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Constitutional Purpose and Inter-clause Conflict: The Constraints Imposed on Congress by the Copyright Clause

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COMMENT

CONSTITUTIONAL PURPOSE AND INTER-
CLAUSE CONFLICT: THE CONSTRAINTS
IMPOSED ON CONGRESS BY THE
COPYRIGHT CLAUSE

Andrew M. Hetherington*

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INTRODUCTION

*The Congress shall have the Power 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.*¹

*The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.*²

A series of recent cases challenging the constitutionality of congressional expansions of the duration and scope of copyright protection focused considerable attention on the so-called preamble to the Copyright Clause, which requires that congressional action “promote the Progress of Science and useful Arts.”³

In *United States v. Moghadam*,⁴ the Eleventh Circuit examined whether congressional extension of copyright protection to live musical performances furthers the promotion of progress as required by the Copyright Clause.⁵ In *Universal City Studios, Inc. v. Corley*,⁶ the Second Circuit noted that the “fair use” doctrine, which permits limited unlicensed copying for academic or journalistic purposes,⁷ is designed to better serve the “very purpose” of copyrights laid down in the Copyright Clause: promoting progress.⁸ And in *Eldred v. Ashcroft*,⁹ the Supreme Court considered whether, in light of the “preambular statement of purpose” contained in the Copyright Clause, a twenty year extension of existing copyrights is unconstitutional.¹⁰

The argument that the preamble of the Copyright Clause provides a strict constraint on congressional intellectual property legislation has met

1. U.S. CONST. art. I, § 8, cl. 8.

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

3. U.S. CONST. art. I, § 8, cl. 8.

4. 175 F.3d 1269 (11th Cir. 1999) (upholding the Anti-Bootlegging Act of 1994, 18 U.S.C. § 2319A).

5. *See id.* at 1280.

6. 273 F.3d 429, 444 (2d Cir. 2001) (rejecting a challenge to the 1998 Digital Millennium Copyright Act, 17 U.S.C. § 1201 *et seq.* on the grounds that it eliminates fair use of copyrighted materials).

7. *See* 17 U.S.C. § 107.

8. *See Universal City Studios*, 273 F.3d at 458.

9. 123 S. Ct. 769 (2003).

10. *See id.* at 771–72, 777–78 (rejecting a challenge to the 1998 Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827).

with broad support among legal academics,¹¹ but it is viewed with some skepticism by the judiciary. The Supreme Court did acknowledge in *Eldred* that intellectual property legislation must, in at least some sense, promote the progress of science,¹² but stressed that it is for Congress, not the courts, to decide what does and does not promote progress.¹³ The Court specifically rejected a “stringent” form of rational basis review for Copyright Clause enactments proposed in Justice Breyer’s dissent,¹⁴ noting that the Court will “defer substantially” to congressional findings that a particular measure will promote progress.¹⁵

This Article examines the wisdom of the “preambular argument,” but it also addresses a more important question that has likewise been the subject of a divergence of opinion between academics and the judiciary: are all the arguments about the Copyright Clause preamble actually moot? Even in the event that the preamble of the Copyright Clause is found to sharply limit congressional action under that clause, Congress might simply enact intellectual property legislation under its commerce power. Who, after all, could deny that intellectual property rights implicate interstate commerce? The prevailing view among legal academics is reflected by William Patry’s argument that Congress may not “ignore the restrictions on its power contained in one clause merely by legislating under another clause” such as the Commerce Clause.¹⁶ But the Eleventh Circuit reached just the opposite conclusion in *Moghadam*, finding 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

11. See, e.g., Brief *Amici Curiae* of Copyright Law Professors in Support of the Petition for a Writ of Certiorari at 5, *Eldred v. Ashcroft*, (No. 01-618) *cert. granted*, 122 S. Ct. 1062 (2002) (“[i]f an enactment cannot plausibly be said to be directed towards [promoting the progress of science and useful arts], therefore, it is outside the scope of the [copyright] power.”); Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 540 (2000) (“From a contemporary perspective, the *Trade-Mark Cases* establish the important principle that the Intellectual Property Clause constrains congressional power.”).

12. *Eldred*, 123 S. Ct. at 785.

13. *Id.* For a discussion of how *Eldred* has been, and will likely be, received by legal academics, see Pamela Samuelson, *The Constitutional Law of Intellectual Property After Eldred v. Ashcroft*, 50 J. Cop. Soc’y (forthcoming 2003).

14. *Id.* at 781 n.10.

15. *Id.* at 781.

16. William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 371 (1999); see also, e.g., Benkler, *supra* note 11, at 538–39; Theodore H. Davis, Jr., *Copying in the Shadow of the Constitution: The Rational Limits of Trade Dress Protection*, 80 MINN. L. REV. 595, 640 (1996); Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 63–64 (2000); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 60 (1999).

can be sustained under another.”¹⁷ As such, the *Moghadam* court held that “in some circumstances the Commerce Clause indeed may be used to accomplish that which may not have been permissible under the Copyright Clause.”¹⁸

In Part I, I examine the text and historical origins of the Copyright Clause itself, and consider arguments that the “promote progress” requirement is not really a purposive preamble at all. I argue that the opening text of the clause does constitute a purposive limitation on congressional action that courts must take seriously, whether we actually use the term “preamble” or not.

In Part II, I examine the practical import of this limitation in light of constitutional case law and doctrine. I conclude that although a reading of the progress requirement as a purposive preamble suggests that courts ought to be less deferential to congressional assurances of compliance than would normally be required by limiting language in the Constitution, any consequent scrutiny would be meaningless if, as the *Moghadam* court held, Congress may simply bypass the constraints of the Copyright Clause by legislating under the Commerce Clause.

In Part III, I consider four different ways to assess whether action under one constitutional clause impermissibly conflicts with the limitations imposed by a different clause and, if a conflict is found, determine which should take precedence. I argue that one must consider the relationship between the constitutional purposes of the respective clauses in order to successfully analyze such conflicts.

Finally, in Part IV, I use the purposive analysis just described to examine potential conflicts between the Copyright Clause and intellectual property legislation passed under the auspices of the Commerce Clause. I suggest that although there is no necessary conflict between the two, legislation could nonetheless run afoul of the Copyright Clause preamble while passing muster under the commerce power.¹⁹ In those cases, I argue, judicial weighing of the rival purposive goals involved will be aided by employing the anti-monopolistic and pro-free expression goals of the copyright preamble. Thus, courts should not only ensure that Commerce

17. *United States v. Moghadam*, 175 F.3d 1269, 1277 (11th Cir. 1999) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)).

18. *Id.* at 1280. The court did assume, *arguendo*, that the Commerce Clause may not be so used if the legislation at issue were “fundamentally inconsistent” with the constraints imposed by the Copyright Clause, but found no such inconsistency in the legislation before the court, and therefore upheld the Anti-Bootlegging Act of 1994 as a constitutional exercise of the commerce power. *Id.* at 1280 n.12, 1282.

19. For example, legislation giving Disney intellectual property rights in public domain novels, such as *Treasure Island*, that have been adapted into successful animated movie franchises may well be permissible under the Commerce Clause, but not the Copyright Clause.

Clause intellectual property legislation has the purpose of promoting the progress of science and the useful arts, but also should employ exacting scrutiny when reviewing congressional assertions that this is the case.

I. THE PURPOSIVE COPYRIGHT CLAUSE: IS THE PREAMBLE REALLY A PREAMBLE?

A. *Why Wouldn't We Treat the Promote Progress Requirement as a Preamble?*

Although the Copyright Clause is often described, by both the courts and legal scholars,²⁰ as having a preamble, many commentators are unsure if the copyright preamble is a “real” or “full-fledged” preamble of the type beginning the Second Amendment²¹ or the Constitution as a whole.²² For example, Eugene Volokh writes that “[t]he Second Amendment, unusually for constitutional provisions, contains a statement of purpose as well as a guarantee of a right to bear arms.”²³ He acknowledges, however, that other commentators have also identified the Copyright Clause as having a similarly purposive structure.²⁴ Sanford Levinson, also discussing the preamble to the Second Amendment, states that “no similar clause is part of any other amendment,”²⁵ but drops an ambiguous footnote to that claim, offering the Copyright Clause as a “*cf., e.g.,*”²⁶ suggesting that there may even be other similar clauses, aside from the Copyright Clause. And John Hart Ely offers his own vague footnote in this context: after noting that the Second Amendment, “as almost nowhere else” has its “own little preamble,”²⁷ he “*but cf.*”s the Copyright Clause,²⁸ even though the presence of another example does not contradict his point.

20. See, e.g., *Eldred*, 123 S. Ct. at 777; Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1148; Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1449 n.461 (1989); Malla Pollack, *supra* note 16, at 60.

21. U.S. CONST. amend. II.

22. U.S. CONST. pmbl.

23. Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793 (1998).

24. *Id.* at 793 n.1.

25. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 644 (1989).

26. *Id.* at 644 n.38.

27. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 95 (1980).

28. *Id.* at 227 n.77.

There are two reasons why one may hesitate to consider the opening phrase of the Copyright Clause²⁹ as a preamble, at least in a full-fledged, broadly purposive sense analogous to the Preamble of the Constitution as a whole or the Second Amendment. First, unlike either of these two preambles, the opening phrase of the Copyright Clause does not indicate why its purposive requirement is a good thing to achieve.³⁰ In one sense, of course, we could view all of the Article I, Section 8 powers as impliedly good things; why else would Congress be given the power to establish post offices,³¹ for example, unless that was considered desirable? And in that sense, the promotion of progress is no less plausibly a beneficial governmental activity than those made possible in other Section 8 clauses. But that sense of desirability does nothing to distinguish the Copyright Clause from its neighbors, which undermines the main thrust of these arguments seeking to present the Copyright Clause as unique within Section 8 by virtue of its opening phrase.

Both the preamble to the Constitution, which states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America,³²

and the preamble of the Second Amendment, which states, somewhat more prosaically, "A well-regulated militia, being necessary to the security of a free State,"³³ make clear not only what is being done, but why it is desirable to do so. The Copyright Clause, on the other hand, does neither. At the very least, then, if the Copyright Clause does have a preamble, it remains distinct.

Even if, *arguendo*, we read the preamble as if it were written, "The promotion of progress being necessary to the well-being of a free State, Congress shall have the power to grant limited copyrights," there is a second reason for doubting that the opening clause should be treated as a purposive preamble. The preambles to the Constitution and the Second Amendment both refer to a purpose that is broader than, and extrinsic to, the document or amendment that follows. A purpose, in other words, that

29. "The Congress shall have the Power To promote the Progress of Science and useful Arts . . ." U.S. CONST. art. I, § 8, cl. 8.

30. By contrast, the opening phrase of the Second Amendment, "A well-regulated militia, being necessary to the security of a free State," does demonstrate why such action is desirable.

31. *See* U.S. CONST. art. I, § 8, cl. 7.

32. U.S. CONST. pmbl.

33. U.S. CONST. amend. II.

may be furthered in several different ways, including, but not limited to, the one specified. There is no sense in the Preamble to the Constitution that ordaining and establishing the Constitution was the only thing that might permissibly be done by the people of the United States in order to perfect their union, establish justice, and so on. Nor, in the case of the Second Amendment, is there any reason to believe that Congress may not take any steps to sustain well-regulated militias other than merely refraining from abridging the right to bear arms.

In contrast, the Copyright Clause severely limits the means by which progress may be promoted. It requires that copyrights be secured “for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³⁴ It does not simply require that if Congress should happen to choose copyrights as a method of promoting progress, then they must be of limited duration; it appears to require that if Congress intends to promote the progress of science and the useful arts, then it must do so by, and (in light of the Tenth Amendment)³⁵ only by, issuing term limited copyrights. This degree of specificity would be out of place if promoting progress were meant as a general good that could be served in many different ways. The Copyright Clause appears to forbid, for example, offering government subsidies to publishers or researchers designed to promote scientific development.³⁶

There seems then, at least some reason to hesitate before reading the Copyright Clause as containing a purposive preamble. But if the “promote progress” part of the clause is not a preamble, a rather pointed question suggests itself: what exactly is it?

B. If The Promote Progress Requirement is Not a Preamble, What is it?

There are three other potential interpretations of the Copyright Clause that can account for its opening phrase. Those interpretations are: (1) promoting progress is not a *purpose* included in the Constitution to limit congressional use of the power granted by the Copyright Clause, but is itself the *power* granted by the clause; (2) the clause actually

34. U.S. CONST. art. I, § 8, cl. 8.

35. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

36. Interestingly, the Copyright Clause also seems to forbid Congress from refusing to offer copyrights in the first place, at least if that refusal is made in the name of progress. Although Congress could presumably get around this problem by declaring that it has simply decided not to exercise its option of promoting art and science, it may not wish to make such a broad declaration. Doing so would implicate all nationally funded science projects, including those that may not require the Copyright Clause for authorization, for example, NASA or military related research.

contains two grants of power to Congress—to promote progress, and to grant limited term copyrights; and (3) the progress requirement is indeed a purposive preamble, but in a more modest and restrictive sense than the broad purposive preambles of the Second Amendment and Constitution as a whole.³⁷

1. Promoting Progress as a Power, Not a Purpose

Judge Sentelle of the D.C. Circuit, dissenting in *Eldred v. Reno*,³⁸ argued that promoting progress is not a purpose that should inform the use of the copyright power, but is instead the actual power granted to Congress by the clause. Granting limited term copyrights is simply the specified means by which that power is to be wielded by Congress. His dissenting opinion states:

[The Copyright Clause] empowers the Congress to do one thing, and one thing only. That one thing is “to promote the progress of science and the useful arts. How may Congress do that? ‘By securing for limited times to authors and inventors the exclusive right to their respective rights and discoveries.’” The clause . . . is a grant of power to promote progress.³⁹

This description suggests that the Copyright Clause is less analogous to the Second Amendment than it is to Article I, Section 8, Clause 12, which provides that: “The Congress shall have the Power To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”⁴⁰ True, the Copyright Clause is somewhat more flexible in its specification of the means by which Congress may wield the granted power, insofar as it merely demands “limited times” rather than a maximum of two years, but the basic structure is the same. The clause grants a power, and then limits the means by which that power may be used.⁴¹

37. This view is found to be the most plausible of the three. See *infra* sections I.B.3 & I.C.

38. 239 F.3d 372 (D.C. Cir. 2001), *aff'd sub nom.* *Eldred v. Ashcroft*, 123 U.S. 769 (2003).

39. *Id.* at 381.

40. U.S. CONST. art. I, § 8, cl. 12.

41. The infrequency with which this reading is proposed in litigation may be somewhat surprising, given that it would support the arguments made in *Eldred*, *Moghadam*, and *Universal City Studios* that Congress must restrict action under the Copyright Clause to that which promotes progress, but there are tactical reasons parties seeking to restrain congressional expansions of copyright protection might balk at such a move. The Copyright Clause, so understood, would be just one more specific and limited grant of power in Article I, Section 8, with the same lack of implications for other constitutional provisions as its neighbors. This would undermine any attempt to argue that the progress limitation of the Copyright Clause

This reading is facially plausible, but it does nothing to solve the problem that confronted the expansive purpose reading it is supposed to replace. Unlike Clause 12, which includes a negative constraint upon what may be considered necessary and proper methods of raising armies, the main body of the Copyright Clause is phrased as a positive power to grant limited time property rights. If the Copyright Clause is intended to grant Congress the power to promote progress, why specify the one and only means by which this can be done? In fact, in the context of Article I, Section 8, it would not only be odd, but a uniquely, and implausibly egregious example of pre-commitment, akin to adding to Clause 13 the precise number of times a year that ships must undergo scheduled maintenance,⁴² or to Clause 15 the particular mode of communication by which the militia is to be called forth.⁴³

Furthermore, it seems strange that the power to promote progress would be mentioned at all, unless it was intended as a purposive element in the clause. If the only means by which Congress may promote progress is by issuing copyrights, then the power granted by the clause is not *to-promote-progress*, but rather *to-promote-progress-by-issuing-copyrights*, which in practice really just means the power to issue copyrights. There would be no reason to specify in the clause why the Framers thought this power important (to promote progress) unless this purpose was somehow designed to guide Congress in deciding how and when to issue copyrights. But in that case, the opening phrase of the clause is less a power in itself, as Judge Sentelle believes, than it is a purposive guiding principle, or preamble.

should also be applied to overlapping legislation passed under the commerce power. *See infra* section IV. Further, the requirement that congressional promotion of progress be effected through time-limited intellectual property rights would appear, on this reading, to be merely a secondary aspect of the Copyright Clause—a suggestion, perhaps, of how best to achieve this end, but by no means a strict requirement that all progress-promotion efforts be restricted to that particular method. This implication would run counter to efforts to attack the constitutionality of copyright extensions such as the Copyright Term Extension Act, *see supra* note 10, on the grounds that they constitute an end-run around the limited times requirement. *See, e.g.*, Petition for a Writ of Certiorari at 2, *Eldred v. Ashcroft*, (No. 01-618), *cert. granted*, 122 S. Ct. 1062 (2002) (“Congress has now found a clever way to evade this simple constitutional command. By repeatedly extending the terms of existing copyrights—as it has eleven times in the past forty years—Congress has adopted a practice that defeats the Framers’ plan by creating in practice an unlimited term.”).

42. *See* U.S. CONST. art. I, § 8, cl. 13.

43. *See* U.S. CONST. art. I, § 8, cl. 15. *But cf.* *Chisholm v. Georgia*, 2 U.S. 419, 474–75 (1793) (Jay, C.J., dissenting) (stating that the “precise sense and latitude” in which the preambular phrase “to establish justice” is to be understood is provided by the Article III, Section 1 provision that “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).

2. Two Distinct Powers: To Promote Progress, and to Grant Copyrights

The Copyright Clause is the only clause in Article I, Section 8 into which it makes sense to read a distinction between the part of the clause that grants power and the part that specifies the purpose of that power. One can inquire as to the purpose of including certain powers in the Constitution in the first place, such as the power to establish post offices, but when we examine whether a given law is "necessary and proper"⁴⁴ to exercise that power it makes no difference whether we ask if a given law is necessary and proper to establish post offices or to further the purpose of establishing post offices. Only in the Copyright Clause does there appear an internal, textual invitation to consider the purpose for which its power is wielded on each particular occasion.

It is clear that both parts of the Copyright Clause can be understood as powers, not purposes. On this reading the Clause grants both the power to issue limited term copyrights and the power to promote progress. As such, one might argue that the clause should actually be understood not as comprising a purpose and a power, or a power and a limitation, but as comprising two distinct powers. Certainly the "necessary and proper" question in each case is quite different: asking whether a given law serves to promote progress is by no means the same as asking whether it serves to grant limited term property rights. Considered as two governmental functions, promoting progress and issuing intellectual property rights need not necessarily be conjoined into a single power.

Interestingly, the records of the constitutional convention suggest that the Framers may have understood promoting progress and issuing property rights to be potentially independent powers. As late as August 18, 1787, the following distinct provisions were under consideration by the convention: 1) to secure to literary authors their copy rights for a limited time; 2) to encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; and 3) to establish seminaries for the promotion of literature and the arts and sciences.⁴⁵ It was not until September 10, 1787, that the Committee of Style presented a version of the Copyright Clause resembling the final, adopted, draft.⁴⁶ This late development is compatible with the idea that promoting progress and issuing rights were understood to be distinct powers that could, in theory, be asserted independently of each other, but which were in fact

44. See U.S. CONST. art. I, § 8, cl. 18.

45. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 321-22 (Max Farrand ed., rev. ed. 1986).

46. See *id.* at 570.

combined in the final draft of the Constitution so that they would have to be exercised in unison.

On this “twin powers” reading, judicial review of congressional action under the Copyright Clause would involve a two-part test: is the legislation in question necessary and proper to both (a) promote progress, and (b) grant a limited term property right to authors and inventors. If the legislation failed to pass both parts of this test, it would be unconstitutional, at least as an exercise of the copyright power.⁴⁷ Such a test would avoid the problems inherent in determining whether Congress acted with the required expansive purpose and would also avoid the oddness problem faced by Judge Sentelle’s “power and limitation” interpretation. It cannot avoid a different problem of its own, however, which is that this reading of the clause appears to be hoist on its own textual petard. It urges us to restrict ourselves to the content of the Constitutional text but ignores the term “by” that conjoins the two halves of the clause. Judge Sentelle seems to be correct on this score—the plain meaning of the text is that the clause grants a power and then specifies the means by which it may be effected. There is no more reason to read ambiguity into this “by” than there is with respect to the same term in Article I, Section 8, Clause 17, which reads in part: “[S]uch District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.”⁴⁸ Just as it is clear that whatever district was to become the seat of government had to be provided through cession and acceptance, it is also clear that whatever Congress may do under the Copyright Clause must be done by issuing limited term property rights to authors and inventors.

3. A Preamble, But With a Limited Purpose

The third way to read the Copyright Clause is probably the most common: to see the progress requirement as being, after all, a purposive preamble, but one that is directed solely towards the power specified in the remainder of the clause—issuing copyrights and patents. On this view, Judge Sentelle was on the right track, but had it backwards. The Copyright Clause gives Congress the power to grant limited term intellectual property rights for the purpose of, and only for the purpose of, promoting science and the useful arts. Unlike a more expansive view of the preamble’s purposive character, this reading does not see the progress requirement as the *raison d’etre* of the Copyright Clause, and certainly not as a license for general government action in its service.

47. The possibility that congressional action could be justified by the commerce power is considered below. See *supra* Sections II.c & IV.

48. U.S. CONST. art. I, § 8, cl. 17.

Rather, this reading treats the progress requirement simply as a binding guide for congressional (or judicial) understanding of the power to grant term limited copyrights.

This reading can be supported on two different grounds: 1) by the debate about the proper justification for intellectual property rights surrounding the clause's adoption, and 2) by a contemporary analysis of the relationship between the Copyright Clause and the First Amendment.

a. Original intent. The framers of the Constitution were confronted with, broadly speaking, the same two theoretical justifications for intellectual property rights that are still debated today: the natural right of an individual to own the fruit of her own (intellectual) labor,⁴⁹ and a more instrumentalist theory by which limited intellectual property rights provide an incentive to produce creative and useful works of art and scholarship for the benefit of all.⁵⁰

In early eighteenth-century England, the "Statute of Anne" marked a recognition of the instrumentalist, incentive-minded view of copyrights by granting statutory intellectual property rights but limiting the monopolies thereby created to periods ranging from fourteen to twenty-one years.⁵¹ The statute was even subtitled "An Act for the Encouragement of Learning."⁵² Even when laid down by statute, however, this utilitarian vision of intellectual property was not always able to withstand the challenge of natural rights theories. As Alfred Yen recounts, English courts initially refused to recognize the Statute of Anne's abridgment of copyrights, on the grounds that natural justice required enforcement of common law rights of occupancy in intellectual property even after the statutory protection had expired.⁵³

49. See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *405 (1765) (analogizing intellectual property to tangible property as a matter of "original and natural right"); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L.J. 517, 517 (1990) (tracing the history of the natural rights view of intellectual property and advocating a return to that theory in contemporary intellectual property jurisprudence).

50. See, e.g., *Memorandum from John Locke to Edward Clarke*, in PETER KING, THE LIFE AND LETTERS OF JOHN LOCKE 208–09 (G. Bell, 1884) (arguing for limited property rights on grounds that issuing "patents for the sole printing of ancient authors is very unreasonable and injurious to learning"), quoted in MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 32–33 (Harvard Univ. Press 1993).

51. 8 Ann., c. 19 (1709) (Eng.), reprinted in HARRY RANSOM, THE FIRST COPYRIGHT STATUTE AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710 109–17 (Univ. of Tex. Press 1956); see also LYMA RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 143–50 (Vanderbilt Univ. Press 1968) (analyzing the statute's provisions).

52. See RANSOM, *supra* note 51, at 109.

53. See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L.J. 517, 527–28 (1990) (recounting the holding in *Millar v. Taylor*, 98 Eng. Rep. 201, 218, 220, 252 (1769)). Five years later, this holding was overruled in *Donaldson v.*

In America, the utilitarian view was more decisively victorious, most likely because of the powerful fear of monopolies that underlay much of the discussion about copyrights. Jefferson, for example, who thought that the Constitution would have been much improved by a bill of rights protecting against monopolies,⁵⁴ conceded that a complete absence of monopoly rights to intellectual property “lessens the incitements to ingenuity,” but nonetheless wrote that “the benefit of even limited monopolies is too doubtful to be opposed to that of their general suppression.”⁵⁵

James Madison, on the other hand, wondered whether, even though monopolies are “justly classed among the greatest nuisances in government,”⁵⁶ was it not also true that “as encouragements to literary works and ingenious discoveries” limited monopolies such as copyrights were not “too valuable to be wholly renounced?”⁵⁷ The promotion of science and useful arts was certainly regarded in the early republic as an instrumental aspect of the diffusion of knowledge.⁵⁸ For example, the Massachusetts Constitution of 1780 provided that:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; . . . it shall be the duty of legislatures and magistrates . . . to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences . . .⁵⁹

In this vein, Madison’s argument was that the admitted dangers of monopolies were outweighed by the positive effects of issuing copyrights. Intellectual property rights, just as much as public universities, were necessary to realize the significant public goods resulting from promoting invention and disseminating ideas.

Beckett, 1 Eng. Rep. 837 (1774). See *Yen* at 527–28. In the United States, *Wheaton v. Peters*, 62 U.S. 322, 327–28 (1858) firmly rejected the argument that there existed a common law right to copyright protection over and above the federal statutory grant thereof. See *Yen* at 529–30.

54. See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian Boyd ed., 1956).

55. Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 440, 443 (Julian Boyd ed., 1956).

56. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 300 (Robert Rutland et al. eds., 1977).

57. *Id.*

58. See Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing The Progress Clause*, 80 NEB. L. REV. 754, 756–58 (2001) (arguing that the term “progress” was for the most part used during this era to refer to the dissemination, not improvement, of knowledge).

59. MASS. CONST. of 1780 Ch. 5, § 2.

By 1813, even Jefferson conceded that he had been won over by the incentive view. Although he remained steadfast in his belief that ideas were not property to which anyone had a natural right, he allowed that “[s]ociety may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.”⁶⁰

The evidence suggests, then, that the inclusion of the Copyright Clause in the Constitution represented a wary, perhaps even grudging compromise. As late as August 18, 1787, the power to issue copyrights was on the table in Philadelphia as a potentially free-standing provision of the Constitution, but ultimately was included only with the addition of a preamble specifying that the purpose of that power was a widely recognized component of the general welfare—the promotion of progress. The preamble was, on this reading, a permanent reminder to Congress and the people that intellectual property rights were not being recognized as natural rights akin to those belonging to occupiers of land, but only as instrumental incentives to the production and dissemination of ideas. The Supreme Court reiterated this point, stating:

It is undeniably true, that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless primary object in granting and securing that monopoly. . . . The true policy and ends of the patent laws enacted under this Government are disclosed under that article of the Constitution, the source of all these laws, viz: “to promote the progress of science and the useful arts . . .”⁶¹

This view continues to have currency today. As the Supreme Court noted in *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁶² “The primary objective of copyright is not to reward the labor of authors, but to “promote the Progress of Science and the useful Arts.”⁶³

b. The Copyright Clause and the First Amendment. We do not have to rely on evidence about the framers’ intent, however, to find support for the “limited purpose preamble” view of the Copyright Clause. As Rebecca Tushnet has argued, if the Copyright Clause is not interpreted as being designed to promote progress in the sense of facilitating the free

60. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in THOMAS JEFFERSON: WRITINGS 1286, 1292 (Merrill Peterson ed., 1984).

61. *Kendall v. Winsor*, 62 U.S. 322, 327–28 (1858).

62. 499 U.S. 340 (1991).

63. *Id.* at 349 (quoting U.S. CONST. art. I, §8, cl.8).

exchange of ideas, it may actually be unconstitutional.⁶⁴ Tushnet notes the tension between the First Amendment requirement that “speech belongs to no one,”⁶⁵ and the Copyright Clause implication that “speech belongs to someone.”⁶⁶ She argues that the supposedly remedial measures built into copyright law, such as fair use and the idea/expression distinction not only fail to resolve this tension, but actually exacerbate it by creating a confusing body of law that is likely to chill speech through the uncertain prospect of liability for inadvertent copyright infringement.⁶⁷ She concludes that the constitutionality of legislation under the Copyright Clause, in light of the First Amendment, “depends on the fact that the government interest underlying copyright is the promotion of speech.”⁶⁸

Tushnet believes that copyright promotes speech by providing precisely the kind of economic incentive to authors, inventors, and publishers that was the aim of the Framers.⁶⁹ One of the key reasons why providing an economic incentive to write and publish serves the interest of free speech is that it provides the financial means for the effective dissemination of creative output to listeners and readers, who provide a critical half of the speaker/listener combination that makes possible freedom of speech and expression.⁷⁰ By *not* providing copyright protection, then, the government would interfere with the spread of ideas and expression, resulting in an impoverished marketplace of ideas.⁷¹ Interestingly, Tushnet’s description of the role of copyright as part of the “engine of freedom of expression”⁷² gels nicely with both Pollack’s claim that “progress” in the context of the Copyright Clause was most likely intended to mean “dissemination” rather than “improvement,”⁷³ and the Framers’ concern for avoiding a monopoly on information.⁷⁴

Thus, the limited purpose preamble view of the Copyright Clause seems plausible both in terms of original intent and a more modern

64. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common With Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 35 (2000).

65. *Id.* at 5.

66. *Id.* at 6.

67. *See id.* at 19–27.

68. *Id.* at 35 (relying upon the holding of *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985), which stated, “[t]he Framers intended copyright itself to be an engine of free expression . . . copyright supplies the economic incentive to create and disseminate ideas”).

69. *See* Tushnet, *supra* note 64, at 36.

70. *Id.* at 36–37.

71. *Id.* at 37.

72. *Harper & Row*, 471 U.S. at 558.

73. Pollack, *supra* note 58, at 756–58.

74. *See supra* notes 54–57 and accompanying text.

structural argument. As we will see below,⁷⁵ however, the difficulty with this view, as opposed to the problematic “expansive preamble” view, is that it is not easy to explain why it would apply to intellectual property legislation enacted under, say, the Commerce Clause.

C. Conclusion

In light of the above historical and contemporary evidence, the “limited purpose preamble” interpretation seems the most plausible. The preamble to the Copyright Clause constrains Congress by stipulating that although copyrights can theoretically be justified in different ways, the actual Section 8 grant to Congress of the right to issue copyrights is to be understood only as an instrumental means of promoting the progress of science and the useful arts.

There is some evidence that the Supreme Court agrees with this view and understands the preamble to the Copyright Clause to limit congressional authority in this way. The Court stated that “[a]s we have noted in the past, the Clause contains both a grant of power and certain limitations upon the exercise of that power.”⁷⁶ The *Feist* Court took this limitation quite seriously when it found copyright protection for raw facts unconstitutional, notwithstanding the “sweat of the brow” exerted in their compilation.⁷⁷ The denial of that protection “is neither unfair nor unfortunate . . . [i]t is the means by which copyright advances the progress of science . . .”⁷⁸ And, before *Eldred*, the courts of appeals generally followed the Supreme Court’s lead in this respect.⁷⁹

Even when the Supreme Court has not described the clause explicitly in terms of progress, there has been an underlying theme consistent with the copyright power’s purpose of serving the public good. For ex-

75. See *infra* section III.

76. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989); see also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (“We have often recognized the monopoly privileges that Congress has authorized, while ‘intended to motivate the creative activity of authors and inventors by the provision of a special reward,’ are limited in nature and must ultimately serve the public good.”) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

77. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991).

78. *Id.*

79. See, e.g., *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 1999) (“[t]he Founding Fathers gave Congress the power to give authors copyrights in order ‘to promote the progress of Science and useful arts . . .’”) (quoting U.S. Const. art. I, §8, cl.8); *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979) (“Congress’ power under this Clause is limited to action that promotes the useful arts.”); *Frantz Mfg. Co. v. Phenix Mfg. Co.*, 457 F.2d 314, 327 n.48 (7th Cir. 1972) (“The congressional power to grant monopolies for ‘Writings and Discoveries’ is likewise limited to that which accomplishes the stated purpose of promoting ‘the Progress of Science and useful Arts.’”) (quoting *Lee v. Runge*, 404 U.S. 887, 890 (1971)).

ample, the Court stated “the ultimate aim [of copyright] is, by this incentive, to stimulate artistic creativity for the public good.”⁸⁰ The only part of the Copyright Clause that would warrant such a description is the preamble.

Furthermore, it is only by holding Congress to the purpose of the Copyright Clause, as provided in the preamble, that the Court can justify its holding that copyright protection may not be extended to something already in the public domain. As the Court explained in *Graham v. John Deere Co.*,⁸¹

Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must “promote the Progress of . . . useful Arts.”⁸²

Other than the “promote progress,” incentive-to-create requirement in the preamble, there is nothing in the Copyright Clause suggesting that intellectual property rights may not be issued to works in the public domain provided that those rights are of limited duration.

II. TO WHAT EXTENT DOES THE PREAMBLE ACTUALLY CONSTRAIN CONGRESS?

Assuming the preamble of the Copyright Clause does indeed constrain the actions of Congress, it is unclear whether those constraints are extensive. In fact, there are two reasons for believing that they are negligible. First, the degree of deference traditionally given to congressional determinations of the constitutionality of legislation is so extensive that

80. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

81. 383 U.S. 1 (1966).

82. *Id.* at 6. In their *cert.* petition, in *Eldred v. Ashcroft*, attorneys for Eldred make a version of this argument, and also suggest that the Court’s requirement that copyright only be extended to original works indicates this type of reliance on the purposive limitations of the preamble. *See* Petition for a Writ of Certiorari at 13, *Eldred v. Ashcroft*, (No. 01-618) *cert. granted*, 122 S. Ct. 1062 (2002); (citing *Feist*, 499 U.S. at 345 (“The *sine qua non* of copyright is originality”). The argument here is that because the term “writings” in the Copyright Clause could just as well mean non-original as original writings, the originality requirement cannot have been derived from the plain language of the clause but must derive from the preambulatory purpose of promoting progress. *See* Petition for Cert. at 13. This argument seems considerably weaker, though, than that concerning the prohibition on removing works from the public domain, because even if the term “writings” is ambiguous, the phrase “their writings” is less so, and the term “inventions” is not at all. *See* U.S. CONST. art. I, § 8, cl. 8.

requiring Congress to adhere to the “promote progress” condition would in effect merely require Congress to accompany any extension of copyright with a statement that doing so will promote progress. Second, although there are some grounds for believing that the preambulatory character of the Copyright Clause’s limitation might make courts less deferential to Congress when evaluating congressional action under that particular clause, it is not clear that the preamble of the Copyright Clause can be understood to constrain congressional action under the authority of other constitutional provisions, such as the Commerce Clause.

A. *Judicial Treatment of Limiting Language in General*

Several constitutional provisions contain limiting language of some form, either purposive, such as the requirement that compensated takings of private property be for public use,⁸³ or technical, such as the necessity that bankruptcy laws be uniform.⁸⁴

When the constitutional text is unambiguous, these constraints are rigidly applied. For example, Article I, Section 8, Clause 12 permits Congress to “raise and support armies,”⁸⁵ but specifies that “no Appropriation of Money to that Use shall be for a longer Term than two Years.”⁸⁶ As the Court noted in the *Legal Tender Cases*,⁸⁷ “[a]ppropriations to execute those powers may be made by Congress, but no appropriations of money to that use can be made for a longer term than two years, as an appropriation for a longer term is expressly prohibited by the same clause which confers the power to raise and support armies.”⁸⁸

The Supreme Court has even expanded the scope of a constitutional constraint beyond the apparent textual requirements of the provision in question.⁸⁹ The Eleventh Amendment states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . .”⁹⁰ This restriction, read literally, not only appears to apply exclusively to the Article III jurisdiction of federal courts, but arguably applies even then only to suits premised on diversity

83. U.S. CONST. amend. V.

84. U.S. CONST. art. I, § 8, cl. 4.

85. U.S. CONST. art. I, § 8, cl. 12.

86. *Id.*

87. 79 U.S. 457 (1870).

88. *Id.* at 613–14.

89. See *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 122 S. Ct. 1864, 1871 (2002) (“the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment”).

90. U.S. CONST. amend. XI.

jurisdiction.⁹¹ The Supreme Court, however, has found that Eleventh Amendment sovereign immunity also protects states in federal question suits involving Congress's Article I powers,⁹² suits in admiralty (as opposed to law or equity),⁹³ administrative agency tribunals,⁹⁴ and state courts.⁹⁵ In these cases, the Court looked beyond the text of the Eleventh Amendment to the division of authority between federal and state governments contemplated by that amendment,⁹⁶ and even to the fundamental character of state sovereignty, as evidenced by "the Constitution's structure, and its history, and the authoritative interpretations by this Court."⁹⁷

Other constitutional limitations on congressional power are more ambiguous. In such cases, the Supreme Court continues to pay lip service to Constitutional limitations on congressional authority. But, the Court defers so extensively to congressional determinations of whether constitutional constraints have been adhered to that those constraints are rendered practically meaningless. Four illustrative examples follow:

1. *Taxation and the general welfare.* The congressional power to tax, granted by Article I, Section 8, Clause 1, was limited by the original Constitution in two ways: a) taxes must be assessed to "pay the Debts and provide for the Common Defence and general Welfare of the United States,"⁹⁸ and b) they must be "apportioned among the several states . . . according to their respective Numbers."⁹⁹ The Sixteenth Amendment removed the apportionment requirement, but the general welfare requirement remains a strict limitation on congressional authority under Clause 1 today.¹⁰⁰ When assessing whether Congress is actually exercising its power to tax and spend in the name of the public purposes listed,

91. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 82 (Stevens, J., dissenting) ("Justice Brennan has persuasively explained that the Eleventh Amendment's jurisdictional restriction is best understood to apply only to suits premised on diversity jurisdiction").

92. *Id.* at 72-73 (Congress may not use its Article I powers to "circumvent the constitutional limitations placed [by the Eleventh Amendment] upon federal jurisdiction.").

93. *Ex parte New York*, 256 U.S. 490, 497-98 (1921) ("It is true the Amendment speaks only of suits in law or equity . . . it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not.").

94. *South Carolina Ports Authority*, 122 S. Ct. at 1875.

95. *Alden v. Maine*, 527 U.S. 706, 712 (1999).

96. See *Seminole Tribe*, 517 U.S. at 54 ("each State is a sovereign entity in our federal system . . . it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent") (internal citation omitted).

97. *Alden*, 527 U.S. at 713.

98. U.S. CONST. art. I, § 8, cl. 1.

99. U.S. CONST. art. I, § 2, cl. 3; see also *id.* art. I, § 8, cl. 1 (requiring uniformity through the United States of duties, imposts, and excises).

100. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); see also *Helvering v. Davis*, 301 U.S. 619, 640 (1937).

however, "courts should defer substantially to the judgment of Congress."¹⁰¹

2. *Uniform bankruptcy laws.* Article I, Section 8, Clause 4 empowers Congress to "establish . . . uniform laws on the subject of bankruptcies throughout the United States."¹⁰² In *Railway Labor Executives' Ass'n v. Gibbons*,¹⁰³ the Supreme Court found the labor protection provisions of the Rock Island Transition and Employee Assistance Act unconstitutional on the grounds that "the uniformity requirement of the Clause prohibits Congress from enacting bankruptcy laws that specifically apply to the affairs of only one named debtor."¹⁰⁴ The *Railway Labor Executives* court noted, though, that the Supreme Court had never previously invalidated a bankruptcy law for lack of uniformity,¹⁰⁵ and stated that "[t]he uniformity requirement is not a straitjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner."¹⁰⁶ In addition, the uniformity requirement does not prevent laws that have different results in different states,¹⁰⁷ direct measures specifically at geographically isolated problems,¹⁰⁸ or even "treat 'railroad bankruptcies as a distinctive and special problem.'"¹⁰⁹

3. *Needful buildings.* Article I, Section 8, Clause 17 authorizes Congress to "exercise [exclusive] Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."¹¹⁰ Although continuing judicial mention and explanation of this list of purposes suggests that Congress may not entirely ignore it, in practice the requirement that Congress exercise "exclusive jurisdiction"¹¹¹ has been read loosely, permitting Congress to invoke Clause 17 "without taking exclusive jurisdiction" when it so desires.¹¹² Furthermore, the list of permissible purposes of that power has been "broadly construed, and the acquisition by consent or cession of exclusive or par-

101. *Dole*, 483 U.S. at 207.

102. U.S. CONST. art. I, § 8, cl. 4.

103. 455 U.S. 457 (1981).

104. *Id.* at 471.

105. *Id.* at 469.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (quoting Reg'l R.R. Reorganization Act Cases, 419 U.S. 102, 159 (1974)).

110. U.S. CONST. art. I, § 8, cl. 17.

111. *Id.*

112. See *Collins v. Yosemite Park Co.*, 304 U.S. 518, 528–29 (1938) ("[The Supreme Court] has given full consideration to the constitutional power of the United States to acquire land under Clause 17 without taking exclusive jurisdiction.").

tial jurisdiction over properties for any legitimate governmental purpose beyond those itemized is permissible.”¹¹³

4. *Takings*. The Fifth Amendment states, “[N]or shall public property be taken for public use, without just compensation.”¹¹⁴ Not only is the procedural requirement of compensation considered binding,¹¹⁵ so too is the purposive requirement that even compensated takings must be for public use. The Supreme Court has “repeatedly stated that ‘one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.’”¹¹⁶ For example, in *Missouri Pacific Railway Co. v. Nebraska*,¹¹⁷ the Court invalidated a compensated taking of property that did not have a justifying public purpose.¹¹⁸

Missouri Pacific was extremely unusual, however, because the taking in question “was not claimed to be” for a public purpose.¹¹⁹ When Congress does claim a public use, courts will not substitute their judgment for that of the legislature as to what constitutes a public purpose “unless the use be palpably without reasonable foundation.”¹²⁰ The effect of this holding is that the public use requirement is coterminous with congressional police powers.¹²¹ The Supreme Court has never struck down a compensated taking where Congress claims the exercise of eminent domain is “rationally related to a conceivable public purpose.”¹²²

These four examples offer no indication that the deference due to Congress in determining whether any given measure advances the progress of the useful arts and sciences should be any less extensive than when determining whether a taking is for public use. In fact, to the extent that promoting progress is an inherently speculative and experimental project, one might argue that Congress would be entitled to more deference towards its efforts in that field. As the Supreme Court

113. *Kleppe v. New Mexico*, 426 U.S. 529, 542 n.11 (1976).

114. U.S. CONST. amend. V.

115. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“The Takings Clause of the Fifth Amendment . . . prohibits the government from taking private property for public use without just compensation. . . . Our cases establish that even a minimal ‘permanent physical occupation of real property’ requires compensation under the Clause.”) (internal citations omitted).

116. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Thompson v. Consol. Gas Corp.*, 300 U.S. 55, 80 (1937)).

117. 164 U.S. 403.

118. *Id.* at 416–17.

119. *Id.* at 416 (emphasis added).

120. *Hawaii Housing*, 467 U.S. at 241 (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

121. *Id.* at 240.

122. *Id.* at 241.

remarked in *Turner Broadcasting System, Inc. v. FCC*,¹²³ “courts must accord substantial deference to the predictive judgments of Congress.”¹²⁴

The Fifth Circuit applied considerable deference with respect to the Copyright Clause when it noted that “[i]t is by the lenient standard of *McCulloch* that we must judge whether Congress has exceeded its constitutional powers in enacting an all-inclusive copyright statute.”¹²⁵ The *Mitchell* court found that although Congress could reasonably conclude progress would be served by requiring that every copyrighted work be individually shown to advance the progress of the useful arts, it could equally well “reasonably conclude that the best way to promote creativity is not to impose any governmental restrictions on the subject matter of copyrightable works.”¹²⁶ The D.C. Circuit suggested that the possibility that motion pictures might be more likely preserved in digital form if their owners were given an incentive to convert them would in itself be enough to justify even a *retroactive* copyright extension in the name of promoting progress.¹²⁷ And, as noted above, the Supreme Court stated in *Eldred* that the Court will “defer substantially” to congressional findings that a particular measure will promote progress.¹²⁸

B. *Judicial Treatment of Preambles in Particular*

Does it make a difference, one might ask, that the Copyright Clause’s limitation is in a preamble? The D.C. Circuit decided that it does not; it held that the preamble of the Copyright Clause does not in any way constrain Congress.¹²⁹ But there are reasons to believe that it should, given judicial treatment of the other two preambles in the Constitution: the overall Preamble, and the preamble of the Second Amendment.

123. 512 U.S. 622 (1994).

124. *Id.* at 665.

125. *Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852, 860 (5th Cir. 1979).

126. *Id.*

127. *See Eldred v. Reno*, 239 F.3d 372, 379 (D.C. Cir. 2001); *see also* S. Rep. No. 104-315, at 12 (1996). This apparently off-hand remark by the court may actually be more significant than it appears on the surface, insofar as it tends to depart from the established principle that copyright may not be extended to a work in the public domain. *See supra* notes 81–82, and accompanying text. Relying on the reasoning of the D.C. Circuit Court, it is not at all clear why removing at least some works from the public domain could not promote progress, given that the preservation rationale for retroactively extending existing copyrights would be equally applicable to movies whose copyright has expired, but of which there remain only a few extant copies, all owned by a movie studio. If extending the life of a movie in order to provide an incentive to convert it to digital format would promote progress, then so too would temporarily removing a movie from the public domain for the same purpose.

128. *See Eldred*, 123 S. Ct. at 781.

129. *Eldred*, 239 F.3d at 379.

1. *The Preamble to the Constitution.* The Preamble to the Constitution is not generally considered to be a source of authority for the government, or even a guiding principle for the exercise of specific constitutional powers; instead, it is considered merely a statement of the general purpose and intent with which the Constitution was adopted in the first place.¹³⁰ This treatment is consistent with judicial treatment of other types of preambles: the Court has looked to the preamble of a state constitutional amendment,¹³¹ and to the preambles of federal statutes,¹³² in order to discern their respective purposes.

For the most part, inquiries by the Supreme Court into the purpose of the Constitution, as expressed by the Preamble, are found in dissenting opinions.¹³³ On at least two occasions, however, the Court has looked to the Constitutional Preamble to limit the powers of government. In *Kansas v. Colorado*,¹³⁴ the Court rejected an argument that the Tenth Amendment reserves all non-enumerated federal powers to the states.

130. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) (“Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments.”); JOHN R. VILE, A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS 24 (1993) (“[The Preamble] is rarely cited in judicial opinions because it grants no specific powers to the national government or to any other.”). But see SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION 60 (1995) (“Many, including the Supreme Court, fail to appreciate that the preamble has substantive significance.”); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 52 (1999) (proposing a view of the constitution that regards its binding and motivating elements as consisting solely in the call to promote the general welfare in the Preamble, with the remaining constitutional text being no more than a series of default suggestions about how best to realize that goal in practice); Remarks of Harry A. Blackmun: Law Dedication Dinner, in IOWA ADVOC., Fall/Winter 1986–1987, at 15 (“Must we not say that the law, in order to be true, at least must ‘establish Justice,’ within the meaning of the ringing words of the Preamble to the Constitution of the United States?”) (quoted in Paul R. Baier, *Dedication: Mr. Justice Blackmun: Reflections from the Cours Mirabeau*, 59 LA. L. REV. 647, 654 (1999)).

131. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829–30 (1995).

132. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (finding that congressional use of the terms “including” and “such as” in the preamble to the Copyright Act of 1976 showed that the examples of fair use listed in the Act were intended to be “illustrative and not limitative.”) (citation omitted).

133. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (“The notion that the Constitution of the United States, designed, among other things, ‘to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,’ prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.”); *McGautha v. California*, 402 U.S. 183, 246 n.17 (1971) (Douglas, J., dissenting) (“It is commonly overlooked that justice is one of the goals of our people as expressed in the Preamble of the Constitution . . .”); *Berger v. New York*, 388 U.S. 41, 72 (1967) (Black, J., dissenting) (defending a New York eavesdropping statute on the grounds that it was “well adapted to our Government, set up, as it was, to ‘insure domestic tranquility’ under a system of laws.”).

134. 206 U.S. 46 (1907).

The Court held that, in light of the preamble, it was clear that the Tenth Amendment reserved power to the people of all the states, not to the states themselves (*qua* governmental units).¹³⁵ Thus, if a distinct constitutional provision prevents a given power from actually falling to the states then it must by definition belong to Congress.¹³⁶ In *U.S. Term Limits v. Thornton*,¹³⁷ the Court struck down an Arkansas constitutional amendment designed to impose term limits on congresspersons elected from that state, and noted that “[i]n the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a ‘more perfect Union.’”¹³⁸

Furthermore, in *Webster v. Reproductive Health Services*,¹³⁹ a case concerning a Missouri statute whose preamble contained “findings” by the state legislature that “[t]he life of each human being begins at conception,”¹⁴⁰ the Court acknowledged that this preamble might be used by state courts to interpret other statutes or regulations, or even other parts of the same statute, in which case the statute may be unconstitutional.¹⁴¹ The Court held that, absent evidence of such use, the preamble did not fall afoul of *Roe v. Wade*¹⁴² because it did not itself regulate abortion.¹⁴³ Instead, it deferred to state courts, allowing them to answer the question whether the preamble might in fact be used impermissibly in practice—clearly acknowledging the possibility that a preamble could be considered binding by a court on its interpretation of the statutory language following the preamble, or even language in other statutes.¹⁴⁴

2. *The preamble to the Second Amendment.* As Roland Beason has pointed out, the Second Amendment as a whole, let alone its preamble, has been almost studiously ignored by the Supreme Court.¹⁴⁵ Even recent opinions discussing firearms have managed to avoid reviewing any of the over twenty thousand current state and local gun control laws.¹⁴⁶ That this preamble does have *some* constitutional significance is suggested by

135. *Id.* at 90.

136. *Id.*

137. 514 U.S. 779 (1995).

138. *Id.* at 838.

139. 492 U.S. 490 (1989).

140. *Id.* at 501.

141. *Id.* at 506.

142. 410 U.S. 113 (1973).

143. *Webster*, 492 U.S. at 506.

144. *See id.*

145. Roland H. Beason, *Printz Puncts on the Palladium of Rights: It Is Time to Protect the Right of the Individual to Keep and Bear Arms*, 50 ALA. L. REV. 561, 579–80 (1999).

146. *Id.*

United States v. Miller,¹⁴⁷ one of the few Supreme Court cases in which the meaning of the Second Amendment has been at issue. *Miller* rejected a Second Amendment challenge to a Commerce Clause statute because the plaintiff failed to show that his particular weapon was suitable for military use.¹⁴⁸ Had his weapon been service issue, or similar, the Court's opinion suggests, *Miller's* suit might have prevailed. In the more than sixty years since *Miller*, the Court has never questioned the validity of that decision, and has never held either that a well regulated militia is no longer necessary for the security of a free state, or that this necessity is irrelevant for all practical purposes to modern-day federal firearms regulation. It does not seem entirely unreasonable to suggest that one reason for the unwillingness of the Court to openly allow the Second Amendment preamble to fall by the wayside is that it is just that: a preamble, which is not so easily buried as a constraint that is already half hidden as a mere qualification within a clause.

Judicial treatment of the preambles to the Constitution as a whole and to the Second Amendment suggest that preambulatory purposive statements may, at the very least, be due more respect by the Court than other less prominent limitations on constitutionally granted powers. It is easier for courts to interpret "other needful Buildings" expansively when it is but one of a list of governmental functions that involve federally purchased property than if Clause 17 began "To construct needful buildings, by means of exercising exclusive jurisdiction over federally purchased land." When the purpose for a constitutional power is blatantly stated, rather than merely implied (by a list of similar activities, for example), there may be reason for less deference in evaluating whether Congress has conformed to the constraint.

If I am correct in suggesting that the Copyright Clause not only indicates the purpose for which Congress is granted the power to dispense intellectual property rights, but in doing so excludes other potential purposes that could have been read into that clause *sans* preamble, then there is reason to believe that courts ought to be less deferential to Congress with respect to the Copyright Clause than in other contexts. Even if the *Turner* Court's assurance of substantial deference towards predictive judgments means that the Court's hands are tied when second-guessing congressional assurances that progress will be promoted by a particular extension of intellectual property rights,¹⁴⁹ the Court can still insist that

147. 307 U.S. 174 (1939).

148. *Id.* at 178 ("In the absence of any evidence [that the right to own a sawn-off shotgun] has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

149. *See supra* note 123.

the progress promised be of the specific variety envisioned by the Copyright Clause, and not simply some generic assurance of improvement. Determining *whether there will be progress* is predictive, and therefore worthy of deference. Determining *what will progress if those predictions actually come true* is not predictive, and therefore requires less deference.

Even if the Copyright Clause deserves heightened scrutiny, such scrutiny may have little practical import. As the legal landscape currently lies, there is good reason for Congress to believe it can side-step any limitations imposed by the Copyright Clause preamble simply by enacting intellectual property legislation under the authority of the Commerce Clause.

C. Bypassing the Constraints of the Copyright Clause With the Commerce Power

Where the Court has addressed the limiting power of the preamble and the underlying purpose of the Copyright Clause, it did not extend that power beyond the Copyright Clause. In the *Trade-mark Cases*, for example, the Court separately examined the constitutional authority for trademark legislation under the Copyright Clause and the Commerce Clause.¹⁵⁰ Only after determining that Congress had claimed authority for its action under the Copyright Clause, rather than the Commerce Clause, did the Court examine the boundaries of the Copyright Clause.¹⁵¹ In a later case, the Supreme Court held that the preamble to the Copyright Clause “is both a grant of power and a limitation,”¹⁵² but did not extend this limitation to congressional action authorized by other clauses: “Congress *in the exercise of the patent power* may not overreach the restraints imposed by the stated constitutional purpose.”¹⁵³ And although the Supreme Court has not directly addressed the issue, two lower court decisions suggest that there is no absolute barrier between the Copyright Clause and the commerce power.¹⁵⁴

150. *Trade-mark Cases*, 100 U.S. 82, 93 (1879) (holding that Congress may not protect trademarks under Article I, Section 8, Clause 8 because they lack originality).

151. *Id.*

152. *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966). The limitation is that Congress may not create intellectual property rights “whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available,” but only grant exclusive rights when doing so will promote “[i]nnovation, advancement, and . . . add[s] to the sum of useful knowledge . . .” *Id.* at 6.

153. *Id.* at 5–6 (emphasis added).

154. *United States v. Moghadam*, 175 F.3d 1269, 1274 (11th Cir. 1999); *Frederick Warne & Co. v. Book Sales, Inc.*, 481 F. Supp. 1191 (S.D.N.Y. 1979).

In *Frederick Warne & Co. v. Book Sales, Inc.*,¹⁵⁵ the District Court for the Southern District of New York considered a potential conflict between copyright protection, awarded under the authority of the Copyright Clause, and trademark protection, awarded by the Lanham Act under the auspices of the commerce power.¹⁵⁶ The *Warne* court held that there is no necessary overlap between trademark protection and copyright protection for two reasons. First, because trademarks are not considered original writings,¹⁵⁷ they are therefore ineligible for copyright protection. Indeed, the *Trade-mark Cases* originally found federal trademark protection unconstitutional as a purported exercise of the Copyright Clause, precisely because trademarks do not fall within the ambit of the that clause.¹⁵⁸ Second, Lanham Act protection against unauthorized copying or use is more limited than that of copyright law, extending only to uses of a protected mark that might confuse customers about the manufacturer or endorser of the goods so labeled.¹⁵⁹

In practice, however, there is some potential overlap between trademarks and copyrightable works. Some marks may be original enough to qualify independently for copyright protection; and if a once-copyrighted image became sufficiently associated with a product, it would then be eligible for trademark protection.

The *Frederick Warne* court held that there is no conflict between trademark protection, which is assigned in perpetuity and without regard to originality, and copyright protection, which may only be granted for limited times and to original works.¹⁶⁰ The court even went so far as to state that “[d]ual protection under copyright and trademark laws is particularly appropriate for graphic representations of characters [which may be] deserving copyright protection, [but] also serve to identify the creator, thus meriting protection under theories of trademark or unfair competition.”¹⁶¹ Notably, the *Warne* court held this way in spite of the fact that the Copyright Clause appears to specify in its preamble that the *only* acceptable reason for congressional issuance of intellectual property rights is the progress of science and the useful arts, *not* consumer

155. 481 F. Supp. 1191 (S.D.N.Y. 1979).

156. *Id.* at 1196–97; see 15 U.S.C. §§ 1114(1) (1988).

157. *Trade-mark Cases*, 100 U.S. at 94 (“we are unable to see any such power in the constitutional provision concerning authors and inventors, and their writings and discoveries.”).

158. *See id.*

159. *See Frederick Warne*, 481 F. Supp. at 1195; 15 U.S.C. § 1114(1) (2000).

160. *See id.* at 1196 (“The fact that a copyrightable character or design has fallen into the public domain should not preclude protection under the trademark laws so long as it is shown to have acquired independent trademark significance, identifying in some way the source or sponsorship of the goods.”).

161. *Id.* at 1196–97 (citations omitted).

protection. One might argue that facilitating consumer confidence in interstate purchases indirectly increases book sales and therefore enhances authors' incentives to write, but that would not solve the problem posed by the fact that trademarks may be renewed indefinitely, and therefore are not necessarily limited in duration.¹⁶²

A stronger argument that there is no absolute barrier between the copyright clause and the commerce power is provided by the Eleventh Circuit's holding in *Moghadam*.¹⁶³ That Court held that there are some circumstances in which Congress may permissibly enact legislation under the commerce power that it would not be authorized to enact under the Copyright Clause.¹⁶⁴

If these cases indicate the existence of a legitimate device by which Congress may side-step the constraints of the Copyright Clause pre-emptible simply by claiming authority for copyright legislation under the Commerce Clause, then the constraints of the copyright clause will be nothing more than a chimera. Whether that device is in fact indicated is addressed in the following Sections.

III. UNDERSTANDING CONFLICTS BETWEEN CLAUSES

Many provisions of the Constitution have little or no impact on other provisions. The Article II power of the President to make recess appointments,¹⁶⁵ for example, has no bearing on the Third Amendment's conditions on quartering soldiers in private homes.¹⁶⁶ Even clauses that contain limitations on the exercise of their own power usually do not implicate congressional action under other clauses; the two-year limit on military appropriations, for instance,¹⁶⁷ does not limit congressional taxing and spending on education under the General Welfare Clause.¹⁶⁸

But there are parts of the Constitution that do conflict with other provisions. The most direct example of conflict is an amendment repealing all or part of a previously existing constitutional provision, such as

162. See 15 U.S.C. §§ 1058–1059 (2000). Of course, a cynic may suggest that, in light of *Eldred*, copyrights can also now be renewed indefinitely at the whim of Congress, much like trademarks.

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

164. *Id.* at 1280; See also *supra* notes 17–20, and accompanying text.

165. See U.S. CONST. art II, § 2, cl. 3.

166. See U.S. CONST. amend. III.

167. See U.S. CONST. art. I, § 8, cl. 12.

168. See U.S. CONST. art. I, § 8, cl. 1.

the Sixteenth and Twenty-first Amendments.¹⁶⁹ Less explicit, but equally clear, conflicts exist between positive grants of power, such as the Commerce Clause, and negative restrictions on the scope of governmental activity, such as the Bill of Attainder Clause,¹⁷⁰ or the First¹⁷¹ and Tenth Amendments.¹⁷² In cases involving these indirect conflicts it is not clear, a priori, which ought to be reined in in the name of the other. As a result, the courts must decide which provision takes precedence. Although the Supreme Court has not always been consistent, or even clear, about the rationale for giving one clause precedence over another, it has generally been willing to undertake this task and to constrain congressional power under one clause in the name of restrictions imposed elsewhere in the Constitution.

In *Nixon v. Administrator of General Services*,¹⁷³ the Court invoked the separation of powers doctrine to find that the Bill of Attainder Clause acts as a broad constraint on congressional exercise of Article I powers.¹⁷⁴ The Court likened this constraint to those imposed on the judiciary by Article III's "cases or controversies" requirement.¹⁷⁵ And in *New York v. United States*,¹⁷⁶ the Court looked to the general philosophy of federalism, supposedly embodied by the Tenth Amendment, to explain how congressional power is constrained by that amendment.¹⁷⁷ The *New York* Court also stated that the First Amendment constrains congressional exercise of Article I powers, although it did not specify why this is so.¹⁷⁸

169. See U.S. CONST. amend. XVI (removing the Article I, Section 2, Clause 3 apportionment requirement from the Article I, Section 8, Clause 1 taxation power); *Id.* amend. XXI (repealing the eighteenth amendment).

170. U.S. CONST. art. I, § 9, cl. 3.

171. U.S. CONST. amend. I.

172. U.S. CONST. amend. X.

173. 433 U.S. 425 (1977).

174. *Id.* at 469–71.

175. See *id.* at 469.

176. 505 U.S. 144 (1992).

177. See *id.* at 156–57 ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself. . . . Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.").

Predictably, this appeal to the political philosophy expressed by the Constitution is somewhat controversial. See, e.g., *id.* at 207 n.3 (White, J., dissenting) ("One would not know from reading the majority's account, for instance, that the nature of federal-state relations changed fundamentally after the Civil War. . . . While I believe we should not be blind to history, neither should we read [the Tenth Amendment] so selectively as to restrict the proper scope of Congress' powers under Article I, especially when the history not mentioned by the majority fully supports a more expansive understanding of the legislature's authority than may have existed in the late 18th century.").

178. See *id.* at 156 ("[U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.").

Commentators suggest that the First Amendment may take precedence on textual grounds, because the words “Congress shall make no law” are an “obvious and express effort” to restrain legislative action.¹⁷⁹ Alternatively, it may just be because the First Amendment was ratified after the original Constitution, and so may be considered to modify those earlier provisions with which it comes into conflict.¹⁸⁰

Conflicts between the Copyright Clause and the Commerce Clause are not only less explicit within the Constitution than the above examples, but are also less clearly conflicts at all, as neither clause is phrased as a general limitation on congressional power. An argument that the preamble of the Copyright Clause limits congressional power to legislate under the Commerce Clause must therefore be able to explain not only why the Copyright Clause takes precedence, but also how the two clauses come into conflict in the first place. In this Section I will consider four arguments to that effect, and assess their success in satisfying those two requirements. They are:

- the clauses conflict whenever Congress legislates in the name of one power in order to evade the limitations of a more appropriate power;
- the clauses conflict when one encroaches on the other to an extent that it is rendered superfluous, because the Constitution may not be interpreted so as to render part of itself superfluous;
- if Congress uses one clause to side-step the restrictions imposed by another clause, an impermissible logical inconsistency is created within the structure of the Constitution; and
- an impermissible conflict is created whenever Congress acts under any constitutional provision in a manner that frustrates an explicit constitutional purpose set out in a different provision.

I will argue that the first of these proposals, the evasion argument, is generally plausible but ineffective with respect to the Commerce Clause. Due to the nature of modern commerce, the commerce power is

179. See *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 566 n.6 (1963) (Douglas, J., concurring).

180. See, e.g., Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2146 n.386 (1996) (“It must not be forgotten that the First Amendment was enacted and ratified subsequent to the original text of the Constitution. Consequently . . . to the extent the original text is inconsistent with the Establishment Clause, the original text, not the Establishment Clause, must yield.”).

considered the appropriate authority for an increasingly expansive range of legislation. I will argue that the second, encroachment argument would be applicable to the commerce power, but that evidence of its actual adoption as an interpretive canon is too ambiguous to warrant judicial application to a conflict between the Copyright and Commerce Clauses; and I will argue that while the third, the logical consistency argument, does succeed in overcoming the problems characteristic of the first two arguments, it fails to provide any mechanism for resolving actual conflicts in a non-circular manner. Finally, I will argue that the fourth, purposive argument provides reason to believe that Congress may not constitutionally legislate under any of its powers in a manner inconsistent with the preamble of the Copyright Clause.

A. *Evasion*

The Supreme Court has made clear that a state cannot evade the requirements of the federal Constitution simply by claiming to adhere to those requirements while acting a manner intended to accomplish indirectly what may not be done directly.¹⁸¹ Although directed at the state of Arkansas, the admonition that “constitutional rights would be of little value if they could be . . . indirectly denied”¹⁸² is phrased and justified quite generally, allowing for equal applicability to the federal government. “To argue otherwise is to suggest that the Framers spent significant time and energy in debating and drafting Clauses that could easily be evaded.”¹⁸³ There is no reason to think that Congress would be exempt from this principle; an entitlement to judicial deference is one thing, but a license to evade the Constitution is quite another. One could argue that this non-evasion principle means that if a particular congressional measure would appropriately fall within the ambit of one constitutional grant of power, it is impermissible for Congress to evade the limitations imposed on that power by artfully claiming to legislate under a different, less suitable power.

Certainly, members of the public may not practice this type of evasion. In *Albright v Oliver*,¹⁸⁴ the Supreme Court rejected an argument that it deemed an attempt to evade the limitations of Fourth Amendment rights of criminal suspects by asking the Court to recognize a “substantive right under the Due Process Clause of the Fourteenth Amendment to

181. *U.S. Term Limits Inc. v. Thornton*, 514 U.S. 779, 829–31 (1995).

182. *Id.* at 829 (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)).

183. *U.S. Term Limits*, 514 U.S. at 831.

184. 510 U.S. 266 (1994). This example comes from William Patry, *supra* note 16, at 376 n.94.

be free from criminal prosecution except upon probable cause.”¹⁸⁵ Notwithstanding the fact that, as Justice Stevens noted in dissent, the Fourth and Fifth Amendments have been historically viewed as overlapping,¹⁸⁶ and that “we have never previously thought that the area of overlapping protection should constrain the independent protection provided by either,”¹⁸⁷ the Court insisted that “it is the Fourth Amendment, and not substantive due process, under which [the] claim must be brought.”¹⁸⁸

The closest the Supreme Court came to constraining congressional power by extending limitations contained in one clause to preclude action otherwise authorized under another, was in *Railway Labor Executives’*, where the Court asserted in dicta that Congress may not enact non-uniform bankruptcy laws under its Commerce Clause powers.¹⁸⁹ Doing so, it reasoned, would “eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.”¹⁹⁰ This would “allow Congress to repeal the uniformity requirement from Art. I, § 8, cl. 4, of the Constitution.”¹⁹¹ Oddly, not only was this remark dicta, but it was *sua sponte* dicta, as the Court prefaced its remarks by acknowledging that “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.”¹⁹² The precedential value of this remark is somewhat ambiguous. One could argue that *sua sponte* dicta is even less binding than ordinary dicta; conversely, one could suggest that the Court, in light of its present judgment, recognized a possible future argument and wanted to make clear in advance that it would not wash.

The courts of appeals have adopted the former interpretation. The Eleventh Circuit acknowledged *Railway Labor Executives* in *Moghadam*,¹⁹³ but distinguished between the fundamental incompatibility of uniform and non-uniform bankruptcy laws recognized in *Railway Labor Executives*, and the mere difference in degree between the copyright protection offered by the Anti-Bootlegging statute and that permitted under the Copyright Clause.¹⁹⁴ Further, in *Authors League of America, Inc. v. Oman*,¹⁹⁵ the Second Circuit did not even mention

185. 510 U.S. at 268.

186. *Id.* at 310 (Stevens, J., dissenting).

187. *Id.*

188. *Id.* at 271.

189. 455 U.S. 457, 468–69 (1981).

190. *Id.*

191. *Id.* at 473.

192. *Id.* at 468.

193. 175 F.3d at 1281.

194. *See id.*

195. 790 F.2d 220 (2d Cir. 1986).

Railway Labor Executives in the course of finding that Congress may permissibly deny copyright protection to certain classes of imported works under the commerce power.¹⁹⁶ Responding to the argument that copyright legislation must promote the progress of science and the useful arts, not just the profitability of the printing industry, the court turned to the commerce power as an alternative justification for the measure, stating “the copyright clause is not the only constitutional source of congressional power that could justify the manufacturing clause. In our view, denial of copyright protection to certain foreign-manufactured works is clearly justified as an exercise of the legislature’s power to regulate commerce with foreign nations.”¹⁹⁷

Unlike the bright, if periodically flexible,¹⁹⁸ line between uniform and non-uniform bankruptcy laws, the relationship between the scope and duration of copyrights and interstate commerce is arguably fluid, to the extent that a changing, increasingly information-driven economy may result in copyright extensions implicating commerce in a way that they simply did not previously. As made clear in *Heart of Atlanta Motel v. United States*,¹⁹⁹ for example, the Court is open to the possibility that the scope of interstate commerce has simply changed over time, and that legislation that would once have exceeded the commerce power no longer does.²⁰⁰ In light of the ample power granted by the Commerce Clause, the *Heart of Atlanta* Court saw no need to investigate whether the Fourteenth Amendment would provide independent (and perhaps more limited) authority for the legislation challenged in that case.²⁰¹ It seems the Court was untroubled by the possibility of overlapping, independent sources of congressional power with respect to civil rights legislation. There is no apparent reason why the Supreme Court would be any more troubled in the context of intellectual property, whose role in interstate commerce has arguably changed as much over the last twenty years as did the mobility of the American populace and circulation of facilities, goods, and services between 1883 and 1964.²⁰²

In sum, even if we accept that Congress may not evade constraints imposed by the clause most appropriate to its action by using a less ap-

196. *See id.* at 221.

197. *Id.* at 224.

198. *See supra* notes 103–109, and accompanying text.

199. 379 U.S. 241 (1964).

200. *See id.* at 251 (noting that civil rights legislation that may have been impermissible under the Commerce Clause in the past may be permissible under the same clause later, given the changing face of interstate commerce).

201. *See id.* at 249–50.

202. *See id.* at 251–52 (distinguishing the Civil Rights Cases, 109 U.S. 3 (1883), on the grounds that the nature of interstate commerce has changed markedly in the intervening years since those cases).

propriate clause instead, it may also be true that notwithstanding the explicit textual connection between the Copyright Clause and intellectual property rights, the commerce clause may increasingly be considered the more appropriate constitutional power for regulating copyrights in the global information age.²⁰³ The evasion argument does not establish a conflict between the clauses which suggests that congressional action should be declared unconstitutional solely on that basis.

B. *Encroachment*

Even if, as the Supreme Court's approach to the commerce power suggests, different clauses of the Constitution can overlap without conflict, and an action that would not be allowed under one applicable clause is permissible under another, one might argue that this overlap should not be tolerated where it effectively renders the more limited clause entirely superfluous. After all, as *Marbury v. Madison* makes clear, "[a]ffirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all. It cannot be presumed that any clause in the constitution is intended to be without effect."²⁰⁴ Further, as Justice Thomas complained in his concurrence to *United States v. Lopez*,²⁰⁵ if the Commerce Clause gave Congress the authority to "regulate all matters that substantially affect commerce," it would "not need the separate authority to . . . grant patents and copyrights . . ."²⁰⁶

The Supreme Court has often held that a constitutional provision may not be interpreted to render *that same clause* redundant or useless. For example, in *Marbury* the Court held that Article III may not be construed to allow Congress to allocate the original and appellate jurisdiction of the Supreme Court in ways that contradict the positive grants of such authority to the Court.²⁰⁷ This principle was echoed in

203. For example, one of the justifications for the Copyright Term Extension Act mentioned by the *Eldred* Court was that it would bring U.S. copyright law in line with that of the European Union. See *Eldred*, 123 S. Ct. at 781–82.

204. 5 U.S. 137, 174; cf. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.") (quoting *Pa. Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990)); *Kansas v. Colorado*, 206 U.S. 46, 91 (1907) ("It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed.").

205. 514 U.S. 549 (1995).

206. *Id.* at 588.

207. 5 U.S. at 174.

Martin v. Hunter's Lessee,²⁰⁸ which also concerned interpretations of Article III that would defeat the purpose of that same Article. Here, the Court noted that Congress may not "under the sanction of the constitution . . . defeat the constitution itself."²⁰⁹ Also, in *United States v. Miller*²¹⁰ the Court held that the National Firearms Act of 1934 was constitutional because it prohibited only weapons without a military pedigree, and hence unnecessary for the common defense provided by a militia.²¹¹ This reasoning could be interpreted to mean that the Second Amendment right to bear arms may not be construed in a way that renders moot the preamble to the same amendment.

In both *Martin* and *Miller*, the Court was concerned with the internal dynamics of constitutional clauses, and appeared reluctant to allow one part of a clause to obviate another part. It is not clear that the Court would be willing to extend this non-superfluosity principle to situations involving the effects of one clause upon a different clause. Not only was Justice Thomas unable to attract any other votes for his recommendation that the Court rein in the Commerce Clause in the name of potentially superceded Article I powers, but, as Michael Dorf has argued, the history of the Constitution since ratification shows that there is "in fact no interpretive canon requiring that every constitutional provision have some effect not attributable to some other provision."²¹²

Dorf cites *McCulloch v. Maryland*²¹³ for the proposition that "because [the constitution] is phrased in general language and so very difficult to amend, its interpretation calls for some degree of flexibility."²¹⁴ He infers that "[i]t should hardly surprise us that over the course of more than two centuries, some provisions of the Constitution faded in importance or were rendered redundant by the sensible expansive interpretation of others."²¹⁵ Examples of provisions that have been rendered superfluous by either the passage of time or changing circumstance are the congressional power to "grant Letters of Marque and Reprisal,"²¹⁶ which was left useless by the 1856 Declaration of Paris,²¹⁷ and the Seventh Amendment's restriction of the right to a jury in civil disputes

208. 14 U.S. 304 (1816).

209. *Id.* at 329.

210. 307 U.S. 174 (1939); see *supra* notes 147–148, and accompanying text.

211. *Miller*, 307 U.S. at 178.

212. Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 CHI.-KENT L. REV. 291, 339 (2000).

213. 17 U.S. 316 (1819).

214. Dorf, *supra* note 212, at 341.

215. *Id.*

216. U.S. CONST. art. I, § 8, cl. 11.

217. See Dorf, *supra* note 212, at 340 (citing BLACK'S LAW DICTIONARY 814 (5th ed. 1979)).

exceeding twenty dollars,²¹⁸ which inflation has made irrelevant.²¹⁹ Examples of redundancies caused by expansive readings of other clauses, Dorf suggests, are the Free Exercise Clause of the First Amendment, which was effectively rendered moot by the Establishment Clause and the Equal Protection Clause after the Court held that only discriminatory burdens on religion are prohibited by the Free Exercise Clause,²²⁰ and various Article I powers, whose needs have been obviated by the Commerce Clause.²²¹ Even after *United States v. Lopez*,²²² Dorf claims,²²³ the Commerce Clause power to regulate intra-state activity substantially affecting interstate commerce has effectively superceded the Article I powers to establish “uniform Laws on the subject of Bankruptcies”;²²⁴ “to Coin Money”;²²⁵ “to provide for the Punishment of counterfeiting”;²²⁶ and, last but not least, to issue copyrights and patents.²²⁷

Of these examples, only one concerns the permissibility of congressional action under a clause that allegedly renders moot a different constitutional provision; namely, Dorf’s claim that the Commerce Clause has obviated the need to legislate under the Bankruptcy, Coinage, Counterfeiting, and Copyright Clauses. And *Lopez* and *Railway Labor Executives* suggest that even this is still an open question. Even though Justice Thomas was alone in warning of the potential reach of an unfettered commerce power, the silence of the other members of the *Lopez* majority does not show conclusively that they disagreed with Thomas’s concerns. The majority may simply have been skeptical that such a scenario could ever play out. And *Railway Labor Executives* casts doubt on Dorf’s claim with respect to the Bankruptcy Clause.²²⁸

In fact, there is some recent evidence that the Court does consider it impermissible for Congress to use one constitutional power in a way that would nullify all practical effects of another. In *Perpich v. Department of*

218. U.S. CONST. amend. VII.

219. As Dorf notes, of course, one could argue that the need to preserve the continued relevance of this requirement in fact requires that the monetary amount mentioned should be indexed to inflation. See Dorf, *supra* note 212, at 340.

220. *Id.*; see also *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990).

221. Dorf, *supra* note 212, at 339–40.

222. 514 U.S. 549, 560 (1995) (striking down the Gun Free School Zones Act because carrying a gun near a school cannot be considered economic activity, but reaffirming the general principle that Congress may regulate economic activity affecting interstate commerce).

223. Dorf, *supra* note 212, at 339–40.

224. U.S. CONST. art. I, § 8, cl. 4.

225. U.S. CONST. art. I, § 8, cl. 5.

226. U.S. CONST. art. I, § 8, cl. 6.

227. U.S. CONST. art. I, § 8, cl. 8.

228. See *supra* notes 103–104, and accompanying text.

Defense,²²⁹ the Court confronted a challenge to the “Montgomery Amendment,” which prevented states from withholding assent to congressional decisions that the National Guard serve and train abroad. The Governor of Minnesota challenged the constitutionality of the amendment on the grounds that it violated, by rendering superfluous, the constitutional grant of power to the states to train the militia.²³⁰ The Court ultimately found that the state and federal powers at issue were compatible, because members of state militias lose that status while serving in the Federal National Guard.²³¹ The federal government does not actually train anyone that a state has a concurrent right to train, because guard members wear their state “hat” and army “hat” at different times.²³² In other words, the Constitution grants the states authority to train members of the National Guard in their role as state militiamen, and grants Congress power to train the same personnel insofar as is a necessary adjunct of their role in the National Guard. This dual system, the Court found, does not nullify the Clause 16 grant of power to the states.²³³ Rather, it simply recognizes federal supremacy in military affairs.²³⁴ It is telling that the Court went to great lengths to refute the Governor’s claim that Congress had effectively nullified a grant of power to the states. If such nullification were permissible, the Court would never have had to reach the factual question of whether it had occurred.

The anti-superfluosity argument appears inconclusive, insofar as the Commerce Clause and the Copyright Clause are concerned. In some cases the Court has apparently put a limit on inter-clause encroachment. In other cases it has done no such thing. As a result, the anti-superfluosity argument cannot establish whether there is a conflict between those clauses unless we have some independent grounds upon which to say that the Copyright Clause is or is not one of those provisions that may not be made obsolete. And, if we knew that, we would already have the answer that the anti-superfluosity argument is designed to give us.

C. *Logical Consistency*

Both of the preceding arguments fall into the trap of examining whether the two clauses conflict only after first considering constitutional provisions independently of the others in order to determine the

229. 496 U.S. 334 (1990).

230. U.S. CONST. art. I, § 8, cl. 16; see *Perpich*, 496 U.S. at 337.

231. *Perpich*, 496 U.S. at 347.

232. *Id.* at 348.

233. *Id.* at 351.

234. *Id.*

proper scope of each. But that analysis will always be circular, and therefore unhelpful, because until we know whether the clauses may permissibly overlap, and in what ways, we have no means of determining their proper scope. The clauses themselves, in other words, cannot be the arbiters of whether they conflict with each other.

To solve this problem, we might learn from Laurence Tribe, who writes that “[r]ead 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.”²³⁵ Considering the Constitution as a whole, then, we could fix a benchmark against which to determine whether two clauses conflict with each other by examining whether the allegedly conflicting scope of each clause is compatible with the internal dynamics of the Constitution.

A difficulty arises in specifying what is meant by the “internal dynamics” of the Constitution. One suggestion, which is both intuitively pleasing and, perhaps for that reason, quite popular, is that the Constitution all fits together to form a coherent, logically consistent whole, whose fundamental internal order may not be disturbed. Justice Marshall, for example, was not deterred from concluding that Maryland could not tax a national federal bank simply because no constitutional provision in particular suggests that conclusion.²³⁶ He echoed the sentiment that “as a matter of general structural logic, surely the part cannot control the whole.”²³⁷ In the practical world, of course, there is no reason why a part cannot control the whole in at least some respects. So what Justice Marshall must surely have recognized is that the logic of the federal system *as described by the Constitution* is such that in some respects the whole must be supreme. This is one of those respects.

As pleasing as this idea is, it is not clear that it helps sort out potential conflicts between clauses. First, it may be impossible to reach any kind of neutral consensus on just what counts as internal consistency simply by specifying that “internal consistency” means “logical consistency.” After all, what Justice Marshall means cannot be “logical” in the abstract, quasi-mathematical sense. Almost any reading of the Constitution is internally consistent in that sense. What he must mean is “logical” in the sense of practical reasoning: compatibility in the eyes of a reasonable person. Not only do reasonable people differ on whether certain ideas are consistent with each other, even when they are broadly in

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

236. See *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819).

237. See Akhil Amar, *Intratextualism*, 112 HARV. L. REV. 747, 752 (1999); see also *McCulloch v. Maryland*, 17 U.S. 316, 426–33 (1819).

agreement about what consistency means, they also differ on what consistency involves in the first place. For some, it will be a matter of simple descriptive accommodation—whether it is possible for two ideas to be true at the same time; for others consistency may be a more normative concept—whether the values underlying idea A permit one to also hold idea B.²³⁸

Second, even if we do have a sense of what consistency means, it is not clear that inter-clause encroachment is actually a source of inconsistency. There is no logical reason why the Constitution cannot overlap in parts. And there is no reason why the Constitution, as a “living document,”²³⁹ cannot breathe a little as times change and one clause expands in influence and scope while others contract. There does not even seem any *logical* reason why one clause cannot encroach upon another to point of rendering it superfluous. True, one might say that it would be inconsistent for Congress to act under the Commerce Clause if doing so encroached on the Copyright Clause in a way that was somehow inconsistent with Congress’s own goals in performing that same action, but that is more a practical inconsistency than a logical one, and it is easy to imagine circumstances in which any self-defeating aspect of the legislation was more than compensated for by its advantages.

One possible source of purely internal inconsistency in congressional action that uses one clause to evade the limitations imposed by another is the principle that the fundamental character of the Constitution entails certain relationships between its parts that would be violated by that kind of evasion. William Patry argues that “[t]he Constitution is not a series of hermetically sealed provisions such that Congress may ignore the restrictions on its power contained in one clause merely by legislating under another clause.”²⁴⁰

There is some evidence that the Supreme Court does not believe that the Constitution should read as a series of discrete provisions, each conferring powers on various governmental branches independently of the others. For instance, the Court holds a long-standing concern for the “spirit of the constitution”²⁴¹ as well as its letter, suggesting some degree

238. Christopher Eisgruber, for example, labels the idea that the Constitution is “a harmonious and pleasing composition” the “aesthetic fallacy,” and his reasons for so judging are almost entirely based on what he considers “clumsy, regrettable” aspects of the Constitution (into which category he places both the inclusion of a bill of rights, and the absence in that bill of rights of an equality right) which conflict with the values he considers the Constitution as a whole to endorse. See Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORDHAM L. REV.* 1611, 1617–19 (1997).

239. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682 (1952) (Vinson, J., dissenting).

240. Patry, *supra* note 16 at 371.

241. See, e.g., *McCulloch*, 17 U.S. at 421.

of interrelation between the various clauses and provisions. Perhaps the clearest example of this concern is the Court's interpretation of the Sixteenth Amendment, which states, "[t]he Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."²⁴² Although, on its face, this might appear to replace prior authority for taxation with a new power that enables Congress to levy taxes without regard for the general welfare, which is not mentioned at all in its text, this is not the case. Instead, the Amendment is interpreted as merely removing one of the Clause 1 limitations on the congressional power to tax. As the Supreme Court noted in *Brushaber v. Union Pacific Railroad Co.*,²⁴³

It is clear on the face of [the Sixteenth Amendment's] text that it does not purport to confer power to levy income taxes in generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived.²⁴⁴

This is actually not at all clear on the face of the Sixteenth Amendment's text. If that same text had been used to describe the taxation power in the original Constitution, it is unlikely that the Court would have described it in this way. Clearly, the Court is looking beyond the text of one particular provision to examine how it relates to other clauses, and perhaps even the overall Preamble. It may have been prompted to do this, and informed by the judicial and congressional history leading up to passage of the amendment, but it did so nonetheless.

Even two apparent counter examples to the "interdependence thesis," the independence of Clause 1 spending power from other Section 8 provisions, and the independence of the Treaty Power from all other

242. U.S. CONST. amend. XVI.

243. 240 U.S. 1 (1916).

244. *Id.* at 17–18; see also *United States v. Sitka*, 845 F.2d 43, 46 (2d Cir. 1988) ("Therefore, the Sixteenth Amendment, along with the pre-existing taxing power created by Article I, section 8 of the Constitution, provides Congress with the necessary authority to impose a direct, non-apportioned income tax.") (citation omitted). Thus, prior to ratification of the Sixteenth Amendment we find the Court remarking that "[t]he Constitution contains only two limitations on the right of Congress to levy excise taxes; they must be levied for the public welfare and are required to be uniform throughout the United States," *Flint v. Stone Tracy Co.*, 220 U.S. 107, 153 (1911), and after ratification we find that "the exercise of the spending power must be in pursuit of the 'general welfare,'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

provisions, do not turn out to be counter-examples upon closer inspection.

i. The Clause 1 spending power. The battle over Clause 1 between Hamilton, who believed it conferred a distinct power to tax and spend independently of the other powers, and Madison, who held that it was simply a formal authorization of the power to fund activities under the other Section 8 clauses, was won by Hamilton (with help from Justice Story).²⁴⁵ To the extent the Clause 1 taxation power is not limited to the specific purposes or powers of the other Section 8 clauses, it follows that none of the other Section 8 clauses are limited by each other, and even that constitutional provisions in general must be understood independently of one another.

On closer examination, however, this interpretation is not warranted. *United States v Butler*²⁴⁶ illustrates that the triumph of the Hamiltonian position, as represented by Justice Story, was a victory for a particular interpretation of the phrase "general welfare."²⁴⁷ To be sure, Madison and Hamilton may each have been led to their respective interpretations of this phrase by their political convictions and divergent visions of the new republic, but the battle turned on the tenability of their interpretations *qua* interpretations, not *qua* political philosophies. As the *Butler* Court explained, the fatal problem with the Madisonian view was that because one would reasonably read into the other Section 8 clauses the implicit authority to raise funds to finance them, reading Clause 1 as nothing more than a reference to the other clauses would render it tautological.²⁴⁸ A canon of construction that warns against interpreting a clause as entirely pointless even at the time of insertion into the Constitution is not at all the same as a canon to the effect that constitutional provisions must always be understood entirely in isolation from one another even when times change, along with the contexts in which those provisions are applied. Indeed, by interpreting one clause in light of the others, it suggests exactly the opposite.

245. See *Helvering*, 301 U.S. at 640; *United States v. Butler*, 297 U.S. 1, 65–66 (1936); see also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ch. XIV *passim* (5th Ed 1891).

246. 297 U.S. 1.

247. *Id.* at 65.

248. *Id.* A similar concern for the structural integrity of the constitution should the spending clause be interpreted on Hamiltonian lines is reflected in Thomas Jefferson's caution that the clause "ought not to be so construed as themselves to give unlimited powers, . . . so taken as to destroy the whole residue of that instrument." Thomas Jefferson, *Draft of the Kentucky Resolutions*, reprinted in THOMAS JEFFERSON: WRITINGS 449, 452 (Merrill Peterson ed., 1984).

ii. *Treaty powers.* In *Missouri v. Holland*,²⁴⁹ a case concerning the constitutionality of congressional regulation of migratory birds pursuant to a treaty between the United States and Great Britain,²⁵⁰ the Supreme Court acknowledged that because such regulation was not authorized by any of the powers granted Congress by Article I, Section 8, the Tenth Amendment would ordinarily reserve those powers to the states.²⁵¹ However, the Court found that the Treaty Power provided an independent authority for implementing congressional legislation.²⁵² The Court held that such authority could not be constrained “by some general invisible radiation from the general terms of the Tenth Amendment,”²⁵³ but only by “prohibitory words” actually found in the Constitution.²⁵⁴

Despite its insistence on prohibitory words, though, this case does not have any significant implications for the scope of the Copyright Clause preamble. The Tenth Amendment reserves to the states only those powers not delegated to the federal government by the Constitution. And to the extent that the Treaty Power is granted to the government by the Constitution, an otherwise permissible treaty will automatically remove any Tenth Amendment objections to measures contained therein. *Before* the treaty in question was signed, Congress had no authority to regulate migratory birds, so any attempt to do so would have violated the Tenth Amendment, but *after* the treaty was signed, regulation of migratory birds became a de facto congressional power for Tenth Amendment purposes. In essence, then, the *Holland* Court was simply rejecting an ill-considered argument, rather than making a significant statement of its own about the Constitution’s internal dynamics.

The interesting question raised by *Holland* with regard to the Copyright Clause is whether its preamble contains “prohibitory words.” But that, of course, is the question at issue in this Article. *Holland* simply stands for the proposition that *if* it turns out that the “promote progress” requirement does constrain Congress *then* the Treaty Power may be constrained along with other forms of congressional action. It cannot, therefore, help us answer that underlying question.

249. 252 U.S. 416 (1920).

250. *Id.* at 431.

251. *Id.* at 432; see U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

252. *Missouri v. Holland*, 252 U.S. at 432 (noting that this authority is granted by Article II, Section 2, delegating the power to make treaties, in combination with Article VI, which declares treaties to be the supreme law of the land).

253. *Id.* at 433–34.

254. *Id.* at 433.

This too seems to be the problem with the consistency approach to inter-clause conflicts. The consistency approach cannot explain if, and when, two clauses overlap each other in a way that requires them to be mutually consistent. We can only tell whether two clauses are consistent with each other once we have already determined their proper scope, and thereby the extent to which they overlap, but that is precisely what consistency analysis is supposed to tell us. Unless we have some factor outside the clauses themselves that can tell us whether they are consistent with each other, there does not appear to be any non-circular way to decide whether they are consistent. So, for example, only if we knew (1) whether limitations imposed by the preamble of the copyright clause extend to activity undertaken in the name of the Commerce Clause, we would know (2) whether congressional action under the latter that evaded those limitations would be inconsistent with the Copyright Clause, in which case we would know (1) whether limitations imposed by the preamble of the copyright clause extend to activity undertaken in the name of the Commerce Clause, and so on.

D. Purpose

The above three arguments amply demonstrate the difficulties involved in trying to describe a plausible basis for finding that legislation under the Commerce Power conflicts with the Copyright Clause; and to concurrently determine that it is the commerce power that must therefore be restrained. Although both the evasion and encroachment arguments succeed in establishing that Congress may neither constitutionally legislate under an inappropriate provision in order to evade constraints laid down by a different provision, nor (in some cases) expand the scope of one clause to the extent that another clause becomes superfluous. Neither succeeds in establishing an independent benchmark by which to define the proper scope of each clause. Depending on how one views the Copyright and Commerce Clauses, one may equally plausibly say either that congressional intellectual property legislation passed under the Commerce Clause but forbidden by the Copyright Clause is appropriate or that it is not. The logical consistency argument is more promising, but ultimately still circular. It succeeds in framing an independent benchmark for evaluating whether congressional action causes an unconstitutional conflict between two clauses. Yet, that framework provides no help in resolving actual disputes because it cannot explain what must be consistent with what. By comparing the clauses to each other, their consistency becomes dependent on the very determination of permissible scope that the consistency analysis was supposed to give us in the first place.

These problems can be overcome, I suggest, if we think of conflicts that may or may not be unconstitutional as occurring not between the clauses themselves, but between the constitutional purposes that we believe each clause serves. If, for example, both clauses serve the same purpose, such as the general welfare, then it would not seem to matter which clause Congress legislates under. On the other hand, if we think at a less general level that each clause serves a specific constitutional purpose distinct from that served by the other, then to the extent that those purposes come into conflict, so will the clauses themselves. We must try to resolve that conflict by considering which, if either, purpose is best able to accommodate some concession to the other. In essence, this purposive analysis fills in the gaps of internal consistency analysis, by explaining what it is that must be consistent with what, without begging the question whether the limitations of one clause apply to action under another.

Because purpose is so important to understanding inter-clause conflicts, it is therefore a good candidate to serve as the “what” in terms of which clauses are or are not consistent. This is so because such conflicts are unlikely to occur except between clauses involving at least one purposive limitation between them. If a particular provision contains a limitation that is not purposive at all, but simply a technical limitation specific to that clause, then there not only seems no reason why action under a different clause should be constrained in its name, but there also seems no reason why such a constraint would even become an issue. The uniformity requirement of bankruptcy laws, for example, could have no implications for other aspects of federal financial regulation unless one were able to suggest a way in which the uniformity requirement served a constitutional purpose that transcends bankruptcy laws. And if a provision no longer has any meaningful purpose, such as the power to grant letters of marque and reprisal, it is unlikely that it would ever come into conflict with another power actually being asserted. In other words, if there is a conflict between two clauses, it will be because they are both considered to have a viable and important constitutional function.

This is not to say that one must attempt to discover the one correct purpose behind a provision or try to discern the intentions of the framers in including it in the Constitution. The point here is simply that because one cannot resolve conflicts between clauses without reference to purpose, the true conflict in any given case is likely to be fought between those purposes, and so any attempt to resolve it requires that we frame the disagreement in those terms. It does not actually matter how one decides what the purpose of a provision is, only that one can explain one’s reasoning.

Purposive analysis solves, at least to some degree, a problem raised in connection with consistency analysis—what qualifies as consistency. Asking whether two purposes are consistent with each other bridges the gap between descriptive and normative accounts of consistency, because a purpose is a simultaneously descriptive and normative idea. Saying “the purpose of *X* is *Y*” is descriptive because it describes what one uses *X* for, but it is also value-laden because one could not want to do *Y* if one did not consider it a good idea. Asking whether one may logically try to advance two purposes at the same time is essentially the same thing as asking whether one may realize both purposes without compromising the values of either.

Disagreement will still exist about the purpose of each clause, the extent to which different purposes are compatible, and, in cases of conflict, which is more important. But there is no reason to believe that this disagreement will be any more extensive than that accompanying any exercise in constitutional analysis. Much of the contemporary debate about the Second Amendment, for example, concerns the meaning of what I have referred to as its purposive preamble: “A well-regulated militia, being necessary to the security of a free State.”²⁵⁵ Although there exists significant, possibly intractable disagreement about what a “well-regulated militia” is in the current context,²⁵⁶ each side in the debate describes Second Amendment constraints on governmental action in terms of the purpose of that amendment,²⁵⁷ and the debate does go on. Certainly, intractability is not a unique aspect of the debate about the Second Amendment.²⁵⁸

255. U.S. CONST. amend. II.

256. See Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 650 (1995) (“The controversy is largely over whether the Framers meant the right to bear arms to apply exclusively to organized state militias tasked with resisting possible federal tyranny (the collectivist theory) or whether they wanted it to apply to the people in an individual sense (the individual rights theory).”).

257. Compare, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 299 n.6 (2d ed. 1988) (“the central concern of the framers was to prevent such federal interferences with the state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy.”), with Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 646–47, 651 (1989) (“There is strong evidence that ‘militia’ refers to all of the people, or at least all of those treated as full citizens of the community . . . we see that one aspect of the structure of checks and balances within the purview of 18th century thought was the armed citizen.”).

258. See, e.g., Kathleen A. Brady, *Putting Faith Back into Constitutional Scholarship: A Defense of Originalism*, 36 CATHOLIC LAW. 137, 137 (1995) (“In one of the most enduring and seemingly intractable debates in modern constitutional scholarship, interpretivists and noninterpretivists argue over the proper task of the judiciary in its exercise of judicial review.”); Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CALIF. L. REV. 893, 893 (1994) (“The academic debate over affirmative action has become a bitter stale-

In the context of the Preamble to the Constitution, the underlying purpose of the Constitution as a whole—as revealed in that Preamble—has been invoked to adjudicate apparent conflicts between constitutional clauses. In the absence of any internal purposive guidance within the clauses themselves, the Court apparently turns to the overall purpose of the Constitution as a canon of construction. In *Lichter v. United States*,²⁵⁹ the Court defended a congressional exercise of war powers against a non-delegation doctrine challenge,²⁶⁰ on the grounds that “while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind,”²⁶¹ specifically, the Preamble’s reference to providing for the common defense and securing the blessings of liberty for posterity.²⁶² In *Hess v. Port Authority Trans-Hudson Corp.*,²⁶³ the Court similarly invoked the purpose of the Constitution to resolve a conflict between the Federal Employers’ Liability Act, passed by Congress under the commerce power,²⁶⁴ and the Eleventh Amendment, which was alleged to prevent the application of FELA to a state port authority on state sovereignty grounds.²⁶⁵ The Court declared that the sovereign immunity of states was not an intrinsic part of the Eleventh Amendment, but rather a judicial interpretation of how that Amendment should be applied, and held that the commerce power in this instance took precedence because, “when confronted with the question whether a judge-made doctrine of this character should be extended or contained, it is entirely appropriate for a court to give controlling weight to the Founders’ purpose to ‘establish Justice.’”²⁶⁶

As I will argue in the next Section, there is reason to believe that not only is purposive analysis also possible with regard to conflicts between

mate.”); William K. Jones, *A Theory of Social Norms*, 1994 U. ILL. L. REV. 545, 585 n.124 (“The intractable nature of the abortion debate”).

259. 334 U.S. 742 (1948).

260. Although the non-delegation doctrine is not laid down explicitly in any single clause of the Constitution, it is essentially shorthand for the combined import of Article I, Section 1 (“All legislative Powers herein shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”), Article I, Section 8, Clause 18 (“[The Congress shall have the Power to] make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers”), and the Tenth Amendment (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935).

261. *Lichter*, 334 U.S. at 782.

262. *Id.* at 782 n.34.

263. 513 U.S. 30 (1994).

264. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 116 (2001).

265. *Hess*, 513 U.S. at 33–35.

266. *Id.* at 54–55.

the Copyright and Commerce Clauses, it may be particularly well-suited to that subject matter because of the purposive interrelationship between the Copyright Clause and the First Amendment. The interaction between intellectual property rights and free expression suggests that the purposes embodied in the preamble to the Copyright Clause transcend the bounds of that clause and have important consequences for our understanding of the scope of other constitutional provisions. One's conclusions about a purposive conflict between the Copyright Clause and the Commerce Clause, for example, may entail corresponding conclusions about First Amendment jurisprudence, and vice versa. To the extent that it has already been established that the First Amendment takes precedence over the Commerce Clause,²⁶⁷ then, if a purposive appeal to the Copyright Clause preamble implicates the constitutional guarantee of free expression, the Commerce Clause may have to yield.

IV. RESOLVING THE CONFLICT BETWEEN THE COPYRIGHT CLAUSE AND THE COMMERCE CLAUSE

For the sake of argument, assume that the purpose of the Commerce Clause is to facilitate free trade by empowering the federal government to prevent protectionist behavior by the states, and otherwise grease the wheels of commerce in order to benefit both the nation as a whole²⁶⁸ and the individuals engaged in trade.²⁶⁹ Let us also say that this purpose is a valid and important one. The questions before us are (1) whether the purpose of the Copyright Clause is compatible with that purpose, and (2) if not, which must take precedence in case of conflict.

The most plausible reading of the Copyright Clause, I argued in Section I, is that its preamble constrains Congress by specifying the purpose for which intellectual property rights may be issued; namely, to provide an incentive to authors. And, I suggested, there are two closely connected ways in which one might understand why this purpose is

267. See *supra* note 178 and accompanying text.

268. See, e.g., *Dennis v. Higgins*, 498 U.S. 439, 447, 449 (1991) ("the Commerce Clause does more than confer power on the Federal Government; it is also a substantive 'restriction on permissible state regulation' of interstate commerce. . . . the Clause was intended to benefit those who, like petitioner, are engaged in interstate commerce. The 'constitutional protection against burdens on commerce is for [their] benefit.'" (quoting *Morgan v. Virginia*, 328 U.S. 373, 376-377 (1946)).

269. See, e.g., *Wardair Can., Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7 (1986) ("The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.") (internal quotations omitted).

important: negatively, as a means to prevent monopolies of information, and positively, as a means of actively facilitating the dissemination of ideas. I think it is fair to say that this purpose, however described, is valid and important. If there is a conflict between the Commerce Clause and the Copyright Clause it will not be easy to sort out which purpose is more valuable.

It is not clear that there is any necessary conflict between the two. The Commerce Clause is, after passage of the Sherman Act at least,²⁷⁰ broadly opposed to monopolistic behavior of precisely the type the Copyright preamble is designed to prevent. If Congress can satisfy the courts that intellectual property legislation is compatible with its mission to enable free trade, one could argue that the purposes of the Copyright Clause are being well served thereby. The same intellectual property rights that serve the free *trade* of ideas could also facilitate the free *expression* of ideas. Just as authors are more likely to devote their time and energy to creative pursuits if a commercial market is available for their output, so too will publishers and distributors be more willing to invest in risky authors and new markets if they are assured that they will have the opportunity to profit by doing so.

It is clear, though, that there is potential for conflict in individual cases. As William Patry noted, Commerce Clause legislation assigning intellectual property rights “decreases the amount and type of information freely available as surely as when Congress legislates under the Copyright Clause.”²⁷¹ Therefore, he argues, if Congress wanted to enact unlimited copyright protection, and turned to the commerce power to avoid the Copyright Clause’s limitation of its power to limited term copyrights, that would have exactly the same effect as that which motivated the inclusion of the “limited times” provision into the Copyright Clause: a perpetual monopoly.²⁷² Patry’s concerns in this respect do not seem entirely unwarranted. Congress could make a good case that (1) intellectual property regulation must occur at the national, not state level, especially in light of the role that the internet plays in modern copyright disputes, and (2) that the distribution of intellectual property rights will have a substantial impact on interstate and foreign commerce. There is no reason to think that unlimited copyrights would be any harder to link to interstate commerce than limited term copyrights.

It seems likely, then, that any conflicts between the Copyright Clause and the Commerce Clause will occur on a case-by-case basis, where congressional legislation violates the purposive limitations of the

270. See 15 U.S.C. 1 *et seq.* (2003).

271. Patry, *supra* note 16, at 371.

272. See *id.* at 376.

Copyright Clause but is not forbidden by the purposes of the Commerce Clause. This leaves the courts to sort out the extent to which enabling free trade or promoting progress takes precedence over the other in any given case. Fortunately, the purposive interrelationship between the Copyright Clause and the First Amendment suggests two reasons why the answer to this inquiry may be more straightforward than it may seem at first glance, and that in the majority of cases the preamble of the Copyright Clause would prevail.

First, the Commerce Clause must adhere to the requirements of the First Amendment.²⁷³ Although Congress is, as noted above,²⁷⁴ given considerable discretion with respect to almost all of the limiting language in the Constitution, judicial deference is markedly less extensive in First Amendment cases. As such, we can say with some confidence that even in the name of the commerce power Congress may not constitutionally enact intellectual property legislation that fails to comply with the rigid First Amendment limitations the Supreme Court has placed on similar legislation under the Copyright Clause. The Court has made it clear that copyrights walk a fine line between restricting and promoting speech and must strictly adhere to the idea/expression distinction and fair use doctrine in order to be compatible with the First Amendment.²⁷⁵ Consequently, any action under the Commerce Clause that might water down these principles would be subject to exacting scrutiny. Indeed, in such cases judicial scrutiny would be “fatal in fact” because the Court does not suggest merely that some blurring or erosion of the idea/expression distinction and fair use doctrine might, on balance, violate the First Amendment, but that only by virtue of adhering to these principles are intellectual property rights permissible in the first place. Furthermore, although Congress may well enact intellectual property legislation on a content neutral basis,²⁷⁶ the power to limit expression thereby delegated to private individuals may then be wielded on whatever basis the rights holder desires.

Second, if it is true, as Tushnet argues, that the constitutionality of intellectual property rights “depends on the fact that the government in-

273. See *supra* note 178 and accompanying text.

274. See *supra* sections II.A & II.B, and accompanying text.

275. See *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539,556 (1985) (“Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed”) (citation omitted); see also *Eldred*, 123 S. Ct. 788–89 (noting that the Copyright Clause has two “built-in First Amendment accommodations”: the idea/expression distinction, and the fair use requirement).

276. A content neutral law restricts speech if the law can be justified without reference to the particular content of that speech. See *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989).

terest underlying copyright is the promotion of speech,²⁷⁷ then the preamble of the Copyright Clause must be adhered to in order to justify those rights no matter what power Congress invokes when granting them. The conflict between the First Amendment and intellectual property rights is not specific to rights granted under the auspices of any one clause because it arises from the practical effects of the rights issued, not the nature of the authority invoked to do so. If the idea/expression distinction, even when combined with statutory fair use requirements, is insufficient to make intellectual property rights compatible with the First Amendment, and it is only the actual purpose of promoting progress that makes copyrights constitutional, then strict scrutiny would also be appropriate to ensure compliance with the Copyright Clause preamble, whether the scrutinized legislation is passed under the authority of the Copyright Clause or the Commerce Clause. If promoting progress is as vital to copyright's constitutionality as are the idea/expression distinction and fair use doctrine, then the *Harper and Row* analysis would require that they be considered with the same degree of seriousness.

One may argue that Tushnet is wrong, of course, in which case the proper standard of scrutiny for Commerce Clause intellectual property laws would be less strict but someone making that argument would be faced with a problem. As noted above, there seems to be only one way to understand the preamble of the Copyright Clause in light of the rest of the clause—namely, as a purposive preamble directed towards issuing intellectual property rights. And there seem to be two ways of understanding why its purposive requirement should constrain Congress today: one is the originalist reading of the purpose behind the actual inclusion of the clause in the Constitution, the other is Tushnet's First Amendment compatibility theory. If Tushnet's theory is rejected, then one is forced either to adopt the originalist interpretation of the preamble, in which case one is probably *more* committed to preventing the issuance of copyrights without ensuring that doing so will definitely promote progress, or to reject what is arguably the only plausible explanation of the preamble, in which case one's position on Copyright and Commerce Clause conflicts will lack a necessary element.

CONCLUSION

Anthony Trollope wrote in his autobiography, "Take away from English authors their copyrights, and you would very soon take away from

277. Tushnet, *supra* note 64, at 35.

England her authors."²⁷⁸ No doubt this is also true of many American authors, and it is in recognition of this fact that the Constitution empowers Congress to grant intellectual property rights. But Trollope's claim is increasingly made today not by authors, but by publishing houses, movie studios, and "content providers" of all kinds, seeking to gain and retain the right to sell their intellectual property well beyond the period necessary to encourage its production. It is in anticipation of such claims that the Constitution specifies that Congress may only grant intellectual property rights for one purpose: to promote the development and dissemination of ideas. Copyrights and patents, thus understood, walk a fine line between commerce and free expression, and the Copyright Clause provides the instructions for keeping on the straight and narrow.

A series of recent cases suggest that not only are those instructions receiving less attention from Congress than they ought, but that the courts are increasingly willing to defer to congressional autonomy in this regard. Furthermore, there are signs that even if the judiciary does insist that intellectual property legislation passed under the auspices of the Copyright Clause adhere to the constraints laid down in its preamble, Congress may simply enact similar legislation under the commerce power. This Article has attempted to show that not only must the preamble of the Copyright Clause be complied with when Congress legislates under that clause, but must also be adhered to when Congress enacts intellectual property legislation under any authority. As Jefferson put it,

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.²⁷⁹

278. ANTHONY TROLLOPE, *AUTOBIOGRAPHY* Ch. 6 (David Skilton, ed., Penguin Books 1996) (1833).

279. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in THOMAS JEFFERSON: *WRITINGS*, 1286, 1291 (Merrill Peterson ed., 1984).