention that copyright cannot extend to “seditious libels” might be understood to imply another connection between the copyright laws and the First Amendment, namely, that their scopes of protection are coterminous. Stated otherwise, Duane implies that copyright should extend only to that speech which the First Amendment protects. See, e.g., *Counterman v. Colorado*, 143 S. Ct. 2106, 2115 (2023) (noting that defamatory communication is not protected by the First Amendment). Of course, that depends, in the first instance, on whether the modern Court’s understanding of the First Amendment’s scope is consistent with the founding public’s understanding of the right to free speech. But even if the two align, it is somewhat more precise to emphasize that copyright need not protect such libels (though it could), and that copyright is best understood as not doing so. In any event, Duane’s principal complaint seems to regard the inconsistency between the law’s treatment of this “seditious libe[l],” apparently protected by copyright, and the writings of the Democratic-Republicans, which landed some of Duane’s compatriots in prison. See *supra* notes 176–79 and accompanying text.

180. See, e.g., William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 126–28 (1984). See also LARSON, *supra* note 127, at 222 (quoting Republican newspaper *Centinel of Freedom* as noting that if a Republican had written the *Letter*, he would have been fined and imprisoned under the Sedition Act).

181. See Eugene Volokh, *Thomas Cooper, Early American Public Intellectual*, 4 N.Y.U. J. L. & LIBERTY 372, 377–78 (2009) (noting that Cooper leveled a similar criticism about Hamilton’s *Letter*). See also DUNN, *supra* note 129, at 164. As Dunn explains, Thomas Cooper “had recently been released from prison for criticizing President Adams” under the Alien and Sedition Acts. *Id.* In light of the *Letter*’s release, Cooper now “audaciously proposed that Hamilton too be prosecuted.” *Id.* The *Aurora* “congratulated” Cooper on his call. *Id.* But no one responded to the call to prosecute Hamilton, showing that “[o]nly Republicans would be prosecuted and thrown in jail for attacking the president.” *Id.*

And so Duane's editorial sounds in a larger question, namely, the extent to which Congress can—via either the Alien and Sedition Acts or the copyright laws—limit public debate on such matters of political importance as the effectiveness of the Federalist Party's (specifically, Adams's) administration.

Indeed, Duane's contention that copyright could not exempt the *Letter* from public scrutiny set the stage for his next move: the *Aurora* printed its own complete edition of the *Letter* for general sale,¹⁸² defeating the protective measures intended to limit circulation. Where the copyright notice would have been, the *Aurora*'s special edition was stamped “*Pro Bono Publico*”—for the public good.¹⁸³

C. Illegal Infringement or Permitted Speech?

As noted, Duane “dare[d]” Hamilton to challenge both the *Aurora*'s publication of excerpts of the *Letter* in the newspaper and its sale of own version of the *Letter* before “any court of the United States.”¹⁸⁴ There appears to be no evidence that Hamilton ever did. Indeed, as described in more detail below,¹⁸⁵ Hamilton came around to the view (contrary to his initial decision to seek copyright protection) that public consumption of the *Letter* would be “productive of good.”¹⁸⁶

But we might nevertheless consider the outcome of a hypothetical copyright case between Hamilton and the *Aurora*: Could Hamilton's registered copyright have prevented Duane from exposing and commenting on the divisions within the Federalist Party by prohibiting him from reprinting an important pamphlet by one of the party's most prominent members?¹⁸⁷ Although we know “relatively little” about how

182. AURORA GEN. ADVERTISER (Phila.), Nov. 1, 1800 (“PRO BONO PUBLICO: An edition of *Hamilton's Two Famous Pamphlets* will be published at this office at the small price of 50 cents for both.”). See also *Introductory Note*, *supra* note 142, at 177 (noting the *Aurora*'s sale of its own edition of the *Letter*); LARSON, *supra* note 127, at 219.

183. Compare Appendix A, *infra* (title page of the *Letter*'s first edition), with Appendix B, *infra* (title page of the *Aurora*'s edition). See also *Introductory Note*, *supra* note 142, at 175 n.30, 177 (noting that the *Aurora* published an “unauthorized,” “*pro bono publico*” edition that “def[ie]d . . . the law”).

184. *Copy-Right Secured.*, *supra* note 140.

185. See *infra* notes 238–42 and accompanying text.

186. CHERNOW, *supra* note 134, at 624 (quoting *Letter* from Robert Troup to Rufus King (Nov. 9, 1800), in 3 THE LIFE AND CORRESPONDENCE OF RUFUS KING 330, 331 (Charles R. King ed., 1896)).

187. The next several paragraphs focus on the question of liability for infringement. On the matter of remedies, “[i]njunctive relief was probably available according to the rules of equity from the time of the first copyright act in 1790.” Lemley & Volokh, *supra* note 76, at 154 n.25. Specifically, Lemley and Volokh find that, under

the Copyright Act of 1790 shaped (and was shaped by) Founding Era norms and practices regarding the press and publication arrangements,¹⁸⁸ it is possible, at least for the excerpts published in the *Aurora*, that Duane would have likely prevailed over any allegations of infringement. Although the bare text of that statutory scheme penalized *any* copy, sale, or reprint, in whole or in part, of a copyrighted work,¹⁸⁹ Justice Joseph Story's famous 1841 decision in *Folsom v. Marsh*¹⁹⁰ (a case regarding a curated selection of George Washington's papers that is widely credited with originating the fair use doctrine¹⁹¹) explains that a critical reviewer "may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism."¹⁹² Justice Story traced such a fair use of copyrighted work to precedents at English common law,¹⁹³ and so the principles set out in his decision would seem to also apply to Duane's decisions to reprint and comment on excerpts of the *Letter*, which was copyrighted under the Act of 1790.¹⁹⁴

But there is (limited) countervailing case law, too. Indeed, the only other apparent relevant decision implicating early common law copyright and examining its relationship to the First Amendment,¹⁹⁵ *Denis v.*

English law, a copyright "plaintiff was presumptively entitled to preliminary injunctive relief." *Id.* at 153. It is somewhat less clear whether American courts would have been receptive to similar claims, as Lemley and Volokh find that "early U.S. courts showed some reluctance to grant preliminary relief to copyright plaintiffs." *Id.* at 154. But these cases postdate Hamilton's *Letter* by over two decades. *See id.* at 154 n.26 (citing cases from 1824 and later). Hence, it is not clear whether an American court in 1800 would be more likely to follow English practice or whether it would act like an earlier link in the chain of U.S. decisions cited by Lemley and Volokh.

188. Bracha, *supra* note 154, § 6. *See also* LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 197–202 (1968) (noting "something of a mystery" as to several provisions of the 1790 Act).

189. *See* Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124.

190. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

191. *See, e.g.,* L. Ray Patterson, *Understanding Fair Use*, 55 LAW & CONTEMP. PROBS. 249, 250 (analyzing "*Folsom v. Marsh*, the 1841 opinion by Justice Story, in which the fair use doctrine originated" (footnote omitted)). *But see* Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1373 (2011) ("In evaluating the history of the fair use doctrine, it is a mistake to start with *Folsom v. Marsh*; the complete history begins with over a century of copyright litigation in the English courts.").

192. *Folsom*, 9 F. Cas. at 344.

193. *Id.* at 348–49. *See also* L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 434 (1998).

194. *See infra* Appendix A (noting date of copyright).

195. Searching and reviewing, for example, WILMA S. DAVIS, COPYRIGHT OFF., BULL. NO. 13, DECISIONS OF THE UNITED STATES COURTS INVOLVING COPYRIGHT AND LITERARY PROPERTY 1789–1909 (1980), turns up only this one relevant result. *See id.* at 744–55.

LeClerc,¹⁹⁶ takes a far less permissive approach to such possible fair uses. In that case, Judge François Xavier Martin¹⁹⁷ of the Superior Court for the Territory of Orleans held that the recipient of a private letter could not publish its contents over the objections of the letter's author, finding that the letter was the "literary property" of the author.¹⁹⁸ Moreover, *Denis* concluded—unlike Justice Story (and more modern fair use analysis)—that the recipient's motive did not matter:

The present case has been endeavored to be distinguished from those cited, in regard to the nature of the attempt—not to print a letter, with a view of appropriating to one's self the profit of the sale, and thus depriving the writer of the benefit secured to him by law, under the denomination of *copy right*; but with the sole view of disclosing the writers' secrets Can the defendant resist the claim of the plaintiff, by saying: true it is I am about violating your property, but I seek not thereby any pecuniary benefit, nor any advantage but the gratuitous pleasure of working an injury?¹⁹⁹

In short, neither the "purpose and character of the use" nor the "effect of the use on the [work's] potential market"—two of the factors

196. 1 Mart. (o.s.) 297 (Orleans 1811). See also DAVIS, *supra* note 195, at 744–55 (reprinting *Denis*). Before discussing *Denis* further, I should note that Judge Martin's decision contains an apparent—and unwarranted and indefensible—allusion to the Haitian Revolution, suggesting that such a reading of the First Amendment's "proclamation of the freedom of the press would be as fatal to the people of these states, as the proclamation of the freedom of the negroes to the Hispaniola planters." *Id.* at 314. I did not think it appropriate to elaborate on *Denis* without first commenting on this reprehensible and needless dicta, which seems to elevate the concerns of plantation owners over the freedom of enslaved populations.

197. Judge Martin is a notable figure in Louisiana's early legal history, having served not only on the Superior Court for the Territory of Orleans but also as the state's first attorney general and, eventually, on the state's supreme court. See generally *Louisiana Supreme Court Justices 1813-Present*, SUP. CT. ST. LA., https://www.lasc.org/bicentennial/justices/martin_francois_xavier.html [https://perma.cc/79YY-ZN47].

198. *Denis*, 1 Mart. (o.s.) at 297. More specifically:

The Defendant . . . obtained copies of the letter and sought to publish it, to which the Plaintiff objected. At first, the Plaintiff obtained an injunction. In his answer to the injunction, the Defendant annexed a copy of the letter and filed it in the office of court clerk, after which he advertised publicly that others interested in reading the letter might do so by visiting the clerk's office. The Plaintiff then approached the court again, seeking to hold the Defendant in contempt. The court obliged

Shyamkrishna Balganesh, *Privative Copyright*, 73 VAND. L. REV. 1, 46 (2020) (footnotes omitted). See also *Denis*, 1 Mart. (o.s.) at 298.

199. *Denis*, 1 Mart. (o.s.) at 305 (emphasis added).

that bear on questions of fair use²⁰⁰—were relevant to Judge Martin's analysis of the recipient's right to publish the letter. And Judge Martin identifies sources of law dating to Cicero in support of the view that a letter's writer controls the publication of a private letter.²⁰¹

Moreover, that court expressly concluded that the First Amendment did not unsettle these established principles, suggesting that doing so would unleash a parade of horrors, even floating one example analogous to (but distinct from) Hamilton's own *Letter*:

A brother may correspond with his brother, and grieve with him on the distresses of the family, occasioned by the misconduct of their father, and devise the means of alleviating the consequences of it. With secrecy he may succeed: but if a gazetteer, in whose hands accident or knavery may place his letter, cannot be compelled to respect the privacy of these family secrets, the writer will innocently incur the odium of the conduct of the younger son of Noah.²⁰²

Superficially, then, these cases appear to be at odds with one another. In *Folsom*, Justice Story describes a longstanding right of some speaker to copy and quote a work—a private letter, say, from George Washington to some other revolutionary—for the purpose, perhaps, of critiquing Washington's views or military strategy.²⁰³ Judge Martin, however, finds no support for any similar right, concluding that the letter is the sole “literary property” of its author, who has a practically absolute right to control that letter's dissemination.²⁰⁴ But while these are in seeming conflict, the nature of the copyrighted work at issue may help to explain the difference. *Denis* involved a private letter between a man and a woman whom he attempted to court—hardly a newsworthy matter of public concern. Hence, *Denis* is consistent with the tradition of using copyright to protect authors' autonomy, dignity, and privacy interests.²⁰⁵ *Folsom*, by contrast, was about a selection of George Washington's papers—a work “of inestimable value, as the repository of the thoughts and opinions of that great man.”²⁰⁶ Hence, the public importance of the letters and other documents at issue in *Folsom*, given

200. See 17 U.S.C. § 107.

201. *Denis*, 1 Mart. (o.s.) at 311–12.

202. *Id.* at 313.

203. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901).

204. *Denis*, 1 Mart. (o.s.) at 297.

205. See Balganes, *supra* note 198. See also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 201–02 (1890).

206. *Folsom*, 9 F. Cas. at 345.

their historical and political value, may have informed Justice Story's somewhat more permissive description of fair use (though, to be sure, the defendant's use in *Folsom* is found to be infringing). Indeed, in other contexts, Justice Story echoed the view that "the publication of such letters," even for purposes of criticism, "is perhaps one of the most odious breaches of private confidence, of social duty, and of honorable feelings."²⁰⁷ Yet, one can find several instances of newsletters (including the *Aurora*) publishing leaked private letters among politicians regarding matters of governance.²⁰⁸ In short, though *Denis* concludes that an author's ownership interests in a private communication are far stronger than Justice Story suggests in *Folsom*, *Folsom*'s particular facts may fit somewhat better the public interests at stake in the controversy over the *Letter*. Stated otherwise, these decisions, sources, and contemporary practices might be understood to distinguish between private communications on private matters and private communications on matters of public importance.²⁰⁹

But even if the principles set out Justice Story's opinion in *Folsom* are best understood as excusing the excerpts of Hamilton's *Letter* reprinted in the *Aurora*, whether Duane's "*Pro Bono Publico*" edition of the *Letter* would also survive review seems a closer question. In *Folsom*, Justice Story reasons that though a reviewer can fairly use a copyrighted work for purposes of a review, they cannot use "the most important parts of the work, with a view, not [to] criticise, but to supersede the use of the original work."²¹⁰ But that seems to have been the aim of Duane's edition: to supersede Hamilton's use of the work, and perhaps not directly to critique it (though he was critical of it), but rather to make it more widely available for others to decide whether to cast their vote for Adams or any other member of the Federalist Party. Put simply: Hamilton's aim was to topple Adams from the presidency and the head of the party; Duane's was too.²¹¹ And so perhaps Duane's "*Pro Bono*

207. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 946 (F. V. Balch ed., 11th ed. 1873).

208. See, e.g., FERLING, *supra* note 137, at 158 (noting that the *Aurora* published a private letter from John Adams to Tench Coxe regarding Pinckney).

209. But see Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in DEMOCRATIC COMMUNITY 163, 181 (John W. Chapman & Ian Shapiro eds., 1993).

210. *Folsom*, 9 F. Cas. at 344–45.

211. This is oversimplifying, of course, and the question of whether Duane's use "supersedes" Hamilton's is one of framing. Hamilton's aim might alternatively be characterized as to keep certain preferred Federalists in power, and that was surely not Duane's aim. Hence, as discussed in Section II.C, whether Duane's reprint is a fair use is a difficult question. And that is exactly the point: whether a given use is fair can be difficult to discern, and the protracted litigation that might ensue gives rise to substantial First Amendment concerns. See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

Publico" reprint would have lost under both *Denis*'s and *Folsom*'s rules.²¹²

Perhaps. But Justice Story also admits that his examples in *Folsom* are "two extremes" between which there's a "wide interval," and so he "call[s] for great caution" when deciding whether to decry a given use as "piracy" (*i.e.*, infringement).²¹³ Indeed, Duane's reprint of Hamilton's secret pamphlet might fall within that interval, because while Duane's aim in reprinting it was to concur in Hamilton's assessment about Adams's fitness for office, he surely meant to also criticize Hamilton for his own actions. By reprinting the *Letter*, Duane tries to highlight, as persuasively as possible, the hypocrisy he sees in Hamilton's actions. Duane does not let Hamilton obscure his actions, and Duane uses Hamilton's own words. Similarly, by reprinting the *Reynolds Pamphlet*, which he offered for sale alongside his open-access edition of the *Letter*, Duane draws attention to what he perceives to be Hamilton's moral failings. And while both Duane and Hamilton sought to unseat Adams, Hamilton wanted the Federalists to retain the presidency; Duane did not.

There is no judicial record of whether either the *Aurora*'s excerpts or its "*Pro Bono Publico*" reprint constituted unlawful copyright infringement. And it is difficult to predict exactly how a contemporary court might have resolved such a suit: both *Denis* and *Folsom*, each of which post-dates the controversy over the *Letter*, marshal ancient principles in support of competing views on how to reconcile the First Amendment with the Intellectual Property Clause. Hence, rather than attempt to divine what these conflicting courts might have done with a hypothetical infringement claim, we might try, instead, to better understand how the parties involved understood the balance between the First Amendment's prohibition against speech-restraining laws and copyright's speech-restraining effects.²¹⁴ Such an understanding of the historical record may help inform our modern speech-copyright equilibrium.

(concluding that "political speech must prevail against laws that would suppress it, whether by design or inadvertence").

212. On the remedy for such possible infringement, see *supra* note 187.

213. *Folsom*, 9 F. Cas. at 345.

214. Cf. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1493 (2005) (The task is to "determine the original meaning of the language . . . that is, to understand how knowledgeable individuals would have understood this language . . . when it was drafted and ratified. Interpreters at the time would have examined various factors, including text, purpose, structure, and history.").

III. HAMILTON'S COPYRIGHT IN MODERN CONTEXT

Hamilton's *Letter*²¹⁵—best known for its effect on the presidential election of 1800²¹⁶—is also the source of an overlooked Founding Era copyright-and-speech controversy. But what, if anything, does this episode mean for doctrine today? The following Sections work through the possible implications of this episode for the modern speech-copyright equilibrium, as applied both to the sorts of political copyright controversies described in Part I and to related restraints on speech.

A. Copyright Implications

As described in Part I, there is some confusion today over the extent to which politicians and advocates can use an opponent's copyrighted materials in a political contest, and that confusion seems to have the practical effect of chilling political (including campaign) speech. Neither the Constitution's Intellectual Property Clause nor the First Amendment offers a clear answer as to how to resolve such controversies: the former expressly grants Congress the power to enact laws "securing for limited Times to Authors . . . the *exclusive* Right to their respective Writings;" the latter expressly prohibits Congress from enacting any laws "abridging the freedom of speech, or of the press."²¹⁷

Given that the Constitution's text does not clearly indicate how to resolve these copyright controversies, we might ask whether the episode regarding Hamilton's *Letter* helps us reconcile these competing constitutional provisions. Stated otherwise, do these forgotten pages of the "historical record"²¹⁸ help us better "understand how knowledgeable individuals would have understood" the balance between the First Amendment and Congress's powers under the Intellectual Property Clause?²¹⁹ Does this evidence from the nation's first modern presidential

215. *Letter*, *supra* note 139, at 186.

216. *See, e.g., Introductory Note* to Letter from Alexander Hamilton to Theodore Sedgwick (May 4, 1800), in 24 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 139, at 444 (describing how Hamilton's "campaign within a campaign" complicated the election).

217. U.S. CONST. art. I, § 8, cl. 8 (emphasis added); U.S. CONST. amend. I.

218. *Golan v. Holder*, 565 U.S. 302, 305 (2012).

219. Michael B. Rappaport, *supra* note 214, at 1493–95. I do not mean to endorse or apply a form of intent-based originalism (focused on, say, Hamilton's views), a mode of interpretation that has been largely eschewed by both scholars and jurists. *But see* EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 178, 191–92, 196–200 (2002) (describing Hamilton's views (and the influence of those views) on the interpretation of the Intellectual Property Clause). Rather, I aim to describe how the *whole* episode over the *Letter*—from Hamilton's decision to copyright the *Letter* to safeguard its confidentiality

election,²²⁰ viewed collectively, shed any light on the public's original understanding of how the Constitution's Intellectual Property Clause and its First Amendment are meant to be read together, and how they ought to apply to present political copyright controversies?

Drawing out these inferences from this episode may be especially important in view of the Supreme Court's new approaches to constitutional interpretation and stare decisis, which place greater emphasis on the correctness of prior decisions²²¹ and which make more room for interpretation by reference to history.²²² So while the historical record has played a part in the Court's prior cases at the intersection of copyright and the First Amendment,²²³ we may consider whether those prior readings of the relevant history require updating in light of Hamilton's *Letter*.²²⁴

At last, what might we infer from the episode surrounding Hamilton's *Letter*? Specifically, what, if anything, can we learn from this episode about the enforceability of a politician's copyright—say, Sharron Angle's copyrighted website—in the midst of a political campaign?²²⁵

to his subsequent decision to make it available for sale, alongside Duane's decisions to publish excerpts and offer an (apparently) infringing copy for public sale, as well as the other statements of their contemporaries—might shed light on how the informed public understood the speech-copyright equilibrium. Moreover, because the text of the competing provisions sheds little light on this matter, I look to evidence of purpose and contemporary practice as indicative of how the Founding Era's public might have understood the balance between the First Amendment and copyright.

220. See *supra* note 127.

221. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2262 (2022).

222. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129–30 (2022).

223. See *Golan*, 565 U.S. at 320–24. See also *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

224. But see Caroline Mala Corbin, *Free Speech Originalism: Unconstraining in Theory and Opportunistic in Practice*, GEO. WASH. L. REV. (forthcoming 2024) (manuscript at 1) (“Courts should not apply originalism in freedom of expression cases.”).

225. Again, on the question of enforceability, I focus on infringement liability, as others have exhaustively covered remedial questions. See *supra* note 187. One distinct question regards copyrightability: Are these political works copyrightable *at all*? At first blush, the question might seem to be a contested one: Duane, after all, does allege that Hamilton's “violent libel” cannot be “protected by a law of the United States enacted for the express encouragement of literature.” See *supra* notes 174–83 and accompanying text. But, as noted there, this framing of Duane's editorial is likely best understood as a critique of the Alien and Sedition Acts, rather than of copyright's applicability to political works of authorship. Moreover, there is a longstanding trend of admitting such political works into copyright's domain, including, but far from limited to, George Washington's papers at issue in *Folsom*, see *supra* note 191 and accompanying text, and even later responses to Hamilton's *Letter*. See, e.g., *infra* Appendix E (reproducing the copyright certificate for one such response). See also KHAN, *supra* note 156, at 236 tbl.8.1 (noting several political works that were copyrighted during the Founding Era). In all, there is

Duane, the editor of the *Aurora*, did not seem to believe that the copyright laws could restrain the republication of a document of such public and historical importance. His editorial in the *Aurora* makes such views plain, and his other statements reflect a view that competing voices and views ought to be publicly aired and debated.²²⁶ These are views that seem to have been widely shared by, at least, several other members of the Democratic-Republican press and the Democratic-Republican Party.²²⁷

Hamilton's views and those of other Federalists may seem, at first, somewhat more difficult to discern. For one, Hamilton sought copyright's protection in order to limit the *Letter*'s circulation and shield it from public view.²²⁸ His contemporaries believed that the purpose of obtaining copyright protection was to prevent the *Letter* from circulating beyond its intended audience.²²⁹ Such actions echo in the Supreme Court's declarations that fair use cannot supersede an author's "interests in confidentiality," even as to works of significant political importance and public interest.²³⁰

Hence, one interpretation of the *Letter*'s episode—particularly Hamilton's decision to seek out and obtain copyright protection—might emphasize copyright's longstanding "privative" purposes.²³¹ Stated otherwise, one interpretation might regard Hamilton's copyright as valid—one that could be asserted successfully against Duane and others (even if Hamilton chose not to do so for various practical reasons, such

overwhelming evidence that such works were copyrightable, even if there were lingering questions about when, and under what circumstances, such copyrights could have been asserted (as well as about the remedies available for such infringement).

226. Pasley, *supra* note 160, at 142 (quoting Duane as lamenting the Federalist press as "very unfortunate" in their views but explaining that such papers "have . . . their use [as] [t]hey promote discussion, and by putting their rivals on the defensive, sometimes promote new facts" (emphasis omitted)).

227. See, e.g., *supra* notes 179–81 (describing the party's objections to the Sedition Acts). See also Pasley, *supra* note 160, at 134–36 (describing the roles of party press (and local editors) in shaping and echoing party orthodoxy); *id.* at 141 (describing Duane specifically as the "clear ideological leader" of the Democratic-Republican press network).

228. See *supra* note 172 and accompanying text.

229. See *supra* note 157 and accompanying text.

230. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985). See also *Salinger v. Random House, Inc.*, 811 F.2d 90, 92 (2d Cir. 1987) (noting, in a case about the publication of Salinger's private and unpublished letters, that Salinger "has chosen to shun all publicity and inquiry concerning his private life").

231. Balganes, *supra* note 197, at 5 (describing and defending the use of copyright to protect such autonomy- and dignitary-based privacy concerns); Smith, *supra* note 116, at 223–26 (noting how copyright is "weaponized" to protect privacy interests). See also Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019, 1037–45 (2019).

as to prevent his political adversaries from selecting which excerpts to highlight).²³²

But, as noted above, to the extent copyright protects the privacy of an unpublished or limited-run work, it generally does so to safeguard the author's autonomy and dignitary interests, rather than, say, to allow the author to hatch a plan of political and public importance.²³³

Indeed, Hamilton's subsequent actions, after the *Letter's* public disclosure, do not invoke the privacy concerns that such a leak might implicate (either as to Hamilton or his co-conspirators in the Adams Administration). Instead, they are more suggestive of an approach that prioritizes First Amendment values in a free and open discussion—*i.e.*, the rights both to speak and to hear²³⁴—on issues of public importance, especially on matters of democratic governance. Contemporary sources close to Hamilton explained his desire to “permit the *Letter* to be thrown into circulation, deeming it better that it should appear *in toto* than by piece-meal.”²³⁵ And while some members of the Federalist Party, particularly those aligned with Hamilton, commended him for “speaking the truth about Adams,”²³⁶ many Federalists were embarrassed by the *Letter*, thought that Hamilton had made a critical strategic error, and worried that a wide circulation would highlight the divisions and disarray within the party.²³⁷ But none appears to have called for Hamilton to enforce his copyright. For his part, Hamilton responded to those concerns by suggesting that the public appetite for this information about the country's leadership would be “productive of good.”²³⁸ Hamilton

232. See *infra* notes 246, 298 and accompanying text.

233. Balganes, *supra* note 197, at 5.

234. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948) (noting the importance of an audience's interests in evaluating the constitutionality of some speech regulation). See also Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1056 (1970) (describing a putative copyright infringer as standing in for the “generalized interest in access”).

235. *Introductory Note*, *supra* note 142, at 176 (quoting John Lang, Editorial, N.Y. GAZETTE & GEN. ADVERTISER, Nov. 27, 1800); LARSON, *supra* note 127, at 219 (same). See also CHERNOW, *supra* note 134, at 622 (“The appearance of juicy passages in the *Aurora* and other Republican papers forced Hamilton to revise his plans and publish his letter openly in pamphlet form. He preferred that people read the entire document rather than portions selectively culled by his enemies.”); DUNN, *supra* note 129, at 164 (noting “Hamilton . . . authorized publication of the whole pamphlet” after it had leaked).

236. CHERNOW, *supra* note 134, at 623–24 (noting several Federalists who praised the *Letter* and its release but explaining that these were a “small minority of politicians,” and that most Federalists feared the damage that Hamilton's *Letter* would do to the party); LARSON, *supra* note 127, at 222.

237. CHERNOW, *supra* note 134, at 624.

238. *Id.* (quoting Letter from Robert Troup to Rufus King (Nov. 9, 1800), in 3 THE LIFE AND CORRESPONDENCE OF RUFUS KING 330, 331–32 (Charles R. King ed., 1896)).

consequently declined to seek any recourse against the *Aurora* or other Democratic-Republican press outlets. In fact, Hamilton even contributed to the *Letter*'s wider distribution, later authorizing a fourth edition for public sale.²³⁹ In short, although Hamilton's switch risked the confidence of some of the private recipients of his *Letter*,²⁴⁰ not to mention his co-conspirators inside the Adams Administration,²⁴¹ he seemed to prefer to discuss his views in their entirety rather than defend only the selected excerpts highlighted by his political opposition.²⁴²

In sum, although Hamilton did seek copyright's protections for the *Letter* in an attempt to limit its reach, Duane's decision to publish the leaked *Letter*, alongside Hamilton's ultimate decision to forgo any copyright claim and release the *Letter* in its entirety to the public, echo the First Amendment values that favor "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus [a]s a precondition to enlightened self-government and a necessary means to protect it,"²⁴³ that full and open "'discussion of public issues and debate on the qualifications of candidates are integral to the operation' of our system of government,"²⁴⁴ and, more generally, that "the best test of

239. See John Lang, Editorial, *Hamilton's Letter*, N.Y. GAZETTE & GEN. ADVERTISER, Nov. 19, 1800 ("Hamilton's Letter. The remainder of the fourth edition of General Hamilton's letter, is now for sale by Furman and Loundon, and at the rest of the Booksellers, at Two Shillings a piece." (emphasis omitted)). See also *Introductory Note*, *supra* note 142, at 175 n.30.

240. See John Lang, Editorial, N.Y. GAZETTE & GEN. ADVERTISER, Nov. 27, 1800, at 3 ("[T]he consistency of Mr. Hamilton has been drawn into question, in consequence of the *general* circulation of his Letter, contrary to the expectation that was given . . .").

241. See *supra* note 146 and accompanying text (noting that Hamilton's *Letter* drew from leaks from inside the Adams Administration, including from Oliver Wolcott, Jr.). See also LARSON, *supra* note 127, at 220 (noting that Wolcott resigned shortly after the *Letter*'s public release).

242. CHERNOW, *supra* note 134, at 622 ("[Hamilton] preferred that people read the entire document rather than portions selectively culled by his enemies."). Cf. LARSON, *supra* note 127, at 219 ("Hamilton actually seemed to welcome all the attention [to the *Letter*].").

243. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Compare *Copy-Right Secured.*, *supra* note 140 (the copyright laws are for "encouragement of learning"), with *Introductory Note*, *supra* note 142, at 177 (quoting *Copyright-Secured.*, *supra*). See also FERLING, *supra* note 136, at 142 (noting that in reprinting excerpts, the *Aurora* "claim[ed] shamelessly that the purpose of . . . copyright law was the dissemination of knowledge"). Cf. DUNN, *supra* note 129, at 163–64 (stating the *Letter* became "public property").

244. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)). Cf. MILLER, *supra* note 134, at 263 (describing that Hamilton believed "the people of the United States . . . had a right to know the worst about their President" and "declared that he had no doubt [the *Letter*'s leak] would be productive of good—the good, of course, being the defeat of John Adams in the presidential election").

truth” is a “free trade in ideas.”²⁴⁵ In short, this episode offers a political precedent both for the acceptable boundaries for enforcing such a copyright against political opponents, and, more generally, for the balance between speech and copyright interests.²⁴⁶

Although examples similar to this episode seem rare, the limited evidence of further historical practice suggests a trend against intrapolitical assertions of copyright²⁴⁷—at least until the more modern political copyright controversies noted in Part I. Unlike the City of Inglewood’s decision to claim and assert a copyright interest in its council meetings, early American practice appears to have repudiated the prior English practice of asserting “parliamentary privilege,” a right that gave the body “a copyright-like power to prohibit anyone . . . from publishing [parliamentary] debates.”²⁴⁸ In another example, a counter-advertisement on behalf of Benjamin Harrison’s 1888 campaign responded to Grover Cleveland by quoting Cleveland’s previous statements.²⁴⁹ In another, a store sold tickets to a “debate” between candidates William Jennings Bryan and William Howard Taft that used recorded speeches and puppets

245. E.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For a similar take based on *Hamilton* (the musical) rather than an episode involving Hamilton (the person), see Rebecca Tushnet, “Every Action’s an Act of Creation”: *Hamilton and Copyright Law*, in *HAMILTON AND THE LAW* 193, 202 (Lisa A. Tucker ed., 2020). Indeed, there is a long tradition of “demand[ing] frankness” from political candidates (outside copyright contexts): as early as 1836, Representative Sherrod Williams described “the right of every citizen of the United States to ask and demand and be fully informed of the political principles . . . of those who are candidates for the various offices in the gift of the people”—a right that cast a long shadow on the development of political campaigns in America. See GIL TROY, *SEE HOW THEY RAN: THE CHANGING ROLE OF THE PRESIDENTIAL CANDIDATE* 16–18 (1996). Cf. *id.* at 115–16 (noting that the *New York Sun* declared a candidate to be “public property” and that such treatment was the “penalty of prominence”).

246. See *infra* note 298. As described there, one might respond that Hamilton’s decision to decline an option that a copyright confers—the option to sue—need not necessarily bear on whether Hamilton and others understood the option to exist at all. Perhaps. But the interpretation offered here suggests a shared understanding of how the law ought to operate in this context—one that is buttressed by a further trend against intrapolitical assertions of copyright. See also *supra* note 233 and accompanying text.

247. Cf. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–20 (2019) (noting that, on one theory of constitutional interpretation, a “course of deliberate practice” over time may help to “settle[]” some “indeterminacy in the meaning of the Constitution,” such as relationship between the Intellectual Property Clause and the First Amendment).

248. Charles Duan, *Copyright in the Texts of the Law: Historical Perspectives*, 9 N.Y.U. J. INTELL. PROP. & ENT. L. 191, 209, 211–13 (2020). But see *id.* at 212–13 (describing one contested instance where New York imprisoned a reporter for breaching the privilege).

249. See, e.g., ON THE CAMPAIGN TRAIL: THE LONG ROAD OF PRESIDENTIAL POLITICS 1860–2004, at 23 (Douglas E. Schoen ed., 2004).

resembling the candidates.²⁵⁰ None of these examples appears to have precipitated copyright litigation.

Moreover, some, myself included, believe that constitutional interpretation should account not only for “history and tradition,”²⁵¹ but also for precedent, purpose, and consequence (alongside other considerations)²⁵²—as settled interests and social outcomes matter, and that history and tradition can be just as malleable as other forms of constitutional argument.²⁵³ On this view, the case for a more permissive copyright regime is even stronger. The consequence of a more strict copyright regime—one that even entertains copyright claims among candidates over political speech—is to devalue downstream political speech that is more likely to represent a greater diversity of viewpoints.²⁵⁴ And though the Supreme Court has tolerated such risks to downstream commentary by explaining that copyright’s incentive “induc[es] the creation of new material of potential historical value,”²⁵⁵ there are ample other incentives that help foster a vibrant market for political speech. For one, the desire to win an election or policy contest itself induces political speech.²⁵⁶ Politicians and advocates also have personal and reputational incentives to write, say, memoirs of historical value that might serve to protect one’s legacy. In *Harper & Row*, for example, Gerald Ford might have written his memoir, whether or not it was protected by copyright,²⁵⁷ in order to explain and defend the consequential and controversial decisions he made as president.²⁵⁸ In short, from a consequentialist

250. *Id.* at 46–47.

251. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

252. *See, e.g.*, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 8 (2005).

253. *See* STEPHEN G. BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* 131–32 (2024). *See also infra* note 299 and accompanying text.

254. Here, I mean more likely as compared to the speech affected by other alleged speech restraints that the Court has discarded. *See supra* notes 67–68 and accompanying text (noting that, in campaign finance contexts, the Court has suggested that the net marginal value of incremental speech, even if derived from a single source, is always positive—but perhaps not so in copyright contexts).

255. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985).

256. *See supra* note 125 and accompanying text.

257. This fact may counsel in favor of understanding *Harper & Row* as a narrower case, limited to protecting the publisher’s right of first publication (rather than the author’s privacy). *See supra* notes 74–75 and accompanying text. But, as noted there, the case has, in practice, cast a shadow that extends beyond this limited scope.

258. Indeed, one might understand the popularity of several major government reports, such as the *9/11 Commission Report*, the *Mueller Report*, and the *January 6th Committee Report* (reports that were prepared by federal government officials and thus

perspective, a more permissive copyright regime can advance core interests in democratic governance.²⁵⁹ Such a regime would serve First Amendment values without undermining the incentives that copyright protection is intended to furnish, whereas a more strict regime undermines our collective interest in “the robust public debate . . . that [is] ‘the essence of self-government.’”²⁶⁰ Such an approach, moreover, is consonant with related but distinct precedents. Consider *New York Times v. United States*,²⁶¹ regarding the leak to the press of the “Pentagon Papers,” and *Bartnicki v. Vopper*,²⁶² regarding the leak to the press of an illegally wiretapped phone call. Both of these cases affirm the First Amendment interest in the public dissemination of speech on matters of “public concern,” notwithstanding laws generally prohibiting or even criminalizing the distribution of such speech.²⁶³ Such an approach is also consistent with copyright decisions predating *Harper & Row*.²⁶⁴

In short, no matter one’s methodological commitments,²⁶⁵ the case for nudging the speech-copyright equilibrium towards speech seems stronger after reviewing the developments regarding Hamilton’s *Letter*, and especially stronger than the Supreme Court has so far suggested in cases like *Harper & Row*, or in cases like *Eldred*²⁶⁶ and *Golan*,²⁶⁷ whose examination of the “historical record” is limited to noting the

not protected by copyright), to suggest that copyright is necessary to neither the creation nor the commercialization of such material of historical value. See 17 U.S.C. § 105.

259. Netanel, *supra* note 20, at 347–63 (setting out such a theory of copyright). See also Bracha & Syed, *supra* note 20, at 252–53 (describing a consequential theory of copyright aimed at fostering our “political democracy”); EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 109–20 (2010) (describing an example arising out of electronic voting machines “of how challenging the boundaries of intellectual property can serve democratic goals of social justice, inclusion, and dialogue”); Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTEL. PROP. L. 319, 325–26 (2003) (arguing for an interpretation of the Intellectual Property Clause that embodies First Amendment values, repudiating the “speech suppressing, anti-competitive, and other repressive” copyright regimes of the past).

260. *Harper & Row*, 471 U.S. at 582 (Brennan, J., dissenting) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

261. 403 U.S. 713 (1971) (per curiam).

262. 532 U.S. 514 (2001).

263. *N.Y. Times*, 403 U.S. at 714; *Bartnicki*, 532 U.S. at 517–18.

264. See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

265. See Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 Nw. U. L. REV. 433 (noting that evidence of history and tradition might supply proof of original meaning and purpose, or it might serve as one mode of constitutional argument within a more pluralistic interpretative framework, among other uses).

266. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

267. *Golan v. Holder*, 565 U.S. 302 (2012).

contemporaneous ratification of the First Amendment and the first copyright laws without any closer examination of the actual speech-and-copyright norms and practices of the era.²⁶⁸

So how might we operationalize such a copyright regime? One possibility actively deters such copyright claims altogether. Short of congressional action that presumptively exempts downstream political speech from infringement liability, courts, including the Supreme Court, can clarify that politicians and advocates may not use a copyright interest in some political speech to stifle political debate. As Chief Judge J. Edward Lumbar explained in *Rosemont Enterprises*²⁶⁹—a case in which Howard Hughes purchased a magazine for the express purpose of using that magazine’s copyrights to suppress the publication of a biography about Hughes himself (based on a series of articles published in that magazine)—the “spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public’s right to be informed regarding matters of general interest.”²⁷⁰

Hence, courts should dismiss such cases on the pleadings²⁷¹ and award fees and costs to defendants.²⁷² Judges might even consider sanctions for attorneys who bring such claims for the purpose of undermining the exchange of ideas that is at the core of our democracy. In sum, the courts should deploy a range of procedural tools to offer a collective and unequivocal statement that copyright will not be made to undermine our First Amendment interests in democratic governance. Congress should act too, as the apparent trend in favor of extrajudicial resolution of such disputes, as in the Sharron Angle example, may cause self-censorship. This Article is not the first to call for such copyright reforms,²⁷³ but it is the first to illustrate how the historical record—and, more specifically, the episode regarding Hamilton’s *Letter*—may strengthen the case for a new approach to our speech-copyright equilibrium.

268. *Eldred*, 537 U.S. at 219; *Golan*, 565 U.S. at 327–28.

269. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966).

270. *Id.* at 311 (Lumbar, C.J., concurring); *id.* at 304–05 (majority opinion). See also Goldstein, *supra* note 36, at 1012 (suggesting that Congress’s deliberations over fair use reform can be read as endorsing *Rosemont*). Cf. *supra* note 38 and accompanying text (discussing the difficulty of defining the speech of interest).

271. *E.g.*, FED. R. CIV. P. 12(b)(6).

272. 17 U.S.C. § 505. See also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534–35 (1994).

273. For a non-exhaustive list, see Goldstein, *supra* note 36, at 1012, and Netanel, *supra* note 20, at 364–86.

B. Further Applications

As noted, a more permissive understanding of the speech-copyright equilibrium is consonant with our approach in other doctrinal areas, including criminal laws regarding wiretapping and classified materials. It is worth considering whether this approach to the First Amendment finds application in other, related doctrinal areas.²⁷⁴ This Section briefly elaborates on two possibilities—one regarding disputes arising under provisions of the Digital Millennium Copyright Act; another regarding protections for online speech under the Computer Fraud and Abuse Act.

As noted above, a mere accusation of infringement directed at content hosted by online service providers—a counter-advertisement posted to YouTube, for example—can cause the “deplatforming” of that content for weeks. When news organizations accused both John McCain and Barack Obama of illegally using press footage in campaign ads, those ads disappeared from the internet for weeks—a seeming eternity during a heated presidential contest.

Another example might be found in the 2022 campaign for one of Arizona’s U.S. Senate seats, which pit Democratic incumbent Mark Kelly against Republican challenger Blake Masters. In August 2022,

274. My focus on the First Amendment has, as noted, is primarily on the First Amendment’s speech protections, with glancing references to its press protections, as in *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) and *Bartnicki v. Vopper*, 532 U.S. 514 (2001). See *supra* note 260 and accompanying text. See also *supra* note 45. Compare Complaint at 2–4, *John Wiley & Sons, Ltd. v. McDonnell Boehnen Hulbert & Berghoff LLP*, No. 12-CV-01446 (N.D. Ill. Feb. 29, 2012), 2012 WL 870238, and Complaint, *Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A.*, No. 12-CV-005282013 (D. Minn. Feb. 29, 2012), 2012 WL 872012 (alleging copyright infringement for submitting journal articles in connection with patent filings), with *Korzybski v. Underwood & Underwood, Inc.*, 36 F.2d 727, 729 (2d Cir. 1929) (holding copyright does not protect drawings submitted in a patent application), and USPTO’s Memorandum in Opposition to Plaintiffs’ Motion To Dismiss or for Summary Judgment on USPTO’s Counterclaim at 7–9, *Am. Inst. of Physics*, No. 12-CV-00528 (2013), 2013 WL 3083498, at *4 (describing the patent office’s “constitutional responsibility” to ensure that copyright assertions do not interfere with petitions to the patent office). Cf. *Denison v. Larkin*, 64 F. Supp. 3d 1127, 1135–36 (N.D. Ill. 2014) (finding no copyright infringement when an attorney disciplinary body copied parts of a licensed attorney’s blog in order to substantiate disciplinary action). Compare also *Newegg Inc. v. Sutton*, No. 15-CV-01395, 2016 WL 6747629 (C.D. Cal. Sept. 13, 2016) (finding that copying another’s brief, filed in court, for use in a different case constitutes copyright infringement), with *White v. W. Publ’g Corp.*, 29 F. Supp. 3d 396, 400 (S.D.N.Y. 2014) (copying another’s brief, filed in court, for use in a commercial legal research database is fair use). See also Tejas N. Narechania, *Patent Conflicts*, 103 GEO. L.J. 1483, 1538–39 (2015) (considering similar examples). Indeed, they may even extend to other laws enacted under the Intellectual Property Clause, such as the patent laws. See *Intell. Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307 (Fed. Cir. 2016). I leave such further extensions to another day.

Blake Masters responded to the political backlash over *Dobbs v. Jackson Women's Health Organization*²⁷⁵ by proclaiming, in a new advertisement, his support for the right of people to obtain access to an abortion through the fifteenth week of pregnancy.²⁷⁶ Masters's new position on abortion rights contravened the position he had previously articulated. Indeed, even at the time of the new advertisement's release, his campaign website said he was "100% pro-life," expressing support for a federal personhood law that would "recogniz[e] that unborn babies are human beings that may not be killed."²⁷⁷ One keen-eyed reporter noticed the discrepancy²⁷⁸ and asked Masters's campaign about the apparent inconsistency. In response, Masters's campaign quickly edited the website to reflect the candidate's new position on abortion.

Other internet users noticed the change and, hoping to hold Masters accountable to his previous position or for his change in position, sought out prior versions of the campaign's website. How does one find an old version of a website? The Internet Archive, a self-described "non-profit digital library," offers access to archived editions of a wide range of websites through its "Wayback Machine." In its twenty-five years, the Internet Archive has archived nearly 800 billion webpages.²⁷⁹ It does so by using automated web crawlers that methodically and regularly visit these websites with the purpose of cataloging and archiving them.²⁸⁰ Such archival versions of websites have been used by the public,²⁸¹ by academics,²⁸² and even by lawyers²⁸³ to highlight a website's changes over time.

275. 142 S. Ct. 2228 (2022).

276. Allan Smith & Marc Caputo, *In Arizona, Blake Masters Backtracks on Abortion and Scrubs His Campaign Website*, NBC NEWS (Aug. 25, 2022, 2:11 PM), <https://www.nbcnews.com/politics/2022-election/arizona-blake-masters-backtracks-abortion-scrubs-campaign-website-rcna44808> [<https://perma.cc/63SX-SQNK>].

277. See Marc Caputo (@MarcACaputo), X (Aug. 25, 2022, 2:40 PM), <https://twitter.com/MarcACaputo/status/1562887546354700290> [<https://perma.cc/7XNE-G7P7>].

278. *Id.* (noting that Allan Smith of NBC News called to inquire about the discrepancy).

279. INTERNET ARCHIVE, <https://archive.org/web/> [<https://perma.cc/R2GD-K3JR>].

280. *Wayback Machine General Information*, INTERNET ARCHIVE, <https://help.archive.org/help/wayback-machine-general-information/> [<https://perma.cc/8EXY-VCVK>].

281. *About the Internet Archive*, INTERNET ARCHIVE, <https://archive.org/about/> [<https://perma.cc/GC7E-2HDK>] (describing the archive's user statistics).

282. E.g., Nick Ruest, Samantha Fritz, Ryan Deschamps, Jimmy Lin & Ian Milligan, *From Archive to Analysis: Accessing Web Archives at Scale Through a Cloud-Based Interface*, 2 INT'L J. DIGIT. HUMANS. 5 (2021).

283. See, e.g., *New York v. Meta Platforms, Inc.*, 66 F.4th 288 (D.C. Cir. 2023). Indeed, a Westlaw search for cases citing "Wayback Machine" generated 274

But somehow, the Internet Archive had failed to keep records of Masters's campaign website. How could that be? Some internet users speculated that Masters's campaign had employed a common technical measure—an edited robots.txt file—to prevent the Internet Archive from recording archival versions of the website. Indeed, some even speculated that Masters edited his website's robots.txt file for the express purpose of obscuring the sorts of policy shifts that are common among politicians who must win both a partisan primary and a general election.²⁸⁴

If that had been so—and if the Internet Archive had decided to ignore the robots.txt directive to not archive the site's contents—such action might have given rise to significant liability under the Digital Millennium Copyright Act, as an apparent “circumvention” of a “technological measure” aimed at “controlling access” to a copyrighted work (namely, the website).²⁸⁵ In short, prior versions of websites may either be obscured by the robots.txt directive, or they may later be deplatformed, with the Internet Archive facing litigation and potential liability.

Indeed, the Internet Archive might not only face liability under the Digital Millennium Copyright Act, it might also find itself facing consequences under the Computer Fraud and Abuse Act, which imposes civil and criminal liability for “exceeding [one's] authorized access” to a computer.²⁸⁶ In *Van Buren v. United States*,²⁸⁷ the Supreme Court explained that one “exceeds authorized access” under the Consumer Fraud and Abuse Act when accessing material that is beyond the scope

results. See also Deborah R. Eltgroth, *Best Evidence and the Wayback Machine: Toward a Workable Authentication Standard for Archived Internet Evidence*, 78 *FORDHAM L. REV.* 181 (2009); Holly Andersen, *A Website Owner's Practical Guide to the Wayback Machine*, 11 *J. ON TELECOMM. & HIGH TECH. L.* 251 (2013).

284. See Jorge Caballero, MD (@DataDrivenMD), X (Aug. 25, 2022), <https://twitter.com/DataDrivenMD/status/1562912908291428352>; u/uncertaincoda, *In Arizona, Blake Masters Backtracks on Abortion, Scrubs Campaign Website*, REDDIT (Aug. 25, 2022, 2:45 PM), https://www.reddit.com/r/arizonapolitics/comments/wxnjqy/in_arizona_blake_masters_backtracks_on_abortion/?rdt=39213.

285. See, e.g., *Healthcare Advocs., Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 643–44 (E.D. Pa. 2007). In *Healthcare Advocates*, the district court noted that although no court has found that a robots.txt file “universally constitutes a ‘technological measure effectively controll[ing] access’ under the DMCA,” it could certainly qualify in specific situations. *Id.* at 634 (quoting 17 U.S.C. § 1201(a)(3)). Failing to address a specific crawler in a robots.txt file generally constitutes an implied license for robots to crawl your page. But once a robots.txt file is updated and explicit, courts expect crawlers to stop collecting content. If a political candidate were to exclude the Internet Archive from its robots.txt file, it would make it difficult for the Internet Archive and similar players to support the First Amendment's prioritization of political speech, especially during elections and campaigns.

286. 18 U.S.C. § 1030.

287. 141 S. Ct. 1648 (2021).

of what they otherwise have authorized access to.²⁸⁸ However, accessing in-scope material for “improper purposes” did not constitute a violation of the statute.²⁸⁹ But what about accessing a publicly available website for the purpose of archiving it, notwithstanding a robots.txt directive proscribing such activity? According to the Department of Justice, such access may still constitute a violation: if the robots.txt file outlines the scope of a website user’s “authorized access,” then an automated web “crawler” disallowed by the file may lack authorization to access the website.²⁹⁰ And so, once again, the Internet Archive’s choice is either to decline to archive a candidate’s website as it changes or to face potentially crushing liability later.²⁹¹

In short, the possibility of liability under either the Digital Millennium Copyright Act or the Computer Fraud and Abuse Act might have the effect of stifling downstream commentary on political speech. More specifically, the possibility of liability makes it harder to hold candidates accountable for their previous policy positions or for changes in those positions by obscuring those earlier views.

Fortunately, in Blake Masters’s case, the cause of the obscurity was easily fixed. Masters, while a private citizen, had asked the Internet Archive to exclude his personal website from the archive, and the website complied.²⁹² But once Masters moved into the public eye as a candidate for political office, the Internet Archive made its archival versions of Masters’s site available publicly.²⁹³ In this example, Blake Masters’s prior campaign materials, and the history of his shifting policy views, remained publicly available. And Masters—like Hamilton—ultimately did not object to the release of archived website versions, notwithstanding his expressed preference to keep them private.

288. *Id.* at 1658.

289. *Id.* at 1662.

290. Jeffrey Neuburger, *DOJ Revises Policy for CFAA Prosecution To Reflect Developments in Web Scraping and Other Matters*, NEW MEDIA & TECH. L. BLOG (May 24, 2022), <https://newmedialaw.proskauer.com/2022/05/24/doj-revises-policy-for-cfaa-prosecution-to-reflect-developments-in-web-scraping-and-other-matters/> [<https://perma.cc/PS3Z-3SUK>].

291. Indeed, the Internet Archive has been sued before. *See Internet Archive v. Shell*, 505 F. Supp. 2d 755, 761 (D. Colo. 2007) (raising conversion, civil theft, RICO, COCCA, and breach of contract claims against the Wayback Machine’s capturing of one individual’s website).

292. Andrew Kaczynski & Em Steck, *Republican Senate Candidate Blake Masters Scrubbed Language on Campaign Website Saying the 2020 Election Was Stolen from Trump*, CNN POL., <https://www.cnn.com/2022/08/29/politics/blake-masters-campaign-website-changes> [<https://perma.cc/X4RX-7JPH>] (Aug. 29, 2022, 10:29 PM).

293. *Id.* *See also* Wayback Machine General Information, *supra* note 277 (“Pages may not be archived due to robots exclusions and some sites are excluded by direct site owner request.”).

But this outcome was far from a guarantee. Other candidates like Masters could have—and might yet—invoke technical measures, potentially enforceable by law, to stifle downstream political commentary. We are worse off for it.

CONCLUSION: COPYRIGHT AND CONSTITUTIONAL INTERPRETATION

In respect to the First Amendment, copyright is exceptional: copyright may burden political speech in ways that other rules may not. Just as the Supreme Court has struck down several campaign finance regulations for fear they may give rise to litigation or other concerns that they stifle political speech, the judiciary has put political speakers to the choice of either facing hundreds of thousands of dollars in potential fees and liability or else stifling their own allegedly copyright-infringing speech. Such copyright exceptionalism begins with the Supreme Court's understanding of copyright's internal limits—fair use and the idea/expression dichotomy—together with its reading of the Founding Era's "historical record."

The Supreme Court's version of the historical record, however, is missing some pages. This Article has tried to restore some of these missing parts, elaborating on the secret and copyrighted *Letter* at the center of Hamilton's plan to unseat John Adams from the presidency and the head of the Federalist Party. Viewed in its entirety, the episode surrounding the *Letter* suggests that copyright, in practice, should be more solicitous of political speech than it has so far been.

But here, I pause. I am a legal scholar, trained in legal methods. And so the version of the episode regarding the *Letter* presented above might be assailed as "law office history."²⁹⁴ It is a lawyer's product, inflected, perhaps, with presentism.²⁹⁵ Moreover, unlike a historian's typical project, I have tried to take an episode from 1800—a time when both political campaigns and copyright law were vastly different than they are today—and give it meaning to contemporary contexts.²⁹⁶

I have done my best, to be sure, to fully excavate the story of Hamilton's *Letter* and to tell it truthfully and completely. I have spent

294. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2177 (2022) (Breyer, J., dissenting). Others might analogously object that this episode is only one data point or mere anecdote. See also Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554 (1995) ("[L]egal scholars, in what in its worst form is dubbed 'law office history,' notoriously pick and choose facts and incidents ripped out of context that serve their purposes.").

295. See Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 670 (2021).

296. See *id.*

nearly a decade (on and off) doing so. But I am not a historian, and I am not trained in historical methods. Others could, perhaps likely, write this story better. And just as the story uncovered here casts new light on the historical record, perhaps other, yet-uncovered evidence will give us yet another view of the speech-copyright equilibrium. Indeed, as noted above, there is even a version of *this* story that emphasizes Hamilton's decision to seek copyright protection for the *Letter* (minimizing his decision to later release it publicly) as consistent with our present status quo;²⁹⁷ much as this Article's interpretation emphasizes Hamilton's decision to release the *Letter* in support of a full and fair public discussion of Adams's perceived faults (over his early decision to copyright it) as consistent with a shift in our extant speech-copyright equilibrium.²⁹⁸ Stated otherwise, the history here is, like some other history, contingent and malleable.²⁹⁹ I do believe the interpretation of the *Letter*'s episode offered here is the best and most complete one, but it is somewhat hard to disentangle that belief from my own priors, which favor a more permissive copyright regime that is more oriented towards facilitating our political democracy. History, then, can offer cover for our priors. And so, perhaps another important lesson to be drawn from the *Letter* looks beyond the saddlepoint between copyright and speech and regards methods of constitutional interpretation. I believe our jurisprudence will be richer if it were informed not only by a modern lawyer's interpretation of some distant, rarified moment in time, but also by common sense and a prudential sensitivity to consequence.³⁰⁰

Copyright can stifle political speech, and it is bad for our democracy when it does so. Maybe Alexander Hamilton and William Duane and

297. See *supra* note 231 and accompanying text.

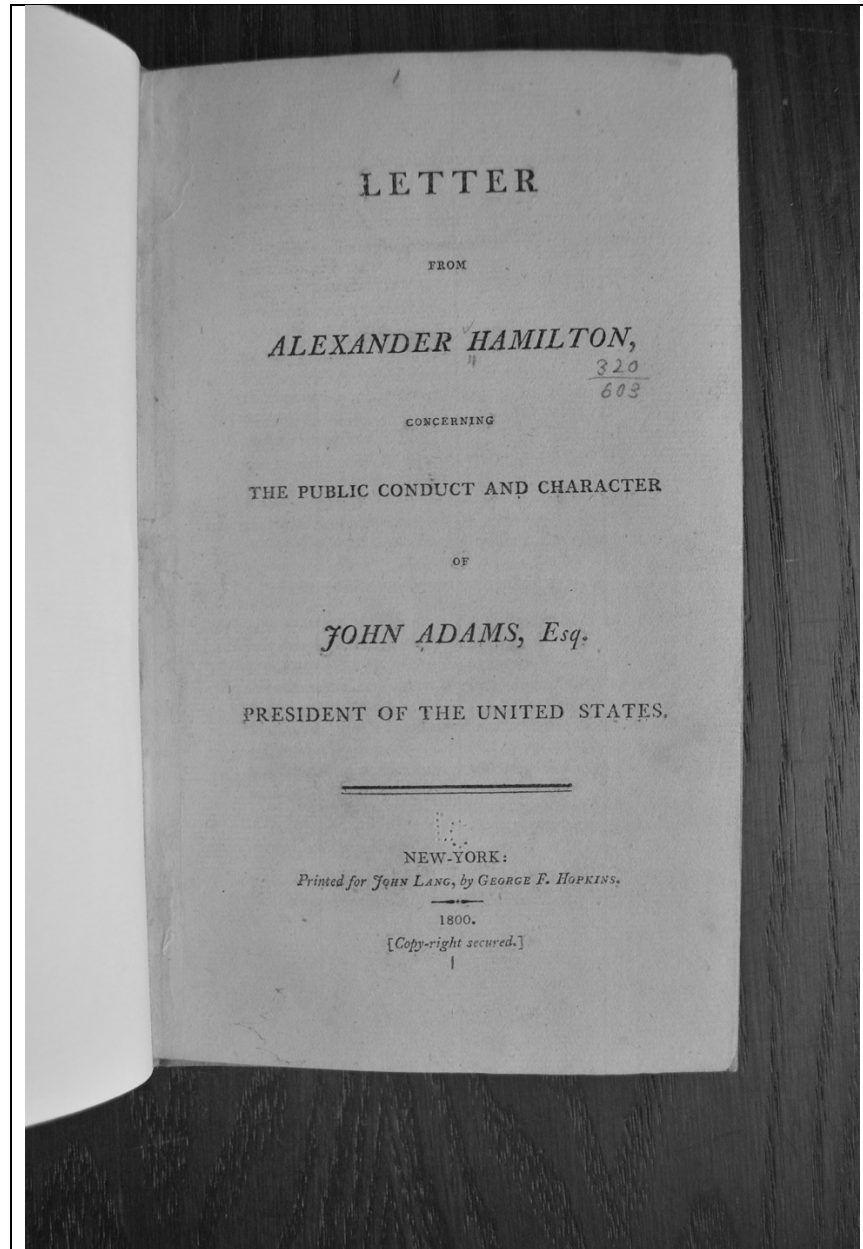
298. Analogously, one might contend that Hamilton's copyright is tantamount to an option—one he can choose to enforce or not. Hamilton's specific decision to decline the option in this instance need not reflect on whether the option existed at all. *But see supra* notes 172–78 and accompanying text (explaining that at least some other contemporaries, including Duane and other Democratic-Republicans, did not seem to think that this option exists). *But cf. supra* note 244 (characterizing the episode as setting a political precedent, if not necessarily a legal one, for the appropriate balance between speech and copyright interests).

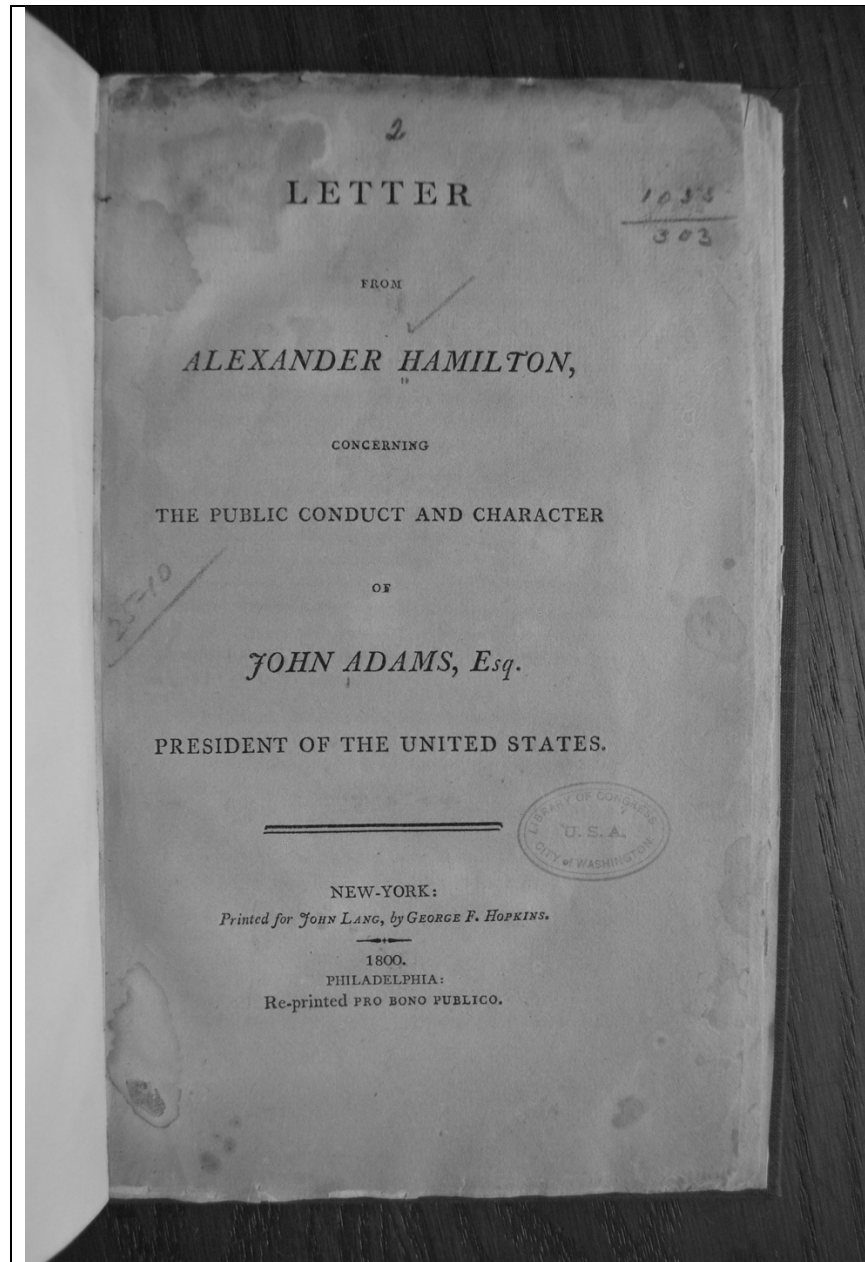
299. See *Atkinson v. Garland*, 70 F.4th 1018, 1028–29 (7th Cir. 2023) (Wood, J., dissenting) (on historiography); BREYER, *supra* note 253, at 131–32.

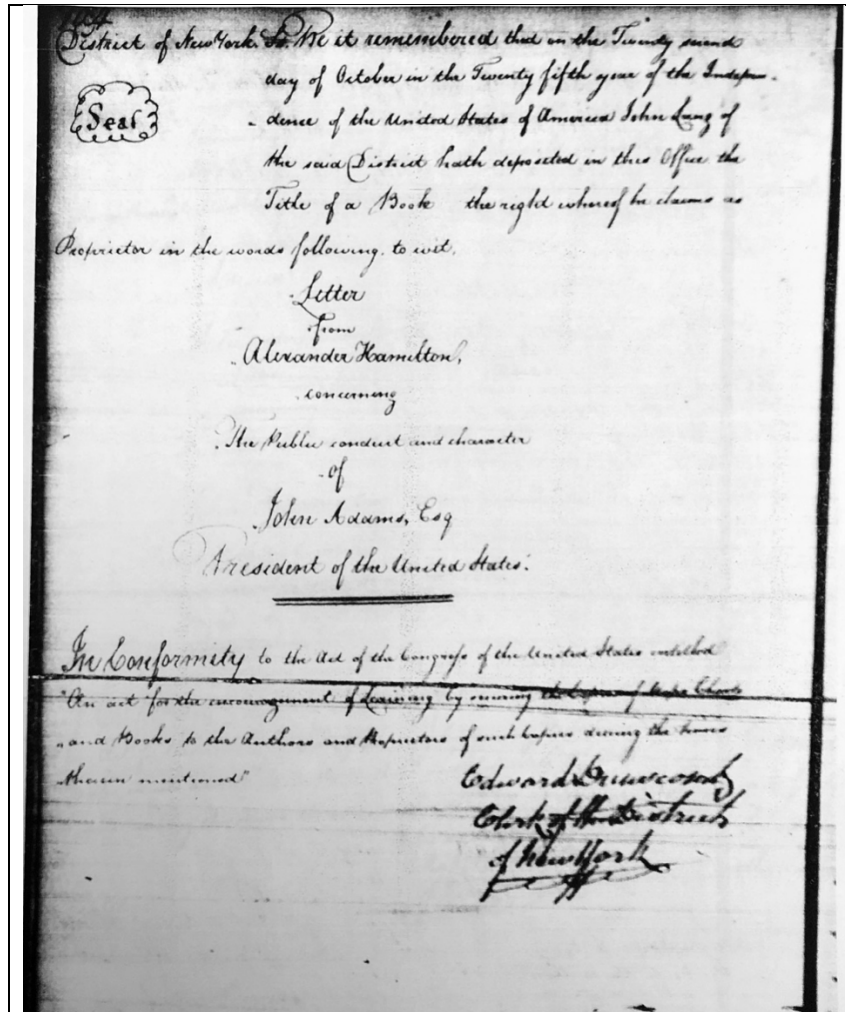
300. See *supra* note 251. See also Lisa Heinzerling, *Resisting Originalism, Even When 'Done Well,'* YALE J. ON REG.: NOTICE & COMMENT (Oct. 31, 2022), <https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-05/> [<https://perma.cc/PG9U-E3DJ>] (“Litigating under the framework of ‘originalism done well’ . . . threatens to remove other possible interpretative approaches from our constitutional vocabulary.”); Corbin, *supra* note 224 (manuscript at 1) (“Courts should not apply originalism in freedom of expression cases.”).

Tench Coxe³⁰¹ and others all understood that; maybe not. Either way, where we draw the line between illegal infringement and protected speech remains up to us.

301. See *supra* note 157.

APPENDIX A. TITLE PAGE OF THE *LETTER*'S FIRST EDITION

APPENDIX B. TITLE PAGE OF THE *LETTER*'S PRO BONO PUBLICO
EDITION

APPENDIX C. THE *LETTER*'S COPYRIGHT REGISTRATION CERTIFICATE

APPENDIX D. THE *AURORA*'S EDITORIAL

There is a law of the United States for the encouragement of learning, by which the copy-right is secured to authors, inventors, &c.

Under the auspices of this law, A. Hamilton, has issued two publications. The first in imitation of "The Memoirs of the Lady of Pleasure" presents the General as the hero of his own story, the redoubtable rival of a despised husband, and the cully of a prostitute wife. In this is disclosed the infamy of two heads of families—and here are presented the faculties of gallantry; ostensibly to obviate a suggestion of the misapplication of public money.

COPY-RIGHT SECURED.

Suppose a man were to publish the manner in which he forged bank notes, and the acts practised in passing them; or had advertised the mode in which he had committed burglary and theft, and the manner of his disposing of the stolen goods. Could such an author claim the protection of a law for the encouragement of Literature?

Shall General Hamilton be privileged by this law, while he is publishing that which directly demoralizes society, and yet shall the felon be excluded from privilege?

The public will readily say, let them take their chance together.

The second publication of Gen. Hamilton is a violent libel on the President of the United States.

COPY-RIGHT SECURED.

General Hamilton does not believe that these publications can be privileged under a law for the encouragement of learning. Nothing is learnt by them except that excess of federalism, and excess of impudence can reside together—and that the laws of God and man are too feeble to bind man after decency has been put at defiance.

Do the printers believe that violations of all laws, human and divine, can be protected and encouraged by our laws? Do they believe that seditious libels on the President of the United States, can be secured by copy-right?

They are not so ignorant. They dare not; and General Hamilton dare not lead up a question before any court in the United States, whether his adultery and sedition, shall be protected by a law of the United States, enacted for the express encouragement of literature.

If adultery and sedition are protected by law; let theft and murder be admitted to the honors of the sitting.

APPENDIX E. THE COPYRIGHT REGISTRATION CERTIFICATE OF A
RESPONSE TO THE LETTER

