
MIXING UP THE MEDICINE:^{*} A REMEDY FOR
CONSTITUTIONAL INTER-CLAUSE
CONFLICTS AND THE CASE OF
THE ANTI-BOOTLEGGING
STATUTES

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^{*} See BOB DYLAN, *Subterranean Homesick Blues*, on BRINGING IT ALL BACK HOME (Columbia Records 1965) (“Johnny’s in the basement / Mixing up the medicine / I’m on the pavement / Thinking about the government”).

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INTRODUCTION

The Constitution contains many enumerated grants of congressional power. Some of these grants, such as the Commerce Clause,¹ are extremely broad and contain no real limitations. Other grants, such as the Bankruptcy Clause² and the Copyright Clause,³ are much narrower, concerning a specific type of law and limiting Congress's power to legislate. Some laws concern both a broad and a narrow grant of power. In the situations where constitutional grants of authority appear to overlap, both are relevant in determining whether the Constitution grants Congress authority to pass a law.

Laws enacted under these circumstances raise an important and difficult question of constitutional interpretation: when an enume-

¹ See U.S. CONST. art. I, § 8, cl. 3 (empowering Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

² See U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States").

³ See U.S. CONST. art. I, § 8, cl. 8 (empowering Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

rated grant of power specifically addresses the realm of conduct that Congress seeks to regulate but limits Congress's authority to act, can Congress instead act under a broader, alternative grant of power? This complicated issue has been termed the problem of inter-clause conflicts.⁴ The Supreme Court has confronted inter-clause conflicts on only a handful of occasions in a variety of contexts, and it has been inconsistent in its method of analysis, arriving at what some courts and commentators consider to be contradictory conclusions. As a result, lower courts have been left with little guidance on how to proceed in the rare circumstances when this important question arises.

One of these circumstances is the relationship between the Copyright Clause and the Commerce Clause. Laws passed by Congress in 1994 that outlaw the "bootlegging" (i.e., the recording, trading, and selling) of live musical performances present an inter-clause conflict. Congress enacted the bootlegging ban in two forms: a civil provision, which Congress added as Chapter 11 of the Copyright Act,⁵ and a criminal provision.⁶ The statutes were included as part of the Uruguay Round Agreements Act (URAA),⁷ which Congress enacted in order to comply with the United States' obligations under the Trade-Related Aspects of Intellectual Property (TRIPs),⁸ a massive intellectual property treaty.⁹ The civil anti-bootlegging provision states that:

⁴ See, e.g., Dotan Oliar, *Resolving Conflicts Among Congress's Powers Regarding Statutes' Constitutionality: The Case of Anti-Bootlegging Statutes*, 30 COLUM. J.L. & ARTS 467, 468-69 (2007) (describing the tension between congressional authority under the Commerce and Copyright Clauses as an "inter-clause conflict").

⁵ See 17 U.S.C. § 1101 (2006) (treating unauthorized recordings of live performances as equivalent to traditional copyright infringement).

⁶ See 18 U.S.C. § 2319A (authorizing up to five years in prison, fines, and forfeiture of equipment for first bootlegging offenses).

⁷ Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended in scattered sections of 15, 17, 19, and 35 U.S.C.).

⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, at Annex 1C, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299.

⁹ The history of the anti-bootlegging statutes, the URAA, and TRIPs is complex. As Melville and David Nimmer explain,

In 1994, the Uruguay Round Agreements Act added to the picture a very brief Chapter 11, consisting of only one section. That section regulates the unauthorized fixation and trafficking in sound recordings and music videos. . . . In order to comply with the obligations of the United States as a signatory to the TRIPs annex to the World Trade Organization Agreement, Congress added this protection for such performances.

3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8E.01[B] (2010) (footnotes omitted); see also Craig W. Mandell, *Balance of Powers: Recognizing the Uru-*

Anyone who, without the consent of the performer or performers involved—

(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States,

shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.¹⁰

guay Round Agreement Act's Anti-Bootlegging Provisions as a Constitutional Exercise of Congress's Commerce Clause Authority, 54 J. COPYRIGHT SOC'Y U.S.A. 673, 678-83 (2007) (providing a detailed history of American anti-bootlegging statutes and the international agreements that preceded them).

The URAA's relationship to TRIPs may implicate a theoretical issue of Congress's authority under the treaty power. Had the anti-bootlegging statutes been passed to enforce a ratified treaty, a very difficult and interesting question regarding the effect of the treaty power on other constitutional limitations (here, the limitations of the Copyright Clause) would have arisen. See generally Caroline T. Nguyen, Note, *Expansive Copyright Protection for All Time? Avoiding Article I Horizontal Limitations Through the Treaty Power*, 106 COLUM. L. REV. 1079 (2006) (arguing that the anti-bootlegging statutes are constitutional under the treaty power and that an analysis of the conflict between the Copyright Clause and Commerce Clause is unnecessary).

This argument, however, ignores the complexity of the URAA's history. One can reach the issue of Congress's authority under the treaty power only if there is a valid treaty on which the power can be invoked. The Senate never ratified TRIPs; rather, Congress elected merely to comply with TRIPs through domestic legislation:

Chapter 11 implements the TRIPs protocol, which in turn mandates compliance with selected provisions of the Rome Convention [to which] [t]he United States does not adhere And Congress explicitly decided not to ratify any treaty when it enacted the [URAA], concluding that all that needed to be done was accomplished by the domestic legislation. There is therefore no treaty on which to hang an invocation of treaty authority.

3 NIMMER & NIMMER, *supra*, § 8E.05[A] (footnotes omitted); see also 4 NIMMER & NIMMER, *supra*, § 18.06[C][3][b] ("Both the Administration and Congress proceeded on the basis that all that needed to be accomplished was effectuated through the [URAA] itself; no treaty was presented to the Senate for United States accession."). Thus, it appears highly questionable whether the treaty power serves as an alternative constitutional basis for Congress to enact the URAA. This theoretical and underdeveloped constitutional question goes well beyond the scope of this Comment but is worthy of exploration in future scholarship.

¹⁰ 17 U.S.C. § 1101(a).

The criminal anti-bootlegging provision is identical in its application, except that it adds an additional requirement: that the actions be taken “knowingly and for purposes of commercial advantage or private financial gain.”¹¹

The anti-bootlegging statutes provide a perfect model for confronting the question of constitutional inter-clause conflicts. Although Congress passed both provisions to comply with an intellectual property treaty and placed the civil provision within the same title as the Copyright Act, the anti-bootlegging statutes depart from traditional copyright law in a number of respects. First, the protections the statutes offer are very similar to copyright, yet they do not provide the full protections and rights that traditional copyright law affords.¹² Second, and more importantly, the anti-bootlegging statutes concern unfixed performances, and the rights the statutes grant are perpetual.¹³ This is unlike all prior federal copyright laws in American history.¹⁴ Fixation and a limited term of protection are widely regarded as requirements for protection under the Copyright Clause.¹⁵ It thus appears highly probable that if the anti-bootlegging statutes are examined solely under the Copyright Clause (i.e., without regard to other constitutional provisions), they will be found unconstitutional. However, because the trading or selling of recordings of live musical performances undoubtedly affects interstate and foreign commerce, if the anti-bootlegging statutes are viewed solely under the Commerce

¹¹ 18 U.S.C. § 2319A(a).

¹² 3 NIMMER & NIMMER, *supra* note 9, § 8E.03[B][1] (“The unfixed musical performances protected under Chapter 11 are accorded something approximating, but not equaling, copyright protection.”).

¹³ *See id.* § 8E.01[B] (“Chapter 11 relates solely to unfixed matters.”); *id.* § 8E.03[C][3] (noting possible constitutional objections to the statute’s grant of perpetual rights).

¹⁴ *See* CRAIG JOYCE ET AL., COPYRIGHT LAW 313-81 (7th ed. 2006) (providing an overview of the duration and termination of terms of protection under American copyright law); 3 NIMMER & NIMMER, *supra* note 9, § 8E.01[B] (“The federalization of control over unfixed productions departs from several centuries of American jurisprudence, given that regulation of activities lacking fixation has traditionally been the realm of state law protection. In that sense, this last chapter represents a greater departure from constitutional moorings than the predecessor additions.” (footnotes omitted)).

¹⁵ *See, e.g.*, 1 NIMMER & NIMMER, *supra* note 9, § 1.08[C][2] (“[I]n order for a work to constitute a writing, it must be embodied in some tangible form. If the word ‘writings’ is to be given any meaning whatsoever, it must, at the very least, denote ‘some material form, capable of identification and having a more or less permanent endurance.’” (footnote omitted)); *see also generally* Eldred v. Ashcroft, 537 U.S. 186, 199-208 (2003) (analyzing whether the Copyright Term Extension Act unconstitutionally grants perpetual rights).

Clause (i.e., without regard to the Copyright Clause), they will likely be deemed constitutional. Therefore, the anti-bootlegging statutes present an apt example for exploring inter-clause conflicts and for analyzing potential solutions to that problem.

A handful of courts have ruled on the constitutionality of the anti-bootlegging statutes and have addressed the constitutional inter-clause conflict question. In some cases, courts have addressed the criminal provision's constitutionality, reaching different conclusions using different reasoning. In cases addressing the civil provision's constitutionality, courts have also reached different conclusions using different reasoning. A number of commentators have taken issue with these decisions and their methods of analysis, some proposing alternative approaches.

In this Comment, I offer a method of constitutional analysis that I have termed "holistic categorization" as a possible solution to the problem of constitutional inter-clause conflicts. This method is grounded in a view of the Constitution as an entity greater than the sum of its parts, in which the relationship between clauses must be considered in its interpretation. I propose a two-step analysis under this approach. First, it must be determined whether the statute at issue falls within the scope of a given constitutional power. This determination relies upon a general conception of the scope of the relevant clause based upon its text and underlying policy. It also requires an understanding of what the statute at issue directly does, as well as the statute's legislative history and construction. Second, once the applicable constitutional powers have been identified, it must be determined whether the statute violates the constitutional limitations upon those powers. This method comports with Supreme Court precedent and, when applied to the anti-bootlegging statutes, finds that the statutes are unconstitutional under the limitations of the Copyright Clause.

In Part I of this Comment, I will introduce and discuss the approaches to inter-clause conflicts that courts have taken in the context of the anti-bootlegging statutes, as well as the Supreme Court opinions to which these courts have looked for guidance outside of the bootlegging context. In Part II, I present my own categorization of the various existing and proposed approaches to inter-clause conflicts, providing other scholars' commentary on the approaches and offering my own criticisms. In Part III, I offer holistic categorization as a new method of constitutional interpretation for inter-clause conflicts. I present the approach in detail and justify each of its rules and factors, grounding the approach in well-established, fundamental principles

of constitutional interpretation. Finally, in Part IV I apply holistic categorization to the anti-bootlegging statutes and find that the statutes are unconstitutional under the Copyright Clause.

I. JUDICIAL APPROACHES TO THE ANTI-BOOTLEGGING STATUTES

Five federal district and circuit courts have discussed the specific question of whether the anti-bootlegging statutes violate the Copyright Clause. Some cases address the criminal provision, and others address the civil provision. Although two district courts held the provisions to be unconstitutional (one addressing the criminal provision and the other the civil provision), both decisions were later reversed. In all five of the opinions, the courts looked to essentially the same Supreme Court precedent for guidance on how to approach the constitutional question of overlapping enumerated powers, but each interpreted the Court's decisions somewhat differently. In this Part, I discuss each opinion in turn.

A. *The Eleventh Circuit's Decision in Moghadam*

The first court to address the constitutionality of either anti-bootlegging statute was the Eleventh Circuit in *United States v. Moghadam*, which held the criminal anti-bootlegging statute to be a valid exercise of Congress's authority under the Commerce Clause.¹⁶ In the case, Ali Moghadam was indicted for violating the anti-bootlegging statute.¹⁷ His motion to dismiss the indictment on the basis that the statute was unconstitutional was denied, and he pled guilty to the crime.¹⁸ On appeal to the Eleventh Circuit, he again raised the issue of constitutionality.¹⁹

In its opinion, the court addressed whether the statute could be a valid exercise of Congress's power under the Copyright Clause. In doing so, the court looked only to the generally accepted fixation requirement (interpreted from the term "Writings" in the Clause), which was the sole ground upon which Moghadam argued unconstitutionality.²⁰ Although the court acknowledged the anti-bootlegging sta-

¹⁶ 175 F.3d 1269, 1282 (11th Cir. 1999).

¹⁷ *Id.* at 1271.

¹⁸ *Id.* at 1271-73. In denying Moghadam's motion to dismiss, the district court does not appear to have issued a written opinion explaining its ruling.

¹⁹ *Id.*

²⁰ *See id.* at 1273 ("Of these limitations, Moghadam has relied in the instant case only on the concept of 'fixation' which is said to be embedded in the term 'Writ-

tute's potential conflict with the Clause, the court declined to decide the question and chose instead to assume *arguendo* that the Copyright Clause was not a valid source of congressional authority to pass the anti-bootlegging statute.²¹

Proceeding on this assumption, the court considered whether the statute could instead fall within Congress's power to regulate interstate and foreign commerce under the Commerce Clause.²² The court determined that, although Congress believed it was acting under the Copyright Clause and included "no jurisdictional element as is commonly found in criminal statutes passed under authority of the Commerce Clause," the statute was nonetheless a valid exercise of the Commerce Clause.²³ The court explained that "[t]he link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident."²⁴

After setting the stage, the court moved to the fundamental question of constitutional interpretation: "whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause."²⁵ The court stated as a rule of constitutional interpretation:

In general, the various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed. In other words, each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another.²⁶

As support for this proposition, the court offered the Supreme Court's influential decision in *Heart of Atlanta Motel, Inc. v. United States*.²⁷ In *Heart of Atlanta Motel*, the Supreme Court considered the

ings.""). Interestingly, in a footnote, the court wrote that the anti-bootlegging statutes may violate the "limited Times" requirement of the Copyright Clause, but declined to decide the question because the issue had not been preserved on appeal. *Id.* at 1274 n.9.

²¹ *See id.* at 1274 (acknowledging appellant's fixation-requirement argument and declining to address the issue because the court found an alternative source of power for the enactment).

²² *Id.* at 1274-82.

²³ *Id.* at 1275-77.

²⁴ *Id.* at 1275-76.

²⁵ *Id.* at 1277.

²⁶ *Id.*

²⁷ *See id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)) (identifying the *Heart of Atlanta Motel* opinion as "[p]erhaps the most prominent example of this principle").

constitutionality of the Civil Rights Act of 1964,²⁸ which prohibited discrimination on the basis of race, color, religion, or national origin in particular classes of businesses that serve the public.²⁹ More than eighty years earlier, in the *Civil Rights Cases*, the Supreme Court had struck down the Civil Rights Act of 1875 as unconstitutional because Congress lacked authority to pass the law under either the Thirteenth or Fourteenth Amendments—the only sources of authority under which the government argued.³⁰ In *Heart of Atlanta Motel*, the Supreme Court distinguished the *Civil Rights Cases* decision on multiple grounds³¹ and held the Civil Rights Act of 1964 to be a constitutional exercise of Congress’s power under the Commerce Clause.³² To support its rule of constitutional interpretation, the *Moghadam* court looked to the Supreme Court’s statement in *Heart of Atlanta Motel* that, because the Commerce Clause gives Congress “ample power,”

we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.³³

Using this statement as guidance, the *Moghadam* court concluded that “as a general matter, the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on whether it can be sustained under another.”³⁴ As additional support in the Copyright Clause context, the court relied upon the Supreme Court’s 1879 opinion in the *Trade-Mark Cases*, which held that Congress lacked authority under either the Copyright Clause or the Commerce Clause to

²⁸ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

²⁹ See *Heart of Atlanta Motel*, 379 U.S. at 247-49 (explaining the challenged provisions of the Act).

³⁰ See *Civil Rights Cases*, 109 U.S. 3, 25 (1883) (“[W]e are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.”).

³¹ See *Heart of Atlanta Motel*, 379 U.S. at 250-52 (declaring the decision in the *Civil Rights Cases* “inapposite, and without precedential value in determining the constitutionality of the present Act”).

³² *Id.* at 261-62.

³³ *Id.* at 250.

³⁴ *United States v. Moghadam*, 175 F.3d 1269, 1277 (11th Cir. 1999). Section II.B of this Comment criticizes this reading of *Heart of Atlanta Motel*, and subsection III.B.3 offers a superior interpretation.

pass a primitive trademark law.³⁵ The *Moghadam* court argued that the Court's attention in the *Trade-Mark Cases* to both the Copyright Clause and the Commerce Clause for authority was evidence "that legislation which would not be permitted under the Copyright Clause *could* nonetheless be permitted under the Commerce Clause."³⁶

The court conceded, however, that its proposed rule of constitutional interpretation—that each grant of legislative power is alternate to all the others—was not absolute, acknowledging the Supreme Court's decision in *Railway Labor Executives' Ass'n v. Gibbons*.³⁷ In *Railway Labor*, the Supreme Court held that a law concerning employee protection during reorganization of a specific railroad company was unconstitutional under the Bankruptcy Clause.³⁸ The Court stated that its analysis must begin by determining whether the law at issue was an exercise of Congress's power under the Bankruptcy Clause or whether it was an exercise of power under the Commerce Clause.³⁹ The Court acknowledged that the clauses were "closely related" but concluded, after looking to the statute's legislative history and its substance, that Congress passed the law under the Bankruptcy Clause.⁴⁰ As such, the Court held, the law was subject to the Bankruptcy Clause's uniformity requirement and the Commerce Clause could not provide an alternative source of power: "[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."⁴¹

The *Moghadam* court reconciled *Railway Labor* with its stated general rule of constitutional interpretation by fashioning an exception applicable when the statute at issue is "fundamentally inconsistent" with the requirements of the narrower constitutional provision.⁴² The court reasoned that because the Copyright Clause's fixation requirement was a malleable concept and the anti-bootlegging statutes pro-

³⁵ *Trade-Mark Cases*, 100 U.S. 82, 94, 99 (1879).

³⁶ *Moghadam*, 175 F.3d at 1278.

³⁷ See *id.* at 1279-80 ("But the *Railway Labor Executives* case suggests that in some circumstances the Commerce Clause cannot be used to eradicate a limitation placed upon Congressional power in another grant of power." (citing *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457 (1982))).

³⁸ See *Ry. Labor*, 455 U.S. at 471-73.

³⁹ *Id.* at 465.

⁴⁰ See *id.* at 465-68.

⁴¹ *Id.* at 468-69. Part II and Section III.B discuss the Supreme Court's reasoning in *Railway Labor*, which is very useful to the inter-clause conflict problem.

⁴² *Moghadam*, 175 F.3d at 1269.

vided copyright-like protection, the criminal anti-bootlegging provision was “not fundamentally inconsistent with the fixation requirement of the Copyright Clause.”⁴³ The court provided no further guidance on how this approach should be applied to other provisions.⁴⁴

B. *The Martignon Decisions*

Years after *Moghadam*, the Second Circuit addressed the constitutionality of the criminal anti-bootlegging provision in *United States v. Martignon*. First, Judge Baer of the Southern District of New York held the criminal anti-bootlegging provision to be unconstitutional.⁴⁵ On appeal, however, the Second Circuit reversed the district court and held the anti-bootlegging statute to be a constitutionally valid exercise of Congress’s power under the Commerce Clause.⁴⁶

1. The District Court’s Opinion

In stark contrast to the Eleventh Circuit in *Moghadam*, Judge Baer used a rule of constitutional interpretation that required classification of the statute at issue: “In order to establish whether the anti-bootlegging statute is constitutional, it is necessary to determine whether the statute is a copyright law or a commercial regulation.”⁴⁷ As support for this rule of interpretation, Judge Baer cited the Supreme Court’s opinion in *Railway Labor*.⁴⁸ Looking to the statute’s legislative history, wording, construction, and substance, Judge Baer concluded that the anti-bootlegging statute was “clearly a copyright-like regulation” to be tested under the Copyright Clause, rather than the Commerce Clause.⁴⁹ Judge Baer distinguished the *Trade-Mark Cases*⁵⁰

⁴³ *Id.*

⁴⁴ Interestingly, the court noted that the anti-bootlegging statute *may* be fundamentally inconsistent with the Copyright Clause’s “limited Times” requirement—rather than the fixation requirement—but declined to decide that question because the parties had not raised it. *Id.*

⁴⁵ *United States v. Martignon*, 346 F. Supp. 2d 413, 429 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

⁴⁶ *United States v. Martignon*, 492 F.3d 140, 153 (2d Cir. 2007).

⁴⁷ *Martignon*, 346 F. Supp. 2d at 419. The court, at the end of its opinion, offered the “fundamentally inconsistent” approach the *Moghadam* court used as an alternative justification for its ruling, *see id.* at 428-29, but this was not the primary method of constitutional interpretation.

⁴⁸ *Id.* at 420 (citing *Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457 (1982)). For a summary of the Supreme Court’s reasoning in *Railway Labor*, *see supra* Section I.A.

⁴⁹ *Martignon*, 346 F. Supp. 2d at 420-22.

from the anti-bootlegging statutes: “Here, unlike in the *Trade-Mark Cases*, the anti-bootlegging statute falls squarely within the purview of the Copyright Clause, and therefore, Congress is limited by the restrictions that the Copyright Clause imposes on its power.”⁵¹ He then found the anti-bootlegging law to violate both the Copyright Clause’s fixation requirement, because it regulates live, unfixed performances,⁵² and the “limited Times” requirement, because its protection lasts indefinitely.⁵³ Thus, using his categorization method of constitutional interpretation, he declared the statute to be unconstitutional.⁵⁴

2. The Second Circuit’s Opinion

On appeal, the Second Circuit sought to clarify the issue of constitutional interpretation that the anti-bootlegging statutes raise. After exploring the Supreme Court’s reasoning in *Heart of Atlanta Motel*, the *Trade-Mark Cases*, and *Railway Labor*, the court presented a bifurcated method of constitutional interpretation that it believed clearly synthesized Supreme Court precedent to resolve conflicts between the Copyright and Commerce Clauses: “Congress exceeds its power under the Commerce Clause by transgressing limitations of the Copyright Clause only when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause and (2) the resulting law violates one or more specific limits of the Copyright Clause.”⁵⁵ Under this method of interpretation, for a statute to fall subject to the Copyright Clause’s requirements, it must actually be a “copyright law,” rather than being merely “like” copyright or “very close” to copyright.⁵⁶ Using this framework, the Second Circuit concluded that the criminal anti-bootlegging statute was not, in fact, a copyright law and thus was not subject to the Copyright Clause’s requirements.⁵⁷

The court reached this conclusion based upon a comparative analysis of the Copyright Clause’s grant of power to “secur[e] . . . Right[s],”

⁵⁰ 100 U.S. 82 (1879). For a summary of the Supreme Court’s reasoning in the *Trade-Mark Cases*, see *supra* Section I.A.

⁵¹ *Martignon*, 346 F. Supp. 2d at 427.

⁵² *Id.* at 423-24.

⁵³ *Id.* at 424.

⁵⁴ *Id.* at 428.

⁵⁵ *United States v. Martignon*, 492 F.3d 140, 149 (2d Cir. 2007).

⁵⁶ *Id.* at 149-50.

⁵⁷ *See id.* at 151 (stating that the statute “is not a law ‘secur[ing] . . . rights,’ nor is it a copyright law” (quoting U.S. CONST. art. I, § 8, cl. 8)). Subsection IV.A.1 of this Comment criticizes the Second Circuit’s reasoning on this crucial question.

the history of the Copyright Clause, and the substance of the criminal anti-bootlegging statute.⁵⁸ After finding the criminal anti-bootlegging statute *not* to be a copyright law, the court held the statute to be a valid exercise of Congress's power under the Commerce Clause.⁵⁹ This is the most recent case to have decided the issue.

C. *The KISS Decisions*

In between the district court's ruling and the Second Circuit's ruling in the *Martignon* case, two separate district courts in the Central District of California addressed the constitutionality of the civil anti-bootlegging statute—the only instance of such a challenge to date—in the same case.⁶⁰ KISS Catalog, Ltd., filed a civil suit against Passport International Productions, Inc., alleging that the defendant violated the anti-bootlegging statute by distributing a DVD containing previously unseen footage of a performance by the band KISS from their 1976 tour.⁶¹ In the first opinion, Judge Rea held the civil anti-bootlegging statute to be unconstitutional under the Copyright Clause.⁶² However, because of a procedural error in the order, Judge Rea agreed to reconsider the case.⁶³ Judge Rea died before he could rehear the case, so the case was transferred to the court of Judge Fischer,⁶⁴ who vacated Judge Rea's order and found the civil anti-bootlegging statute to be constitutional under the Commerce Clause.⁶⁵

⁵⁸ See *id.* at 150-51 (discussing the substance of the anti-bootlegging statute and the Copyright Clause's text and history).

⁵⁹ See *id.* at 152-53 (discussing the nexus between bootlegging and commerce and concluding that the statute was within Congress's authority to regulate interstate and foreign commerce).

⁶⁰ See *KISS Catalog v. Passport Int'l Prods. (KISS I)*, 350 F. Supp. 2d 823, 825 (C.D. Cal. 2004) (detailing the factual history of the case), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

⁶¹ See *id.* at 825 (detailing the factual history of the case). It is unclear why anyone would *want* such a video.

⁶² *Id.* at 836-37.

⁶³ See *KISS Catalog, Ltd. v. Passport Int'l Prods., Inc. (KISS II)*, 405 F. Supp. 2d 1169, 1170 (C.D. Cal. 2005) (explaining that, because the court failed to notify the Attorney General of the finding of unconstitutionality, Judge Rea granted a request by the United States to rehear the case).

⁶⁴ See *id.* (explaining the death of Judge Rea and subsequent transfer of the case to Judge Fischer's court).

⁶⁵ *Id.* at 1171.

1. The *KISS I* Opinion

In his opinion in *KISS I*, Judge Rea began by determining whether the civil anti-bootlegging statute was “copyright-like legislation.”⁶⁶ Judge Rea looked to Judge Baer’s analysis of the criminal statute in *Martignon* and concluded that the civil provision was undoubtedly a “copyright-related statute” that “seeks to offer copyright-like protections for recordings of live performances,” even more so than the criminal provision.⁶⁷ Judge Rea then applied the requirements of the Copyright Clause to the anti-bootlegging statute.⁶⁸ Judge Rea acknowledged the difficult question of applying the fixation requirement and declined to answer it,⁶⁹ but ruled that the statute unquestionably violated the “limited Times” requirement.⁷⁰

Against this backdrop, Judge Rea moved on to the question of constitutional inter-clause conflicts and attempted to reconcile the Supreme Court’s decisions in the *Trade-Mark Cases*, *Heart of Atlanta Motel*, and *Railway Labor*. Judge Rea distinguished the *Trade-Mark Cases* and *Heart of Atlanta Motel*, arguing that neither case implicated a direct conflict between the limitations of the Copyright Clause or another power and the Commerce Clause.⁷¹ He reasoned that in the *Trade-Mark Cases*, the Court had merely held that “Congress had insufficient power, under both the Commerce and Copyright Clauses, to enact federal trademark legislation,” and in *Heart of Atlanta Motel*, the Court “did not explicitly hold that Congress exceeded its power” un-

⁶⁶ *KISS I*, 350 F. Supp. 2d at 830.

⁶⁷ *Id.* This is a different line of logic than the Second Circuit would follow in its review of Judge Baer’s decision in *Martignon*. Judge Rea’s opinion predated the Second Circuit’s review by almost three years. In its review, the Second Circuit decided that to fall within the requirements of the Copyright Clause, the statute must *be* a copyright law, rather than being merely copyright-like. For a discussion of this opinion, see *supra* subsection I.B.2. Subsection IV.A.1 discusses this crucial question.

⁶⁸ *KISS I*, 350 F. Supp. 2d at 831-33. Judge Rea wrote that the Copyright Clause only “contains two limitations with respect to copyright; the Copyright Clause protects ‘writings’ only ‘for limited Times.’” *Id.* at 831 (quoting U.S. CONST. art. I, § 8, cl. 8). Some commentators have argued that the Copyright Clause contains other limitations. See, e.g., Oliar, *supra* note 4, at 492-94 (arguing that the Copyright Clause also contains limits in its “Authors” term and its statement of purpose to promote the arts).

⁶⁹ See *KISS I*, 350 F. Supp. 2d at 832 (“Since the allegedly unauthorized recording has already been made, that existing recording may satisfy the fixation requirement. Like the *Moghadam* court, this Court will not attempt to reach a conclusion on this question.” (citations omitted)).

⁷⁰ See *id.* at 833 (“Since the Court cannot include a limited term of its own accord, the Court holds that the current version of the statute creates perpetual copyright-like protection in violation of the ‘for limited Times’ restriction of the Copyright Clause.”).

⁷¹ *Id.* at 836.

der the Fourteenth Amendment.⁷² He then declared “*Railway Labor* to be the most instructive case on this issue.”⁷³ Following *Railway Labor*, Judge Rea held that the Commerce Clause could not be used to circumvent the limitations of the Copyright Clause:

The framers certainly believed that some limit on protection for copyrights and patents should exist; otherwise, they would not have included the explicit limits contained in Art. I, § 8, cl. 8. Permitting the current scope of the Commerce Clause to overwhelm those limitations altogether would be akin to a “repeal” of a provision of the Constitution.⁷⁴

Judge Rea also explicitly rejected the Eleventh Circuit’s “fundamental inconsistency” test from *Moghadam*, arguing that the *Moghadam* court’s parsed reading of the Copyright Clause was misguided and rejecting the standard the court used for the fixation requirement.⁷⁵ Judge Rea held the civil anti-bootlegging statute to be unconstitutional.⁷⁶

2. The *KISS II* Opinion

On rehearing, Judge Fischer approached the problem far differently, following the Eleventh Circuit’s reasoning in *Moghadam* almost entirely. Judge Fischer argued that the *Trade-Mark Cases* and *Heart of Atlanta Motel* stood for the principle that “nothing prohibits Congress from protecting similar things in different ways—so long as some provision of the United States Constitution allows it to do so.”⁷⁷ She distinguished *Railway Labor*, arguing that the bankruptcy statute in that case “was a bankruptcy statute—not a ‘bankruptcy-like’ statute.”⁷⁸ However, the anti-bootlegging statute, according to Judge Fischer, was only “copyright-like” or “copyright-related,” and thus “[did] not fall within the purview of the Copyright Clause.”⁷⁹ Judge Fischer also followed the Eleventh Circuit’s “fundamental inconsistency” test and argued that the anti-bootlegging statute did not “negate any of the purposes of, protections afforded by, or limitations established by, the Copyright Clause.”⁸⁰ She vacated the *KISS I* order, holding the statute constitutional.⁸¹

⁷² *Id.* In Section II.B, I argue that this is the proper reading of both cases.

⁷³ *Id.*

⁷⁴ *Id.* at 837.

⁷⁵ *See id.* at 837 n.11 (responding directly to the Eleventh Circuit’s reasoning).

⁷⁶ *Id.* at 837.

⁷⁷ *KISS II*, 405 F. Supp. 2d 1169, 1174 (C.D. Cal. 2005).

⁷⁸ *Id.*

⁷⁹ *Id.* at 1175.

⁸⁰ *Id.* at 1174.

⁸¹ *Id.* at 1177.

II. ASSESSING THE EXISTING AND PROPOSED METHODS OF CONSTITUTIONAL INTERPRETATION

As the anti-bootlegging cases and Supreme Court cases like the *Trade-Mark Cases*, *Heart of Atlanta Motel*, and *Railway Labor* demonstrate, there are varying approaches to inter-clause conflicts, the rare situations in which a narrow enumerated power overlaps with a broader enumerated power. Unfortunately, courts rarely identify their approaches as distinct methods, and even the similar approaches vary in both theory and application. Several commentators have attempted to classify these approaches,⁸² and in this Part, I offer my own classifications. I have divided the existing approaches into three rough categories: the strict categorization approach, the strictly alternative approach, and the fundamental inconsistency approach. Within each of these categories, recognized variances exist. Furthermore, in many instances the cases I have labeled as following a particular approach do not fit squarely within the category I have identified; courts have often incorporated principles from other approaches or justified their decisions under multiple approaches. Nonetheless, I believe the categories I have created represent a concise and useful means of analyzing constitutional inter-clause conflicts.

A. *The Strict Categorization Approach*

In determining whether a statute can be constitutional under a broader power, many courts have begun their analysis by determining under which singular clause of the Constitution the statute at issue falls and then applying only that clause's requirements and limitations. This approach can be termed the "strict categorization approach." Other commentators have referred to this approach merely as "categorization"⁸³ or placed the approach within a more general label,⁸⁴ but such a generalized view of the approach obscures a characteristic distinct from

⁸² See e.g., Oliar, *supra* note 4, at 495-507 (dividing the approaches to resolving inter-clause conflicts into five categories); William McGinty, Note, *Not a Copyright Law? United States v. Martignon and Why the Anti-Bootlegging Provisions Are Unconstitutional*, 23 BERKELEY TECH. L.J. 323, 332-39 (2008) (arguing that the approaches courts have taken can be divided into three categories: solitary analysis, categorization, and fundamental inconsistency).

⁸³ See, e.g., McGinty, *supra* note 82, at 334.

⁸⁴ See, e.g., Oliar, *supra* note 4, at 496-97 (placing the strict categorization approach within a larger category Oliar terms "formalism").

other modes of categorization⁸⁵: the strict categorization approach refuses to accept that multiple enumerated powers may be applicable to a given statute, instead forcing the statute to fit within a singular power.

Many courts have used the strict categorization approach to resolve inter-clause conflicts. The most notable case to take this approach is the Supreme Court's opinion in *Railway Labor*.⁸⁶ In *Railway Labor*, the Supreme Court plainly declared: "[i]t is necessary first to determine whether the labor protection provisions of amended RITA are an exercise of Congress' power under the Bankruptcy Clause, as contended by appellees, or under the Commerce Clause, as contended by appellant and the United States."⁸⁷ Even after acknowledging the close relationship between the Bankruptcy Clause and the Commerce Clause, the Court stated that it would look only to the Bankruptcy Clause in its analysis, because otherwise, "we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws."⁸⁸

Following *Railway Labor*'s lead, the district court in *Martignon* began its analysis by stating that it was first necessary to classify the anti-bootlegging statute as either a copyright law or a commercial regulation.⁸⁹ The Second Circuit also followed this approach in its reversal of the district court's decision, concluding that the anti-bootlegging statute was *not* a copyright law and thus judging the statute under the Commerce Clause alone.⁹⁰

Similarly, both the *KISS I* and *KISS II* courts began their analyses by determining whether the anti-bootlegging statute was a copyright

⁸⁵ In this Comment, I propose that such an alternate mode of categorization (a "nonstrict" or "liberal" categorization) exists and is the most useful method of constitutional interpretation for resolving inter-clause conflicts. Thus, the distinction between "strict categorization" and categorization more generally is very important. Part III discusses my proposed method of interpretation.

⁸⁶ *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457 (1982). For a discussion of the facts of the case and the analysis in the opinion, see *supra* Section I.A. While the Supreme Court did, in fact, apply a strict categorization approach, I find that the Court nonetheless reached the proper result due to the lack of limitations within the Commerce Clause. See *infra* note 180.

⁸⁷ *Ry. Labor*, 455 U.S. at 465.

⁸⁸ *Id.* at 469.

⁸⁹ *United States v. Martignon*, 346 F. Supp. 2d 413, 419 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

⁹⁰ See *United States v. Martignon*, 492 F.3d 140, 152 (2d Cir. 2007) ("We therefore conclude that it was not enacted under the Copyright Clause. We have no need to examine whether it violates limits of the Copyright Clause and proceed instead to an examination of its sustainability under the Commerce Clause.").

law or a commercial regulation.⁹¹ The *KISS I* court found that because the statute was “copyright-like,” it fell only within the authority of the Copyright Clause.⁹² In *KISS II*, the court followed a similar approach but arrived at a different result, concluding that the anti-bootlegging statute did *not* “fall within the purview of the Copyright Clause, [and thus the court] need no longer consider whether it complies with the limitations of the Copyright Clause.”⁹³

The strict categorization approach, while importantly recognizing the need to determine the applicability of constitutional clauses, is flawed. The approach operates under the incorrect assumption that each statute fits neatly within a single enumerated power. The strict categorization approach ignores the reality that many statutes concern more than one realm of constitutional power. Critics have justly criticized the approach on this ground.⁹⁴

This conceptual problem is particularly evident with regard to the anti-bootlegging statutes. The anti-bootlegging statutes concern both the Copyright Clause and the Commerce Clause.⁹⁵ The district courts in *Martignon* and *KISS I* advanced the incredulous claim that the Commerce Clause is to be ignored when discussing the constitutionality of the anti-bootlegging statutes.⁹⁶ The anti-bootlegging statutes surely meet the low threshold for falling within the realm of the Commerce Clause.⁹⁷ It is impossible to deny that some statutes, particularly the anti-bootlegging statutes, fall within *multiple* enumerated powers.

⁹¹ See *KISS II*, 405 F. Supp. 2d 1169, 1172-73 (C.D. Cal. 2005); *KISS I*, 350 F. Supp. 2d 823, 830 (C.D. Cal. 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

⁹² *KISS I*, 350 F. Supp. 2d at 833-37.

⁹³ *KISS II*, 405 F. Supp. 2d at 1175.

⁹⁴ See, e.g., McGinty, *supra* note 82, at 348 (arguing that categorization “has the disadvantage . . . of pigeonholing statutes so that they are analyzed under only one part of the Constitution, when they may actually relate to several areas of the law”).

⁹⁵ My contention here that the anti-bootlegging statutes concern the Copyright Clause is controversial, as many courts and commentators have held that the statutes do not fall within the realm of copyright. Part IV fleshes out in greater detail my argument that the statutes concern both the Copyright Clause and the Commerce Clause. Other commentators have expressed concerns similar to my criticism of the strict categorization approach. See, e.g., Olliar, *supra* note 4, at 496 (arguing that the categorization approach is weak, particularly in the anti-bootlegging context, because “[t]he statutes . . . have the characteristics of both intellectual property and foreign commerce”).

⁹⁶ See *KISS I*, 350 F. Supp. 2d at 836-37; *United States v. Martignon*, 346 F. Supp. 2d 413, 424-29 (S.D.N.Y. 2004), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

⁹⁷ See *United States v. Moghadam*, 175 F.3d 1269, 1274-77 (11th Cir. 1999) (reasoning, in great detail, that the criminal provision falls within the Commerce Clause because of its “self-evident” link to interstate and foreign commerce).

Comparing the anti-bootlegging decisions reveals the other significant flaw with the strict categorization approach: courts following the approach can logically reach opposite results by manipulating the realm of activity that a given enumerated power addresses. A comparison of the district and appellate opinions in *Martignon* provides an apt example of this manipulation. Although the district court and the Second Circuit used the same method of constitutional interpretation, the courts reached opposite results. The district court placed the criminal anti-bootlegging statute within the Copyright Clause category because the statute was “clearly a copyright-like regulation.”⁹⁸ The Second Circuit, however, placed the statute within the Commerce Clause category because it was not a true copyright law.⁹⁹ The crucial difference between the district court’s reasoning and the Second Circuit’s reasoning was not the content of the anti-bootlegging statute itself; rather, the courts actually disagreed over the *scope* of the Copyright Clause category.

The district court in *Martignon* construed the realm of the Copyright Clause broadly. Under its construction, any statute that is “copyright-like” is categorized as copyright and falls subject to the Copyright Clause’s limitations.¹⁰⁰ The Second Circuit, however, constructed the realm of the Copyright Clause very narrowly. Under its construction, a statute is categorized under the Copyright Clause (and thus subject to its requirements and limitations) only if it is a pure copyright law.¹⁰¹ The statute completely avoids the Copyright Clause’s limitations if it does not fall within the narrow definition of copyright, no matter how similar the law is to that definition. This example illustrates that the strict categorization approach leaves a crucial question unanswered: how broadly should each constitutional clause’s category be construed? The answer to this question is the turning point in determining constitutionality, and courts have failed to provide sufficient justification for one route over another.¹⁰²

⁹⁸ *Martignon*, 346 F. Supp. 2d at 422.

⁹⁹ See *United States v. Martignon*, 492 F.3d 140, 151-52 (2d Cir. 2007) (concluding that the statute is not “a copyright law”).

¹⁰⁰ *Martignon*, 346 F. Supp. 2d at 420-22.

¹⁰¹ *Martignon*, 492 F.3d at 150-51.

¹⁰² My proposed method of holistic categorization entirely rejects the Second Circuit’s narrow view that a statute does not fall within the scope of a specific power if it *approximates* the subject matter concerned. See *infra* subsection III.B.2.

B. *The Strictly Alternative Approach*

In contrast to the strict categorization approach, a different view of the Constitution holds that each of its enumerated powers is entirely alternative. Under this method of constitutional interpretation, a statute is a constitutionally valid exercise of congressional authority if *any* power can be found to authorize it, irrespective of any other powers' limitations. If courts applied this method to the anti-bootlegging statutes, the statutes would be held constitutional under the Commerce Clause, regardless of whether they fall within the realm of the Copyright Clause's authority and regardless of whether they violate the Copyright Clause's requirements.

Case law does not support the "strictly alternative approach," a relatively extreme interpretation of the Constitution. At least one commentator has argued that the Supreme Court followed the strictly alternative approach in *Heart of Atlanta Motel*,¹⁰³ but such an argument is difficult to make. In *Heart of Atlanta Motel*, the Supreme Court upheld Title II of the Civil Rights Act of 1964, which prohibited discrimination on the basis of race, color, religion, or national origin by certain classes of business establishments that served the public, as a constitutional exercise of Congress's power under the Commerce Clause.¹⁰⁴ This ruling came more than eighty years after the *Civil Rights Cases*, in which the Supreme Court struck down the Civil Rights Act of 1875 as unconstitutional because Congress lacked authority to pass the law under either the Thirteenth or Fourteenth Amendment—the only sources of authority under which the government argued.¹⁰⁵ In *Heart of Atlanta Motel*, the Supreme Court distinguished the 1875 Act from the 1964 Act and pointed to limiting language in the *Civil Rights Cases* to conclude that the decision was "without precedential value in determining the constitutionality of the present Act."¹⁰⁶ The Court declined to address whether the Act could be sustained under any other provision

¹⁰³ See McGinty, *supra* note 82, at 333-34 (arguing that *Heart of Atlanta Motel* represents a clear example of the "solitary analysis approach," which the author defines as holding that "the statute is constitutionally valid so long as one of the powers standing alone is sufficient to uphold it").

¹⁰⁴ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247-61 (1964) (explaining the details of Title II and holding it constitutional).

¹⁰⁵ See *Civil Rights Cases*, 109 U.S. 3, 25 (1883) ("On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.")

¹⁰⁶ *Heart of Atlanta Motel*, 379 U.S. at 250-52.

of the Constitution—namely Section 5 of the Fourteenth Amendment—and instead held the Act valid under the Commerce Clause.¹⁰⁷ To read the Court’s opinion as an endorsement of the strictly alternative approach, one must understand it to mean that even if the Court had found the Civil Rights Act to *violate* Section 5 of the Fourteenth Amendment, it would not matter because the Act was constitutional under an alternate source of power—the Commerce Clause. Nothing in the Court’s opinion, however, suggests this.

A more plausible reading of *Heart of Atlanta Motel* is not that the Court failed to rule whether the Act *violated* Section 5, but rather that the Court declined to address whether the Civil Rights Act *fell within the scope or realm* of Congress’s Section 5 power.¹⁰⁸ The Court’s opinion supports this reading, since it points to language in the *Civil Rights Cases* stating that the decision was limited to the *scope* of the Thirteenth and Fourteenth Amendments.¹⁰⁹ The Court in the *Civil Rights Cases* reasoned that the action Congress took—the regulation of private parties—was not within the scope of Section 5 of the Fourteenth Amendment, which the Court held to be limited to regulating state action only.¹¹⁰ This nuanced distinction between finding a statute beyond the *scope* of a power and finding a statute to *violate* a power is crucial and must be understood.¹¹¹ In the *Civil Rights Cases*, the Court determined that the Civil Rights Act of 1875 was not within the scope of Congress’s Section 5 power. In effect, the Court would have

¹⁰⁷ See *id.* at 250 (“This is not to say that the remaining authority upon which [Congress] acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.”).

¹⁰⁸ This reading of *Heart of Atlanta Motel* comports with the method of holistic categorization I propose in subsection III.B.3.

¹⁰⁹ *Id.* at 251-52 (quoting the *Civil Rights Cases*, 109 U.S. at 18).

¹¹⁰ See *Civil Rights Cases*, 109 U.S. at 19 (“What we have to decide is, whether such plenary power has been conferred upon Congress by the Fourteenth Amendment; and, in our judgment, it has not.”); *id.* (“And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.”); see also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 289 (3d ed. 2006) (“The Court also held [in the *Civil Rights Cases*] that Congress lacked authority to enact the law under the Fourteenth Amendment. In fact, the Court broadly declared that the Fourteenth Amendment only applies to government action and that therefore it cannot be used by Congress to regulate private behavior.”).

¹¹¹ This distinction is inherent in the categorization approach that I have identified in its strict form, see *supra* Section II.A, and propose in modified form, see *infra* Part III. In the first step of a categorization analysis, one determines whether a statute falls within the *scope* of the power, and in the second step, one determines whether that power is *violated*.

reached the same holding if the government had claimed, for example, that the Spending Clause granted Congress authority to pass the law: the Court would not have held that the Spending Clause was *violated*; rather, it would have held that it was beyond the Spending Clause's scope. As a counterexample, had the Act restricted state action—rather than private action—but done so beyond what was congruent and proportional to the harm it sought to remedy, the Act would *violate* Section 5 of the Fourteenth Amendment, rather than exceed its scope.¹¹²

Like *Heart of Atlanta Motel*, the *Trade-Mark Cases*¹¹³ can be misread as endorsing the strictly alternative approach to the Constitution. In the *Trade-Mark Cases*, the Supreme Court did not follow the strictly alternative approach and reason that regardless of whether the trademark statute at issue *violated* the Copyright Clause, it could plausibly be sustained under the Commerce Clause.¹¹⁴ A proper reading of the *Trade-Mark Cases* recognizes that the Court did not even reach the question of the requirements of the Copyright Clause, because it concluded that the trademark statute did not fall within the realm of the Clause: “The ordinary trade-mark has no necessary relation to invention or discovery. . . . [W]e are unable to see any such power in the constitutional provision concerning authors and inventors, and their writings and discoveries.”¹¹⁵ Some courts have recognized this important distinction.¹¹⁶

A true strictly alternative approach would be an extreme and deeply flawed interpretation of the Constitution. The approach would eviscerate explicit, unquestionable limitations that the Framers included in the Constitution. This explains why the Supreme Court emphatically rejected this approach in *Railway Labor*:

¹¹² Of course, the doctrine of congruence and proportionality developed long after the *Civil Rights Cases*, but this is irrelevant for purposes of my counterexample. See CHEMERINSKY, *supra* note 110, at 296-300 (discussing *City of Boerne v. Flores*, 521 U.S. 507 (1997), and the doctrine of congruence and proportionality).

¹¹³ 100 U.S. 82 (1879).

¹¹⁴ *Id.* at 95-99. Subsection III.B.3 of this Comment discusses this reading of the *Trade-Mark Cases* within the context of my proposed method of holistic categorization.

¹¹⁵ *Id.* at 94.

¹¹⁶ See, e.g., *United States v. Martignon*, 346 F. Supp. 2d 413, 427 (S.D.N.Y. 2004) (“Therefore, the Supreme Court’s analysis [in the *Trade-Mark Cases*] does not suggest that Congress may enact legislation that falls *within* the purview but not the power of the Copyright Clause, under its Commerce Clause authority. Rather, the *Trade-Mark Cases* establish the non-controversial point that when Congress does not regulate in the field covered by the Copyright Clause, it may look to an alternative grant of power.”), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007); *KISS I*, 350 F. Supp. 2d 823, 836 (C.D. Cal. 2004) (“In *The Trade-Mark Cases*, the Supreme Court held that Congress had insufficient power, under both the Commerce and Copyright Clauses, to enact federal trademark legislation.”), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

We do not understand either appellant or the United States to argue that Congress may enact bankruptcy laws pursuant to its power under the Commerce Clause. Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. Thus, if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.¹¹⁷

The Supreme Court's valid criticism of the strictly alternative approach in the bankruptcy context applies to copyright as well. If applied to the copyright context, the strictly alternative approach would hold that *any* copyright law—pure or copyright-like—could avoid the limitations of the Copyright Clause altogether and be constitutional under the Commerce Clause. The Copyright Act itself (unquestionably a copyright law) could be amended to remove all term limits—in clear violation of the “limited Times” requirement of the Copyright Clause—but still be held constitutional under the Commerce Clause. That the Supreme Court did not even mention the possibility of constitutionality under the Commerce Clause in its consideration of the constitutionality of the Copyright Term Extension Act of 1998 is a testament to the unacceptability of this approach.¹¹⁸

Under the strictly alternative approach, narrow, limited grants of authority that overlap with broad powers would be effectively repealed. This outcome is unacceptable. The Constitution's provisions cannot be viewed in a vacuum. The Constitution establishes an entire government, with varying powers and limitations that relate between branches and within branches. For it to have meaning, its provisions must be interpreted in light of the other provisions,¹¹⁹ and the strictly alternative approach fails to do so.

C. *The Fundamental Inconsistency Approach*

The “fundamental inconsistency approach” to inter-clause conflicts, first used by the Eleventh Circuit in *Moghadam*,¹²⁰ attempts to

¹¹⁷ *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982) (citations omitted).

¹¹⁸ See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (judging the Copyright Term Extension Act of 1998's constitutionality under only the Copyright Clause).

¹¹⁹ Subsection III.B.1 further explores and supports this assertion.

¹²⁰ See *United States v. Moghadam*, 175 F.3d 1269, 1281 (11th Cir. 1999) (holding the criminal anti-bootlegging provision constitutional because it is “copyright-like” leg-

remedy the flaws of the strict categorization and strictly alternative approaches by treating the Constitution's clauses as alternative while still viewing the Constitution as a whole. Under the fundamental inconsistency approach, courts consider the Constitution's powers in the alternative unless there is a "fundamental inconsistency" between a statute passed under one power and the language or policy of another. This approach comes in two forms, which I have identified as the "clause-bound form" and the "fundamental policy form." Courts have used the clause-bound form in the anti-bootlegging context, most notably in the *Moghadam* decision, and the fundamental policy form outside of the anti-bootlegging context. Commentators have advocated for the latter form. Though this approach is appealing on its face, further exploration reveals it to be unacceptably flawed.

1. The Clause-Bound Form

In its clause-bound form, the fundamental inconsistency approach looks to the language of the narrow constitutional provision that overlaps with the broad provision and determines which elements of the provision are "constitutive" and which are "limiting."¹²¹ "Constitutive" elements of a clause help to define the *scope* of the clause's applicability; they are used to determine whether a statute falls within a clause's realm. "Limiting" elements define the requirements of the power; they are used to determine whether the clause has been violated.¹²² Once the scope of a power has been separated from its requirements, courts must determine whether the statute violates those requirements and, if so, whether those requirements are fundamental or if the statute is otherwise fundamentally inconsistent with the clause.

The Eleventh Circuit in *Moghadam* essentially took this approach, though it also incorporated elements of the fundamental policy form. The court looked to the Copyright Clause and determined that the term "Writings," which is the source of the fixation requirement, defined the scope of the grant of power: "The grant itself is stated in

isolation that "is not fundamentally inconsistent with the fixation requirement of the Copyright Clause"); *see also* Oliar, *supra* note 4, at 497-98 ("The anti-bootlegging cases include a potentially more promising approach to resolving inter-clause conflicts: the fundamental inconsistency test adopted in *Moghadam* and used by the other anti-bootlegging courts.").

¹²¹ Dotan Oliar created the terms "constitutive" and "limiting" to describe the Eleventh Circuit's approach in *Moghadam*. *See* Oliar, *supra* note 4, at 498.

¹²² For a detailed discussion of my distinction between scope of a power and violation of its requirements, *see supra* Section II.B.

positive terms, and does not imply any negative pregnant that suggests that the term ‘Writings’ operates as a ceiling on Congress’ ability to legislate pursuant to other grants.”¹²³ After this determination, the court concluded that because other legislation had significantly lowered the threshold for fixation, the anti-bootlegging statutes that protected unfixed works were not “fundamentally inconsistent.”¹²⁴

In his *KISS I* opinion, Judge Rea astutely criticized the Eleventh Circuit’s approach, noting that its characterization of the “Writings” term as constitutive could not be reconciled with *Railway Labor*. He wrote, “[T]he uniformity ‘requirement’ is similarly a positive statement and does not necessarily imply a negative pregnant, i.e., the Bankruptcy Clause does not state that Congress may not enact non-uniform bankruptcy laws.”¹²⁵ But Judge Rea’s criticism of the Eleventh Circuit, however valid, is not fatal to the method itself, because it attacks only the Eleventh Circuit’s application.

Dotan Oliar, however, has offered a valid criticism of the method itself. Oliar essentially argues that the clause-bound form is a *fait accompli*:

If qualifying language is characterized as “constitutive,” then harmony between it and the statute will be found by assumption: language that does not prevent something does not conflict with it. But the lack of a conflict assuming that language is not limiting cannot serve as a basis for concluding that it is not limiting.¹²⁶

While it is important to recognize the difference between the realm of a grant of power and limitations on that grant—as I have emphasized in Section III.B and as the clause-bound form also does—this distinction cannot serve as the dispositive factor in the constitutional inquiry. Oliar’s demonstration that the clause-bound form employs circular logic is fatal to this form of the fundamental inconsistency approach.

¹²³ *Moghadam*, 175 F.3d at 1280.

¹²⁴ *See id.* at 1281-82 (concluding that because “fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power,” unfixed works can be protected pursuant to the Commerce Clause without being “fundamentally inconsistent” with the Copyright Clause). The court’s consideration of the importance of fixation—even after it determined that fixation was a constitutive element—is more similar to the fundamental policy approach, which subsection II.C.2 will discuss.

¹²⁵ *KISS I*, 350 F. Supp. 2d 823, 837 n.11 (C.D. Cal. 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

¹²⁶ Oliar, *supra* note 4, at 498-99.

2. The Fundamental Policy Form

The fundamental policy form of the fundamental inconsistency approach is a marginally more sensible approach to the problem of inter-clause conflicts. In this form, to determine constitutionality one looks to the underlying policy values of the narrow, restrictive grant of power and determines whether the statute at issue violates or significantly undermines those values. If so, the statute is unconstitutional only if the violated policy value is “fundamental.”¹²⁷

Although *Oliar* appears to have entirely distinguished the Eleventh Circuit’s approach in *Moghadam* from the fundamental policy form,¹²⁸ I argue that by weighing the importance of the fixation element of the Copyright Clause, the *Moghadam* court incorporated some of the fundamental policy form into its analysis. The court ruled that fixation was not a “rigid, inflexible barrier” in delineating between copyrightable works, and thus it was inconsequential that anti-bootlegging statutes protected unfixed works.¹²⁹ Implicit in this finding was a determination that broadening the scope of protected works to include unfixed works did not violate any fundamental value inherent in the Copyright Clause.¹³⁰ As an example of the fundamental policy form, commentators typically cite an opinion by a Northern District of California court that upheld certain sections of the Digital Millennium Copyright Act (DMCA)¹³¹ as constitutional under the Commerce Clause.¹³² In that case, the court acknowledged that the DMCA provisions at issue threatened certain copyright law values, namely fair use and public accessibility, but concluded that those harms did not amount to fundamental inconsistency with the Copyright Clause.¹³³

¹²⁷ See *id.* at 499 (describing the alternate form of the fundamental inconsistency approach, which I have termed “the fundamental policy form”).

¹²⁸ See *id.* at 497-99 (contrasting the fundamental policy form with the *Moghadam* approach).

¹²⁹ *Moghadam*, 175 F.3d at 1281.

¹³⁰ See *id.* at 1281-82 (concluding that because “fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power,” unfixed works can be protected pursuant to the Commerce Clause without being “fundamentally inconsistent with the Copyright Clause”).

¹³¹ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

¹³² See *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1141-42 (N.D. Cal. 2002) (holding section 1201(b) to be constitutional).

¹³³ See *id.* at 1141-42 (addressing the potential harms of the DMCA and concluding that the provisions were not “irreconcilably inconsistent” with the Copyright Clause).

Some commentators have promoted this approach to inter-clause conflicts—and the anti-bootlegging statutes in particular—as the superior method of constitutional interpretation.¹³⁴ To be sure, this approach’s view of the Constitution as a whole and its attempt to look beyond the text and consider underlying policy values are laudable. The other approaches that I have identified do not possess these features.

However, the fundamental inconsistency approach has its own problems. In its fundamental policy form, the fundamental inconsistency approach asks courts not only to determine the underlying values of the Constitution’s provisions, but also to assess their importance. The result is that, with no rules of application, explicit provisions of the Constitution can be entirely circumvented—held to be virtually meaningless—because they are not considered “fundamental.”

This is obvious in courts’ and commentators’ application of the approach to the anti-bootlegging statutes. The Eleventh Circuit’s ruling in *Moghadam* can be read either to excuse nonconformity with the fixation term in the Copyright Clause or to remove the fixation threshold entirely as a prerequisite for copyright protection. Under either reading, the court disregarded an entire constitutional term with a well-grounded meaning because it did not find it important enough. Similarly, William McGinty disregards the fixation requirement entirely in his proposed application of the fundamental inconsistency approach to the anti-bootlegging statutes, claiming that this is acceptable “because of the very wide definition of ‘fixed’ in copyright law.”¹³⁵ He acknowledges that this is the effect of his approach: “This causes some of the limitations in the Copyright Clause, such as the fixation requirement, to lose effectiveness.”¹³⁶

¹³⁴ See, e.g., Oliar, *supra* note 4, at 499 (“The fundamental inconsistency test was applied more satisfactorily in *Elcom*. . . [I]ts approach of examining the degree of harm to copyright-related values as means of determining whether a fundamental inconsistency existed is commendable.”); McGinty, *supra* note 82, at 339 (“When considering the constitutionality of the anti-bootlegging provisions, the fundamental inconsistency approach is best because it gives teeth to all of the limitations in the Copyright Clause but acknowledges the ambiguous position the provisions have between the Copyright Clause and the Commerce Clause.”).

¹³⁵ McGinty, *supra* note 82, at 348.

¹³⁶ *Id.* at 350. However, McGinty finds the duration requirement of the Copyright Clause to represent a fundamental policy value and thus holds the anti-bootlegging statutes unconstitutional under the “limited Times” provision of the Copyright Clause alone. See *id.* at 349 (“Thus, under the fundamental inconsistency test, § 2319A and § 1101 are unconstitutional due to their perpetual nature.”).

Such an argument is unacceptable; the effective repeal of a constitutional provision cannot be tolerated in any constitutional interpretation. Furthermore, it is not clear that courts are skilled in determining the importance of the constitutional provisions at issue. For example, despite the fixation requirement's low threshold under modern copyright law, it has been regarded as serving very important policy goals.¹³⁷ However, in determining that fixation was of little importance, the Eleventh Circuit in *Moghadam* erroneously looked to the definition of "fixed" in the Copyright Act, rather than engaging in a constitutional analysis.¹³⁸ Oliar has noted the potential inadequacy of the approach and the ambiguous nature of its application.¹³⁹

In sum, the fundamental inconsistency approach—both in its clause-bound and fundamental policy value forms—is a beneficial, though ultimately unsatisfying, method of resolving inter-clause conflicts. Its application is ambiguous, and more importantly, its end result—that entire limitations contained in the Constitution can be disregarded as unimportant—is unacceptable. Nonetheless, the approach offers useful features. Most importantly, it necessitates a holistic view of the Constitution, which considers the policy values un-

¹³⁷ See, e.g., JOYCE ET AL., *supra* note 14, at 64 (explaining that Congress considered fixation to be one of two "fundamental criteria of copyright protection" in passing the Copyright Act (quoting H.R. REP. NO. 94-1476, at 51-53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664)). Wendy Gordon also emphasized the central importance of the fixation requirement in copyright law:

[A]n interdependent world requires demarcations to avoid paralysis and preserve valuable, mutually beneficial reciprocities. . . . Physical boundaries provide one important limit. Copyright provides its own boundaries which, by and large, substitute well for physical boundaries, both in regard to promoting transactions and to keeping liability within tolerable limits.

First among these substitute boundaries are copyright's fixation and demarcation requirements.

Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1380 (1989).

¹³⁸ See *United States v. Moghadam*, 175 F.3d 1269, 1273-74 (11th Cir. 1999). The *KISS I* court noted this error in the *Moghadam* court's reasoning: "[T]he Eleventh Circuit surprisingly relied on a constitutionally untested definition of 'fixed' in Title 17 to argue that fixation may occur simultaneously with transmission and thus has few boundaries. It is unclear why Congress' definition of 'fixed' informs the constitutional definition of fixation since these are distinct inquiries." *KISS I*, 350 F. Supp. 2d 823, 837 n.11 (C.D. Cal. 2004), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

¹³⁹ See Oliar, *supra* note 4, at 499 ("*Elcom* can be criticized for its assessment of the DMCA's copyright-related costs and benefits. It also did not explain when an inconsistency would be 'fundamental.'").

derlying the Constitution's provisions. This perspective is necessary to a successful method of constitutional interpretation.

III. A PROPOSED METHOD OF ANALYSIS: HOLISTIC CATEGORIZATION

As demonstrated in Part II, the methods that courts and commentators have used to determine the constitutionality of statutes when an inter-clause conflict exists are lacking. In this Part, I propose a method of analysis for resolving inter-clause conflicts that I term "holistic categorization." This method draws from the advantages of existing methods of analysis, yet avoids the flaws of those methods. First, I present holistic categorization in detail. Second, I offer a justification and defense of the method, showing that the holistic categorization approach fits with a proper account of the Constitution, avoids many of the flaws of the existing methods of analysis, and even comports with Supreme Court precedent.

A. *The Method of Holistic Categorization*

To determine the constitutionality of a statute in the context of inter-clause conflicts, I propose a method of analysis in which an intuitive two-step process is undertaken. First, a court should determine within which of the Constitution's clauses the statute at issue falls. Second, a court should apply the limitations and underlying policy considerations of all of the applicable clauses to the statute. This method can appropriately be termed "holistic categorization," because it takes a categorical approach to statutes and a deeply holistic view of the Constitution.

The first step of holistic categorization is to identify the constitutional clause—or clauses—under which the statute at issue is to be analyzed. This is a "modified categorization" based on the strict categorization approach that courts have applied in the past.¹⁴⁰ My modification to this approach entails considering the scope or realm of a granted power before looking to the limitations of that power to determine whether the statute at issue falls within it. In considering the realm of a power's control, rules of definition that are strict and formalistic cannot be used. While the conception must be grounded in the language of the Constitution's clause, it should not turn on the parsing of sentence structure into "constitutive" and "limiting" terms to

¹⁴⁰ For a discussion and analysis of the strict categorization approach, see *supra* Section II.A.

establish a rigid definition, as the clause-bound form of the fundamental inconsistency approach attempts to do.¹⁴¹ Instead, to determine the proper realm of a power's control, one must look to the subject matter that the clause concerns, the legislative action that the clause is designed to address, and the underlying policy of the clause.

Once a court considers these factors and forms a concept of scope, it must determine whether the statute falls within that scope. In doing so, the direct legislative action should be considered, disregarding ancillary effects. Beyond the direct action taken, the court should also consider the legislative history, intent, and statutory construction. Statutes that approximate the subject matter the constitutional clause controls—for example, “copyright-like” statutes—*may* fall within the scope of the clause. Finally, the court should recognize that statutes may fall within the scope of more than one constitutional clause.

In the second step of holistic categorization, the court should apply all of the limitations of the clauses identified in the first step to the statute at issue. Unlike under the fundamental inconsistency approach, the relative worthiness of the limitations should not be considered;¹⁴² rather, the limitations and restrictions explicit in the clause should be strictly applied. The court may also assess the policy concerns underlying the clause at issue to determine whether the statute is contrary to those policy objectives. If a statute violates a clause within which it falls, the statute should be held unconstitutional. Similarly, if a statute significantly undermines the policy objectives of a clause within which it falls, it should also be held unconstitutional.

B. *Justification*

The holistic categorization approach that I have proposed is, in many ways, a synthesis of the useful features of existing methods that eschews many of the flaws in those methods. Important principles of constitutional interpretation that the Supreme Court and noted commentators have identified guide the approach.

1. The Holistic View of the Constitution

Holistic categorization is, unsurprisingly, grounded in a holistic view of the Constitution. The approach endorses an account of the

¹⁴¹ For a discussion and analysis of the clause-bound form of the fundamental inconsistency approach, see *supra* subsection II.C.1.

¹⁴² For a discussion of the fundamental inconsistency approach, see *supra* Section II.C.

Constitution—and particularly Congress’s enumerated powers—as not merely a collection of grants, commands, and limitations, but as a document that is greater than the sum of its parts. It recognizes that in assessing the constitutionality of a given statute, one cannot read each constitutional clause independently of the others. Any view of a constitutional grant of authority *must* bear in mind other related provisions of the Constitution. Laurence Tribe, among others, endorses the holistic view:

Read in isolation, most of the Constitution’s provisions make only a highly limited kind of sense. Only as an interconnected whole do these provisions meaningfully constitute a frame of government for a nation of states. . . . Like any blueprint of a complex architectural edifice, moreover, the whole constituted . . . is plainly more than the sum of its parts. There is no way to avoid at least some reading between the lines if one is to make coherent sense of the edifice in its entirety.¹⁴³

The holistic perspective is not an entirely novel principle of interpretation, as it tracks closely with canons of statutory interpretation.¹⁴⁴ This view should be distinguished from the view the strict categorization, strictly alternative, and to an extent, fundamental inconsistency approaches implicitly take. Both the strict categorization approach and the strictly alternative approach consider the Constitution’s provisions in a vacuum, applying only the limitations and grants contained in one clause without considering other clauses that may apply.¹⁴⁵ The fundamental inconsistency approach *does* recognize the interrelatedness of the Constitution’s provisions.¹⁴⁶ However, because the approach only allows the limitations of one provision to inform the analysis of constitutionality under an alternate provision when it considers those limitations “fundamental,” the approach does not commit itself as strongly to the holistic view of the Constitution as holistic categorization does.

¹⁴³ Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235-36 (1995).

¹⁴⁴ See 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2009) (“A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.” (footnote omitted)). In fact, the entire holistic categorization approach parallels well-established doctrines of statutory interpretation, particularly because it applies all relevant, specific limitations to the statute under examination. See *infra* subsection III.B.2.

¹⁴⁵ See *supra* Sections II.A and II.B.

¹⁴⁶ See *supra* Section II.C.

2. The Two-Step Analysis

The detailed two-step analysis I propose follows established principles of constitutional interpretation. It also draws from the useful features of existing methods of interpretation while avoiding many of their drawbacks.

A modified categorization, the first step in the holistic categorization analysis, is necessary in any serious method of interpretation. Any assessment of the constitutionality of a given statute must involve some form of categorization. Before determining whether constitutional authority exists or is violated, one must know where in the Constitution to look for it.¹⁴⁷ The modified categorization that I have proposed, however, recognizes the flaws in an analysis that sets strict rules to create a rigid definition of the scope or realm of a statute.¹⁴⁸ The modified categorization instead identifies several important factors that should be used to form a general conception, rather than a rigid definition, of the realm with which the constitutional clause concerns itself. Doing so acknowledges that clauses in the Constitution differ in their language, underlying policy, and structure: some contain preambles; others contain clear, strict limitations; and others contain no limitations at all. With such variance, any attempt to create a strict set of rules to clearly define a clause's realm will create more problems than it will solve.

Once the scope or realm of a clause's authority has been conceptualized, the holistic categorization approach proceeds to determine whether the statute at issue falls within that scope.¹⁴⁹ By considering the direct action of the statute, rather than its ancillary effects, the holistic categorization approach acknowledges that the Constitution grants Congress a wide array of powers and means to achieve its objectives. In this way, the approach also recognizes that in some circumstances, ends may not be prohibited simply because certain means are.

¹⁴⁷ Thus, the strict categorization approach is not the only approach to apply some form of categorization. The strictly alternative approach requires one to determine in which constitutional clauses the statute at issue can find authority. Likewise, when using the fundamental inconsistency approach, one must determine which clause's limitations and policies apply before determining whether fundamental limitations or policy are violated.

¹⁴⁸ The strict categorization approach and the clause-bound form of the fundamental inconsistency approach revealed the flaws of such an approach. See also Oliar, *supra* note 4, at 496-97 (criticizing "formalistic argumentation").

¹⁴⁹ The modified categorization approach accepts that some statutes fall within more than one constitutional clause and thus avoids the criticism that the strict categorization approach pigeonholes statutes into a single category. See *supra* Section II.A.

The Supreme Court has used such a principle of constitutional interpretation, most notably in *South Dakota v. Dole*.¹⁵⁰ In *Dole*, the Court held that Congress could use its Spending Clause power to provide strong incentives for states to raise their drinking ages to twenty-one years, even though the Twenty-First Amendment prohibited Congress from setting a drinking age directly.¹⁵¹ In its reasoning, the Court explained: “[O]bjectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”¹⁵² The holistic categorization approach to inter-clause conflicts adopts this important principle, which courts and commentators have not considered.

Perhaps most importantly, the holistic categorization approach entirely rejects the Second Circuit’s ruling in *Martignon* that a statute cannot fall within the scope of a specific power if it approximates, yet is not entirely, the exact subject matter concerned (e.g., it is “copyright-like”).¹⁵³ Such statutes can—and in most cases should—be determined to fall within the scope of a clause and thus be subject to its limitations.

This rule of interpretation takes guidance from the Supreme Court’s analysis of the Lanham Act¹⁵⁴ in *Dastar Corp. v. Twentieth Century Fox Film Corp.*¹⁵⁵ In *Dastar*, the Court rejected an argument that the Lanham Act accorded “special treatment to communicative products [because such a construction] causes the Lanham Act to conflict with the law of copyright, which addresses that subject specifically.”¹⁵⁶ The Court cited an earlier opinion holding that “[i]n general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying.”¹⁵⁷ Most notably, the Court expressed a concern that allowing a cause of action under the Lanham Act “would create a *species of mutant copyright law*.”¹⁵⁸ The Court went

¹⁵⁰ 483 U.S. 203 (1987).

¹⁵¹ See *id.* at 212 (“Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action . . . is a valid use of the spending power.”).

¹⁵² *Id.* at 207 (citation omitted) (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)). Although the Court’s rule in *Dole* concerned Congress’s spending power, there is no reason that one cannot derive a broader principle regarding the distinction between prohibited ends and means. As discussed in subsection III.B.3, this broader principle comports with the Court’s ruling in *Heart of Atlanta Motel* as well.

¹⁵³ See *supra* subsection I.B.2.

¹⁵⁴ 15 U.S.C. § 1125(a) (2006).

¹⁵⁵ 539 U.S. 23 (2003).

¹⁵⁶ *Id.* at 33.

¹⁵⁷ *Id.* (quoting *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001)).

¹⁵⁸ *Id.* at 34 (emphasis added).

on to explain that a Lanham Act cause of action would violate the duration requirement of the Copyright Clause.¹⁵⁹

Courts and commentators have wrongly ignored this important case. *Dastar* stands for the proposition that “copyright-like” statutes *must* fall subject to the requirements of the Copyright Clause. To hold, as the Second Circuit did, that such statutes may instead be constitutional under the Commerce Clause is to create the very “mutant copyright law” against which the Supreme Court warned.

Finally, the second step of the holistic categorization analysis applies all limitations that the relevant clauses contain, regardless of whether a court considers them “fundamental.” This rule is derived from the Supreme Court’s clear objective of enforcing the Constitution’s explicit limitations. The Court made this objective evident with respect to the Copyright Clause in *Dastar*¹⁶⁰ and more generally in *Railway Labor*. In *Railway Labor*, the Court insisted on applying the uniformity requirement of the Bankruptcy Clause, even though one could certainly label the statute at issue a commercial regulation.¹⁶¹ To do otherwise “would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.”¹⁶²

The holistic categorization approach recognizes that the Constitution’s limitations must be given force. This view comports with the fundamental rules of *statutory* interpretation. In 2009, the Supreme Court stated that “one of the most basic interpretive canons” is that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”¹⁶³ Thus, the principle is well-grounded, even though it has been ignored by the fundamental inconsistency approach, which even its proponents admit allows some constitutional provisions to lose their effectiveness.¹⁶⁴ Furthermore, holding all of the Constitution’s limitations as necessary avoids the more pragmatic problem of courts misjudging the importance of constitutional limitations.¹⁶⁵

¹⁵⁹ See *id.* at 37 (“To hold otherwise would be akin to finding that [the Lanham Act] created a species of perpetual patent and copyright, which Congress may not do.”).

¹⁶⁰ See *id.*

¹⁶¹ *Ry. Labor Execs.’ Ass’n v. Gibbons*, 455 U.S. 457, 468-69 (1982).

¹⁶² *Id.* at 469.

¹⁶³ *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (alteration in *Corley*).

¹⁶⁴ See *supra* subsection II.C.2.

¹⁶⁵ Subsection II.C.2 discusses this criticism of the fundamental inconsistency approach.

3. Reconciliation with Supreme Court Precedent

In their attempts to determine the proper method of analyzing inter-clause conflicts, the anti-bootlegging courts have looked primarily to the Supreme Court's decisions in the *Trade-Mark Cases*,¹⁶⁶ *Heart of Atlanta Motel*,¹⁶⁷ and *Railway Labor*.¹⁶⁸ In many instances, the courts had difficulty reconciling these cases.¹⁶⁹ The holistic categorization approach that I present fits comfortably within the Supreme Court's reasoning in these three cases.

The Supreme Court's reasoning in the *Trade-Mark Cases* fits within the holistic categorization approach's first step. The Court essentially held the trademark statute at issue to fall outside both the scope of the Copyright Clause¹⁷⁰ and the scope of the Commerce Clause.¹⁷¹ Translating this decision into the language of the holistic categorization approach, the Supreme Court established a conception of the realms that the Copyright Clause and Commerce Clause controlled and then found the trademark statute to fall outside of these realms.¹⁷² The second step of the analysis was unnecessary, as there were no limitations to apply. The statute was unconstitutional.

One can similarly apply the holistic categorization approach to the Court's decision in *Heart of Atlanta Motel*.¹⁷³ As discussed, the most plausible interpretation of the Court's decision in light of the *Civil Rights Cases*,¹⁷⁴ which the Court elected not to revisit, is that it considered the Civil Rights Act of 1964 to be outside the scope of the Fourteenth Amendment and within the scope of the Commerce Clause.¹⁷⁵ This account fits well within the holistic categorization approach.

In holistic categorization terms, the Supreme Court held in the *Civil Rights Cases* that the scope of Section 5 of the Fourteenth

¹⁶⁶ 100 U.S. 82 (1879).

¹⁶⁷ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹⁶⁸ *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457 (1982).

¹⁶⁹ See, e.g., *United States v. Moghadam*, 175 F.3d 1269, 1279 (11th Cir. 1999) (noting that "there is some tension between" the cases).

¹⁷⁰ See *Trade-Mark Cases*, 100 U.S. at 94 ("[W]e are unable to see any such power in the constitutional provision concerning authors and inventors, and their writings and discoveries.").

¹⁷¹ *Id.* at 95-99 (reasoning that the trademark statute falls outside the scope of the authority granted by the Commerce Clause).

¹⁷² For a more detailed account of the *Trade-Mark Cases* opinion, see *supra* notes 113-14 and accompanying text.

¹⁷³ 379 U.S. 241 (1964).

¹⁷⁴ 109 U.S. 3 (1883).

¹⁷⁵ See *supra* text accompanying notes 103-10.

Amendment was limited to federal regulation of state action to enforce the Fourteenth Amendment.¹⁷⁶ Looking to the direct action of the Civil Rights Act—the regulation of private parties, not state action—the Court held that the Act could not be categorized as a Section 5 law.¹⁷⁷ The Court endorsed this interpretation in *Heart of Atlanta Motel*, holding that the motivation of ending racial discrimination was permissible so long as the Constitution authorized the *means*—the direct action—that Congress took.¹⁷⁸ Thus, the holistic categorization approach would follow a similar analysis for the Civil Rights Act of 1964 and find it to be outside the scope of the Fourteenth Amendment but constitutional under the Commerce Clause.

Finally, the holistic categorization approach perfectly aligns with the Supreme Court's decision in *Railway Labor*.¹⁷⁹ In *Railway Labor*, the Supreme Court effectively followed the holistic categorization approach without using the terms I propose.¹⁸⁰ In finding the statute at issue to fall within the scope of the Bankruptcy Clause, the Court looked to the

¹⁷⁶ See *Civil Rights Cases*, 109 U.S. at 11 (“Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.”).

¹⁷⁷ See *id.* at 24-25 (holding that the Fourteenth Amendment did not authorize the Civil Rights Act).

¹⁷⁸ In *Heart of Atlanta Motel*, the Court stated:

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

379 U.S. at 257.

¹⁷⁹ *Ry. Labor Execs. Ass'n v. Gibbons*, 455 U.S. 457 (1982). For a more detailed discussion of the facts of the case and the Court's opinion, see *supra* Section I.A.

¹⁸⁰ Earlier in this Comment, I described the Court's decision as falling within the strict categorization approach. See *supra* Section II.A. This is because although the Court acknowledged the overlap between the Commerce Clause and the Bankruptcy Clause, see *Ry. Labor*, 455 U.S. at 468-69, it declined to categorize the statute at issue as both a bankruptcy statute *and* a commerce statute. The holistic categorization approach would include the formality of characterizing the statute as falling within both powers. However, with respect to these two constitutional clauses, there is no practical difference, since the approach applies the limitations in all applicable clauses and the Commerce Clause contains no express limitations.

same sources and factors I suggest: the substance of the statute and its direct action, its legislative history, and the underlying policy of the constitutional clause at issue.¹⁸¹ Once the Court determined that the statute fell within Congress's bankruptcy power, it applied the Bankruptcy Clause's uniformity limitation—as the holistic categorization approach would do—and held the statute unconstitutional.¹⁸²

IV. APPLYING HOLISTIC CATEGORIZATION TO THE ANTI-BOOTLEGGING STATUTES

With the holistic categorization approach now clearly established, it can be applied to the specific inter-clause conflict this Comment has highlighted—that created by the anti-bootlegging statutes Congress passed as part of the Uruguay Round Agreements Act (URAA).¹⁸³ Section A of this Part applies the first step of the holistic categorization approach, modified categorization, to the anti-bootlegging statutes. It finds that both the civil and criminal statutes approximate a form of copyright protection and fall within the scope of both the Copyright Clause and the Commerce Clause. Section B of this Part applies the second step of the holistic categorization approach, which concerns limitations of the applicable clauses. When the Copyright Clause's limitations are applied to the anti-bootlegging statutes, it becomes clear that the statute violates the clause's durational requirement, as well as perhaps the clause's fixation requirement. Because the statutes violate at least one constitutional limitation, they are unconstitutional.

A. *Categorizing the Anti-Bootlegging Statutes*

1. Conceptualizing the Copyright Clause's Realm

The holistic categorization approach begins by using the relevant constitutional clauses to form a conception of the realms in which the clauses operate. The anti-bootlegging statutes implicate the Copyright Clause, so it will be the primary focus of the inquiry.¹⁸⁴ The Copyright Clause empowers Congress “[t]o promote the

¹⁸¹ See *Ry. Labor*, 455 U.S. at 467-69 (addressing the statute's substance, the statute's legislative history, and the policy of the Bankruptcy Clause).

¹⁸² *Id.* at 469-73.

¹⁸³ The civil anti-bootlegging provision is found at 17 U.S.C. § 1101 (2006), and the criminal provision is found at 18 U.S.C. § 2319A.

¹⁸⁴ Subsection IV.A.3 of this Comment makes the uncontroversial determination that the anti-bootlegging statutes fall within the very broad realm of the Commerce Clause.

Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁸⁵ Several factors are involved in establishing a conception of the Copyright Clause.

One must first consider the subject matter that the clause concerns. The Supreme Court has stated that “[t]o comprehend the scope of Congress’ power under the Copyright Clause, ‘a page of history is worth a volume of logic.’”¹⁸⁶ History reveals that Congress has used the Copyright Clause to protect a wide range of subject matter, which has expanded over time.¹⁸⁷ Perhaps the best conception of the Copyright Clause’s focus is simply the copying of original, “intangible products of the mind.”¹⁸⁸

Second, the analysis turns to the type of congressional action with which the Copyright Clause is concerned. The Copyright Clause authorizes Congress to “secur[e] . . . exclusive Right[s].”¹⁸⁹ In *Martignon*, the Second Circuit understood this phrase to mean “to create, bestow, and allocate . . . rights” and based its entire constitutional analysis on this interpretation.¹⁹⁰ The court’s analysis of *what* rights the Copyright Clause concerned centered on its comparison of the criminal anti-bootlegging statute to the existing Copyright Act.¹⁹¹ This line of reasoning is erroneous, however, because the question is not the scope of rights that Congress has decided to secure through the Copyright Act, but rather the scope of rights that the Constitution authorizes Congress to secure.¹⁹² There simply is not enough information available to define precisely what it means to secure rights to authors. In the case of the Copyright Clause, one can consider the type of action specified in the clause, but that certainly cannot serve as the sole guidepost in construing the scope of the Copyright Clause.

¹⁸⁵ U.S. CONST. art. I, § 8, cl. 8.

¹⁸⁶ *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).

¹⁸⁷ See generally JOYCE ET AL., *supra* note 14, at 14-25 (tracing the history of Anglo-American copyright law from the Statute of Anne, through the Copyright Act of 1909, to the Copyright Act of 1976).

¹⁸⁸ *Id.* at 3.

¹⁸⁹ U.S. CONST. art. I, § 8, cl. 8.

¹⁹⁰ *United States v. Martignon*, 492 F.3d 140, 150 (2d Cir. 2007).

¹⁹¹ See *id.* at 151.

¹⁹² See 1 NIMMER & NIMMER, *supra* note 9, § 1.07 (“The Copyright Clause of the Constitution vest [sic] in Congress the authority to enact copyright legislation, but does not in itself command that copyright legislation must be enacted. Congress is given discretion whether in fact to enact such legislation, and if so, as to its scope.”).

However, the third factor to be considered in forming a conceptual scope of the Copyright Clause, the underlying purpose or policy of the clause, is very useful. Understanding the purpose of copyright is essential to forming a conception of the clause's scope. This is because the Copyright Clause is one of the only constitutional provisions that contains a policy statement. The clause states that the purpose of Congress's power is "[t]o promote the Progress of Science and useful Arts."¹⁹³ One must consider the inclusion of this policy statement—which makes clear that more than the simple creation of private property rights guides Congress's copyright power¹⁹⁴—in forming a conceptual scope of the Copyright Clause.

The importance of this policy is evident in the history of copyright law in the United States. American copyright law is unique in that the overarching social policy contained in the Copyright Clause constantly guides it. As Joyce and coauthors explain, "U.S. copyright law has been conceived as an instrument of national cultural policy, rather than a mere scheme of private rights. From its inception, it has been the vehicle for the balancing of private proprietary claims and the public interest in access to information resources."¹⁹⁵ Joyce and coauthors further explain that this underlying social policy has more than "rhetorical significance"; rather, it has shaped the modern copyright doctrine and is at the root of the language of the Copyright Clause.¹⁹⁶ In particular, this public policy is the source of the "limited Times" provision.¹⁹⁷ Because the Copyright Clause embodies such a strong, important social policy, one must construe its scope broadly.

2. Determining Whether the Anti-Bootlegging Statutes Fall Within the Scope of the Copyright Clause

With a general conception of the scope of the Copyright Clause established, it must now be determined whether the anti-bootlegging

¹⁹³ U.S. CONST. art. I, § 8, cl. 8.

¹⁹⁴ See JOYCE ET AL., *supra* note 14, at 19 ("The constitutional language—which does not even employ the term 'copyright'—seems to suggest that the dominant purpose of the Framers was to promote the creation (and, by implication, the dissemination) of knowledge, so as to enhance public welfare. This goal is to be achieved through provision of an *economic* incentive: a monopoly right given for 'limited Times,' whose direct beneficiary is the 'Author.'").

¹⁹⁵ *Id.* at 988.

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* ("Where copyright doctrine is concerned, it has had an important generative influence. It explains the 'limited Times' language of the constitutional Copyright Clause.").

statutes fall within that scope. The holistic categorization approach considers several factors in making this determination. Three of these factors are relevant to the anti-bootlegging statutes: what the statute directly does, legislative history and congressional intent, and statutory construction. Consideration of these three factors makes clear that the anti-bootlegging statutes closely resemble copyright law.

Analyzing the substance of the anti-bootlegging statutes—what they directly do—is the most difficult. Although the statutes are, in many ways, different from traditional copyright law, they nonetheless afford copyright-like protection. Nimmer and Nimmer reason that under the statutes, musical performances “are accorded something approximating, but not equaling, copyright protection.”¹⁹⁸ They note that the anti-bootlegging statutes confer rights that are “comparable” to those conferred by traditional copyright: the right to control unauthorized reproductions and the right to public distribution.¹⁹⁹ Furthermore, the anti-bootlegging statutes also “confer[] a limited right—communication of a live musical performance,” which occupies an odd place within traditional copyright law.²⁰⁰ It should be noted here that the Second Circuit erroneously reasoned that a criminal provision could not be a copyright law.²⁰¹ The Copyright Act itself provides numerous criminal penalties for copyright infringement that—like the criminal anti-bootlegging provision—parallel its civil protections.²⁰² In fact, the Uruguay Round Agreements, the agree-

¹⁹⁸ See 3 NIMMER & NIMMER, *supra* note 9, § 8E.03[B][1].

¹⁹⁹ See *id.* (“Two of the rights belonging to traditional copyright proprietors are to control unauthorized reproductions and public distributions of their works. Chapter 11 accords comparable rights.” (footnotes omitted)).

²⁰⁰ *Id.* Nimmer and Nimmer state, “That right is broader than the comparable right given to sound recordings, which lack any performance component. By contrast, it is narrower than the right conferred on, for example, musical works, rights in which are not limited to live performance.” *Id.*

²⁰¹ See *United States v. Martignon*, 492 F.3d 140, 151 (2d Cir. 2007) (“It is a criminal statute, falling in its codification . . . between the law criminalizing certain copyright infringement and the law criminalizing ‘trafficking in counterfeit goods or services.’ It is, perhaps, analogous to the law of criminal trespass. Rather than creating a right in the performer him-or [sic] herself, it creates a power in the government to protect the interest of performers from commercial predations.”). It is surprising that the Second Circuit even acknowledged other criminal copyright laws, because the existence of such laws defeats the court’s argument. It is also interesting that in its analysis, the court never mentioned that Congress passed the criminal provision in conjunction with the civil provision, which is nearly identical and falls under the same title as the Copyright Act. See *supra* text accompanying notes 5-9.

²⁰² See JOYCE ET AL., *supra* note 14, at 915-17 (detailing the Copyright Act’s numerous criminal penalties); see also McGinty, *supra* note 82, at 343-44 (disagreeing with the Second Circuit’s reasoning on this ground).

ments that Congress implemented through the anti-bootlegging statutes, explicitly mandate that signatories “shall provide for *criminal procedures and penalties* to be applied at least in cases of willful . . . copyright piracy on a commercial scale.”²⁰³

That one of the anti-bootlegging statutes carries criminal penalties is inconsequential to the analysis of whether the statutes fall within the scope of the Copyright Clause. Looking only to the substance of the statutes, it is apparent that while they do not give the full range of protections offered by modern copyright law, they nonetheless resemble some form of traditional copyright protection.

Turning next to the legislative history of the anti-bootlegging statutes, there is no doubt that until their constitutionality was scrutinized, all involved considered the statutes to be intellectual property laws. Congress enacted the statutes as part of the URAA, which adopted the TRIPs, a massive international intellectual property treaty, into law.²⁰⁴ The very name of the treaty with which the statutes were passed to comply—the Agreement on Trade-Related Aspects of Intellectual Property Rights—strongly suggests that the anti-bootlegging statutes are within the realm of the Copyright Clause. If this evidence is somehow insufficient, the statutes’ legislative history supports the conclusion as well.²⁰⁵

Considering the anti-bootlegging provisions’ statutory construction similarly points towards placing the statutes within the category of copyright. As the district court in *Martignon* noted, the civil anti-bootlegging provision is located within the same title of the United States Code as the Copyright Act, “almost as a sub-set of the Copyright Act.”²⁰⁶ The criminal anti-bootlegging provision appears in the United States Code in the same title as, and immediately following, the criminal copyright-infringement provision.²⁰⁷ On top of all of this, the sta-

²⁰³ See Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 8, art. 61.

²⁰⁴ See 3 NIMMER & NIMMER, *supra* note 9, at § 8E.01[B] (“In 1994, the Uruguay Round Agreements Act added to the picture a very brief Chapter 11, consisting of only one section. That section regulates the unauthorized fixation and trafficking in sound recordings and music videos. . . . In order to comply with the obligations of the United States as a signatory to the TRIPs annex to the World Trade Organization Agreement, Congress added this protection for such performances.” (footnotes omitted)).

²⁰⁵ See *United States v. Martignon*, 346 F. Supp. 2d 413, 420-21 (S.D.N.Y. 2004) (detailing numerous passages in the statutes’ legislative history that make clear that these statutes—and the URAA more generally—were considered copyright laws), *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

²⁰⁶ *Id.* at 421.

²⁰⁷ See *id.* at 421-22.

tute explicitly adopts the definitions of the Copyright Act²⁰⁸ and makes available “most civil remedies of copyright law.”²⁰⁹

Almost all courts and commentators seem to agree that the anti-bootlegging statutes provide at least “copyright-like” protections.²¹⁰ Some commentators have argued, however, that because the statutes do not provide full, traditional copyright protection, they cannot be considered copyright laws.²¹¹ There are several serious flaws in this line of reasoning.

First, the argument makes the common mistake of judging the statutes by comparing them to the Copyright Act. As discussed above, the proper inquiry is whether the statutes fall within the constitutional—not statutory—scope of copyright. While the detailed provisions of the Copyright Act are useful in this analysis, comparisons to it should not be determinative.

Second, to accept these commentators’ arguments is to completely disregard a legislative history and statutory construction that point strongly in favor of categorizing the anti-bootlegging statutes as copyright laws. While these factors should not be determinative, when they point this strongly, they ought not be ignored.

Third, and perhaps most importantly, to accept these commentators’ arguments is also to disregard the important social policy underlying the Copyright Clause. To place laws that do not entirely reproduce modern copyright law outside of the Copyright Clause turns the clause’s underlying policy on its head. It would mean that the Constitution, rather than identifying a narrow group of intellectual works as important enough to warrant copyright protection, instead makes this group *more* difficult to protect. Allowing all “copyright-like” laws to es-

²⁰⁸ See *id.* at 422 (“And, the ‘Definitions’ provision of the anti-bootlegging statute, rather than defining crucial terms, such as ‘fixed,’ ‘musical work,’ and ‘sound recordings,’ adopts the definitions of these terms as stated in Title 17—the Copyright Title.” (citing 18 U.S.C. § 2319A(e) (2006))).

²⁰⁹ 3 NIMMER & NIMMER, *supra* note 9, § 8E.03[B][2][a].

²¹⁰ See, e.g., *Martignon*, 346 F. Supp. 2d at 420-22 (“Based on the anti-bootlegging statute’s language, history, and placement, it is clearly a copyright-like regulation.”); *KISS I*, 350 F. Supp. 2d 823, 830 (C.D. Cal. 2004) (“This Court does not believe there can be much debate that § 1101 is a copyright-related statute.”); Brian Danitz, Comment, *Martignon and KISS Catalog: Can Live Performances Be Protected?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1143, 1181 (2005) (characterizing the statutes as “quasi-copyright”).

²¹¹ See, e.g., Mandell, *supra* note 9, at 700-03 (arguing that, although the anti-bootlegging statutes “closely mirror the reproduction and distribution rights” of the Copyright Act, they are “outside the scope of the Copyright Clause”); Danitz, *supra* note 210, at 1180-83 (arguing that the anti-bootlegging statutes fall outside of the Copyright Clause).

cape the requirements of the Copyright Clause creates the very “species of mutant copyright law” that the Supreme Court warned against in *Dastar*.²¹² To prevent such an anomaly, the anti-bootlegging statutes *must* fall within the scope of the Copyright Clause and be subject to its limitations.

3. Determining Whether the Anti-Bootlegging Statutes Fall Within the Scope of the Commerce Clause

One unique feature of the holistic categorization analysis is that it allows statutes to fall within the scope of more than one constitutional power. Courts must thus determine whether the anti-bootlegging statutes fall within another clause of the Constitution, namely the Commerce Clause. Fortunately for this analysis, the Commerce Clause’s broad authority is well-established.²¹³ In *United States v. Lopez*, the Supreme Court held that the clause grants Congress the authority to regulate activities that “substantially affect interstate [or foreign] commerce.”²¹⁴ *This is the scope of the Commerce Clause.*

In the case of the anti-bootlegging statutes, it is very easy to conclude, as the Eleventh Circuit in *Moghadam* did in its excellent analysis, that the regulated subject matter substantially affects interstate commerce. As the *Moghadam* court correctly noted, “[t]he link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident.”²¹⁵ There are myriad connections to interstate and foreign commerce.²¹⁶ Beyond these, however, one need only look to the history of the anti-bootlegging statutes to see the obvious connection to interstate, and particularly foreign, commerce. Congress enacted the anti-bootlegging statutes as part of the Uruguay Round Agreements Act, which implemented

²¹² *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003); *see also supra* subsection III.B.2.

²¹³ *See* CHEMERINSKY, *supra* note 110, at 242 (“Practically speaking, [the Commerce Clause] has been the authority for a broad array of federal legislation, ranging from criminal statutes to securities laws to environmental laws.”).

²¹⁴ 514 U.S. 549, 559 (1995).

²¹⁵ *United States v. Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999).

²¹⁶ *See, e.g., id.* (“Bootleggers depress the legitimate markets because demand is satisfied through unauthorized channels. . . . [P]erforming artists who attract bootleggers are those who are sufficiently popular that their appeal crosses state or national lines. The very reason Congress prohibited this conduct is because of the deleterious economic effect on the recording industry.” (citation omitted)).

the Trade Related Aspects of Intellectual Property protocol.²¹⁷ It is nonsensical to claim that the anti-bootlegging statutes, passed pursuant to the World Trade Organization's authority, do not affect commerce and thus to deny that the anti-bootlegging statutes fall within the Commerce Clause's broad scope.²¹⁸

B. *Applying the Relevant Limitations to the Anti-Bootlegging Statutes*

Under the holistic categorization analysis, once a court determines that the anti-bootlegging statutes fall within the scope of both the Copyright Clause and the Commerce Clause, the court must apply the limitations of those clauses. The Supreme Court has stated that the Commerce Clause does not "contain[] an affirmative limitation or restriction upon Congress' power."²¹⁹ By contrast, the Copyright Clause does contain limitations. Thus, only the Copyright Clause is relevant at this stage of the analysis.²²⁰ Like most courts and commentators, I will focus on the Copyright Clause's duration and fixation requirements in this Section, although some commentators have suggested that additional limitations in the Copyright Clause exist and should be applied to the anti-bootlegging statutes.²²¹ It is obvious that granting perpetual protection violates the Copyright Clause's duration requirement, and it is probable, although less certain, that the anti-bootlegging statutes protect unfixed works and thus violate the Copyright Clause's fixation requirement.

²¹⁷ See Agreement on Trade-Related Aspects of Intellectual Property Rights, *supra* note 8, art. 7 (setting the objectives of the agreement as protecting and enforcing intellectual property rights "to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and *economic* welfare" (emphasis added)).

²¹⁸ See 3 NIMMER & NIMMER, *supra* note 9, § 8E.05[A] ("Given how broadly the reach of [the Commerce Clause] has been construed, it would be difficult to maintain that accords mandated by the World Trade Organization fall outside the type of trade and commerce that Congress can legitimately regulate." (footnote omitted)).

²¹⁹ *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982).

²²⁰ See *id.* at 467-72 (contrasting the Commerce Clause with the Bankruptcy Clause).

²²¹ See, e.g., Oliar, *supra* note 4, at 489-95 (contending that the anti-bootlegging statutes, when tested against the "Writings" term, the "limited Times" term, the "Authors" term, the "Progress" language, and the originality requirement, may violate the Copyright Clause's restrictive grant of power).

1. Applying the “Limited Times” Requirement

The Copyright Clause states that in securing rights to authors, Congress must give such rights “for limited Times.”²²² The Supreme Court has held that any protection granted under the Copyright Clause must, at some point, end.²²³ Because the anti-bootlegging statutes do not include a statement of duration (i.e., when the protections will expire), the statutes violate this very basic limitation. On this question, courts and commentators agree almost unanimously.²²⁴

The notable exception to this virtual unanimity is Brian Danitz, who argues that the anti-bootlegging statutes are consistent with the “limited Times” requirement “because a live performance is inherently limited in duration.”²²⁵ Dotan Oliar has sufficiently responded to this faulty reasoning, noting that Danitz ignores the anti-bootlegging statute’s prohibitions on broadcasting and trafficking, which are perpetual, and ignores these statutes’ infinite retroactive application, as shown by the *KISS* litigation.²²⁶ The anti-bootlegging statutes plainly violate the “limited Times” requirement under the Copyright Clause and are thus unconstitutional.

2. Applying the Fixation Requirement

The Copyright Clause empowers Congress to protect authors’ “Writings.”²²⁷ The Supreme Court has held this term to mean that copyright protection can only be extended to “any physical rendering of the fruits of creative intellectual or aesthetic labor.”²²⁸ A recorded musical performance falls within this requirement.²²⁹ The question of

²²² U.S. CONST. art. I, § 8, cl. 8.

²²³ See *Eldred v. Ashcroft*, 537 U.S. 186, 199-200 (2003) (recognizing that the Copyright Clause requires that the duration of a copyright be “appropriately ‘limited’”).

²²⁴ See Oliar, *supra* note 4, at 491 & n.127 (“The overwhelming majority of courts and commentators suggest that the anti-bootlegging statutes violate the limited times requirement.”).

²²⁵ Danitz, *supra* note 210, at 1198-99.

²²⁶ See Oliar, *supra* note 4, at 491-92.

²²⁷ U.S. CONST. art. I, § 8, cl. 8.

²²⁸ *Goldstein v. California*, 412 U.S. 546, 561 (1973); see also 1 NIMMER & NIMMER, *supra* note 9, § 1.08[C][2] (“[I]n order for a work to constitute a writing, it must be embodied in some tangible form. If the word ‘writings’ is to be given any meaning whatsoever, it must, at the very least, denote ‘some material form, capable of identification and having a more or less permanent endurance.’” (footnote omitted) (quoting *United States v. Martignon*, 346 F. Supp. 2d 413, 423 (S.D.N.Y. 2004))).

²²⁹ See *Goldstein*, 412 U.S. at 561-62 (stating that a recorded musical performance “may” satisfy the fixation requirement).

whether the anti-bootlegging statutes violate this requirement is more difficult than the duration question. Most courts and commentators that consider the requirement relevant believe the anti-bootlegging statutes violate the fixation requirement because they protect unfixed works, such as live musical performances.²³⁰

This reasoning has one glaring flaw: the performances that the anti-bootlegging statutes protect *have* been fixed—by the infringer. After all, if an audience member heard a live performance one night, committed it to memory, and then perfectly recreated the performance later, either on record or live, she would not violate the anti-bootlegging statutes. Judge Rea recognized this nuanced distinction in *KISS I*.²³¹

The argument that infringement can satisfy the fixation requirement raises interesting questions.²³² If courts accepted the argument, the threshold for fixation, already extremely low, would reach the brink of meaninglessness. This question may ultimately need to be decided on policy grounds. For the fixation requirement to retain any meaning, a line must be drawn. This debate, however, is moot with respect to the anti-bootlegging statutes: the statutes are clearly unconstitutional under the Copyright Clause’s “limited Times” requirement.

CONCLUSION

The Constitution’s complex structure grants the federal government many powers—both broad and narrow in scope—and restricts the exercise of those powers. When two grants of power conflict, a

²³⁰ See, e.g., *Martignon*, 346 F. Supp. 2d at 423-24 (holding that the criminal anti-bootlegging statute violates the fixation requirement). See generally Joseph C. Merschman, Note, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce Clause End Run Around Limits on Congress’s Copyright Power*, 34 CONN. L. REV. 661 (2002) (arguing that the anti-bootlegging statutes clearly violate the fixation requirement of the Copyright Clause and that this limitation cannot be circumvented).

²³¹ *KISS I*, 350 F. Supp. 2d 823, 832 (C.D. Cal. 2004) (“Since the allegedly unauthorized recording has already been made, that existing recording may satisfy the fixation requirement.”), *vacated in part*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

²³² The Copyright Act requires the work’s author to authorize fixation. See 17 U.S.C. § 101 (2006) (defining “fixed” to mean fixed “by or under the authority of the author”). Whether such authorization is *constitutionally* required is a separate question. One interesting answer that future study might explore is that the term “their” in the Copyright Clause requires authorization: if fixation is only accomplished by an infringer, a “Writing” cannot rightly be considered to belong to the author. See U.S. CONST. art I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to *their* respective Writings and Discoveries” (emphasis added)).

fundamental question of constitutional interpretation arises. Such a situation rarely occurs, but the anti-bootlegging statutes present a perfect model for understanding and confronting the constitutional question of inter-clause conflicts.

In this Comment, I presented various judicial and scholarly approaches to inter-clause conflicts, demonstrating their inadequacies while highlighting their useful features. I offered my own proposal, “holistic categorization,” as a plausible solution.

I do not offer this approach as a panacea. Rather, I acknowledge that the approach may possess its own flaws. For example, by eschewing strict rules in favor of a multitude of factors that are weighed differently on a case-by-case basis, the holistic categorization approach might be faulted for being unpredictable. Nonetheless, I argue that this approach is the best means of analyzing inter-clause conflicts. In fact, a lack of predictability may be beneficial. If courts assert constitutional limitations, Congress may be forced to consider whether it possesses the authority to undertake actions before legislating, rather than assuming that its power is unlimited (as it appears to have done with respect to the anti-bootlegging statutes).²³³ The approach may also force Congress to consider whether the action it wishes to take aligns with the policy objectives underlying the Constitution’s grants of power, and this surely cannot be viewed as a negative outcome.

My hope is that this Comment contributes to the emerging legal literature on inter-clause conflicts. As scholars debate this difficult issue, useful thoughts and methods continue to emerge. My analysis has far from exhausted the topic. Additional questions, such as whether the practical effect of holistic categorization will be beneficial from a legislative, judicial, or even societal standpoint and whether other possibilities for inter-clause conflicts exist, are open to future examination. My hope is that this Comment will take the debate one step further, forcing courts and commentators to consider difficult issues of constitutional limitations and underlying policy and adding another voice to the longstanding discussion of the Constitution and its limitations.

²³³ At the start of the 112th Congress, the House of Representatives amended its rules to require a member who introduces legislation to submit “a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.” H.R. Res. 5, 112th Cong. (2011) (enacted). Such a statement from the sponsor of legislation would certainly be a useful, though far from determinative, consideration in the holistic categorization analysis. One can wonder whether Congress might have given thought to the constitutional limitations of the Copyright Clause had this rule been in effect at the time of the anti-bootlegging statutes’ passage.