This Article examines a question of general interpretive significance about the relationship between enumerated powers within the particular context of intellectual property. Specifically, the Article asks whether Congress can avoid the restrictions on its intellectual property power (such as the "limited Times" requirement or the prohibition against protecting facts and, consequently, electronic databases) by resorting instead to other Article I powers, most notably the commerce power.

Because the federal government is one of enumerated powers, it is impossible as a matter of text or structure to determine whether limits on one Article I power apply to the others. Instead, one must identify the values underlying the different Section 8 restrictions and whether they are worthy of general application—whether they represent constitutional norms.

Once one closely examines the history of intellectual property and American trade regulation, it becomes clear that no such generally applicable norm is at work in the limits on Congress's intellectual property power. Beliefs about the importance of preventing Congress from granting monopolies were neither widely held at the time of the framing nor were they a feature of the Constitution as adopted. In the end, “exclusive rights” are merely another form of regulation that Congress may, and frequently does, use to confer economic rents on favored special interests. The Constitution, it will come as no surprise, offers very little protection against rent-seeking.
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INTRODUCTION

The economic realities of intellectual property are changing at a dramatic pace. Demonstrating the responsiveness of our political system, Congress has in recent years sought to provide new forms of protection to intellectual property in order to fill gaps in traditional copyright and patent doctrines. But traditional copyright and patent doctrines have developed within the constitutional framework established by the Intellectual Property Clause. In the copyright context, for example, the Clause only authorizes Congress to protect "Writings," a term that has been interpreted to exclude protection for facts, which means that Congress likely cannot provide database protection, for instance, pursuant to the Intellectual Property Clause. The search for constitutional authority to pass intellectual property legislation outside of the Intellectual Property Clause is arising in many other contexts, including the protection of inventions that do not meet the constitutional standard of patentability under the Patent Clause and copyrightable works that have fallen into the public domain, with the Commerce Clause serving as the prime candidate to supply the power necessary to support such regulation. But turning to other powers raises a question: Do the limits in the Intellectual Property Clause establish a general prohibition against granting certain kinds of protection, or do they operate only when Congress is using the grant of power contained in the Intellectual Property Clause?

The overwhelming view among commentators is that the Intellectual Property Clause's limits apply to all of Congress’s powers and therefore that Congress may not look to other Article I, Section 8 powers in order to avoid those limits. The prevailing wisdom is that the limits in the Intellectual Property Clause, for instance that exclusive rights be granted only to "Writings" and "Discoveries" or that they be for "limited Times," must be read as applying to all of Congress’s powers in order to be true to the text and structure of Article I and to the idea of a federal government of

1. As used in this Article, "intellectual property" refers loosely to those areas of law related to traditional copyright and patent doctrines. Although trade secret, unfair competition, and trademark are often included under the rubric of "intellectual property," I will address those areas in only a limited fashion and will refer to them specifically when I do.

Similarly, I will use the term "Intellectual Property Clause" to describe Article I, Section 8, Clause 8 of the Constitution, which enumerates the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." When necessary for clarity or in order to conform to convention, I will refer to the "Copyright Clause" or "Patent Clause" even though such clauses exist separately only as a conceptual matter and even though the Intellectual Property Clause does not mention "intellectual property," "copyright," or "patent."

2. See infra Part I.
4. See infra Part II.
limited and enumerated powers. To do otherwise would render the Intellectual Property Clause superfluous and its well-defined limits null.⁵


Others have acknowledged the force of such arguments without necessarily adopting or arguing for them. See, e.g., Jane C. Ginsburg, No “Sweat”? Copyright and Other Protection of Works of Information After Feist v. Rural Telephone, 92 Colum. L. Rev. 338, 370–75 (1992) [hereinafter Ginsburg, No Sweat] (conceding that “the Supreme Court may already have foreclosed” the use of the Commerce Clause as an alternative source of power “in the Patent-Copyright Clause context,” but arguing that Congress should have wide discretion to interpret the reach of the Intellectual Property Clause itself); see also Graeme W. Austin, Does the Copyright Clause Mandate Isolationism?, 26 Colum. J.L. & Arts 17, 34
The prevailing wisdom is wrong. Arguments that Congress may only enact intellectual property regulation pursuant to the Intellectual Property Clause are the result of over-simplified approaches to constitutional analysis and fundamental misperceptions about the nature and function of Article I. Because the federal government is a government of enumerated powers, it is impossible to tell as a matter of text or structure whether a limitation in any of the Section 8 grants of authority applies generally to all of Congress's powers. Rather, an accurate evaluation of the Intellectual Property Clause's place in the Constitution requires a new approach that recognizes that not all of the limits on Article I powers are of equal constitutional weight and that considers the constitutional significance of the restriction in question. In cases addressing whether limitations in Article I grants of power should be applied externally—that is, to the rest of Article I—courts have attempted to determine whether the limit in question is in furtherance of an enforceable constitutional norm. In the present context, an inquiry into the values incorporated in the Intellectual Property Clause and its limits leads inexorably to the conclusion that they

& n.107 (2002) (recounting the "somewhat circular analysis" required for resolving any conflict between the copyright and commerce powers "[b]ecause reliance on Commerce Clause in the copyright context will frequently involve assessment of what is 'fundamentally inconsistent' with the Copyright Clause"); Paul Bender, The Constitutionality of Proposed Federal Database Protection Legislation, 28 U. Dayton L. Rev. 143, 148 (2002) (acknowledging that "Congress cannot use its commerce power to give copyright protection for an unlimited time" but arguing that database legislation is completely outside the Copyright Clause and therefore is a proper subject of the Commerce-Clause-based legislation); Anant S. Narayanan, Note, Standards of Protection for Databases in the European Community and the United States: Feist and the Myth of Creative Originality, 27 Geo. Wash. J. Int’l L. & Econ. 457, 493 (1994) (arguing that database regulation is outside the scope of Intellectual Property Clause and therefore not limited by the Clause's strictures).

I have found only four sources arguing that Congress can avoid the limits in the Intellectual Property Clause by relying instead on the Commerce Clause. See Dan L. Burk, Protection of Trade Secrets in Outer Space Activity: A Study in Federal Preemption, 23 Seton Hall L. Rev. 560, 614–15 (1993); Dennis S. Karjala, Copyright and Misappropriation, 17 U. Dayton L. Rev. 885, 897–98 n.48 (1992); Michael B. Gerdes, Comment, Getting Beyond Constitutionally Mandated Originality as a Prerequisite for Federal Copyright Protection, 24 Ariz. St. L.J. 1461, 1467–68 (1992); Philip H. Miller, Note, Life After Feist: Facts, the First Amendment, and the Copyright Status of Automated Databases, 60 Fordham L. Rev. 507, 536–37 (1991) (citing older edition of Nimmer on Copyright and the decision in Authors League of America v. Oman, discussed infra notes 34–45 and accompanying text). I have also found the following equivocal statement from Professor Goldstein:

The [Feist] Court's reliance on the Trade-Mark Cases, holding that Congress can protect trademarks under the commerce power, but not under the copyright power, may be a signal that the Court would uphold federal protection for telephone directory white pages and other data collections that lack copyright's required 'creative spark' so long as Congress makes clear that the commerce clause, and not the copyright-patent clause, animates the legislation and so long as the legislation meets the requirements of the commerce clause.

1 Paul Goldstein, Copyright § 2.2.1, at 2:10 (2d ed. Supp. 2004).
6. See infra Part III.
do not rise to the level of constitutional norms requiring application throughout Article I. Some have cited the First Amendment as the source of such a norm, but even if it were, the norm's constitutional significance is to be found in the First Amendment, not Section 8. Theories calling for restricting grants of exclusive rights to those consistent with the Intellectual Property Clause also claim to reflect an historical understanding of the Clause and the Constitution. But neither the history leading up to the Constitution nor the history of its adoption provides support for such broad application of the Intellectual Property Clause's limits. The most profound defect of theories that would constrain all grants of exclusive rights to those permitted by the Intellectual Property Clause, though, is their foundation upon the widely held but previously unquestioned belief that there is something economically or politically unique about the awarding of "exclusive rights." Once questioned, that assumption unravels, and with it so do such restrictive theories. The somewhat counterintuitive but inescapable conclusion is that, if it can find another power to support the legislation, Congress may grant exclusive rights without regard to the limits set out in the Intellectual Property Clause.

I begin in Part I by describing the circumstances—both real and potential—in which Congress may seek authority for intellectual property regulation outside of the Intellectual Property Clause and by outlining the first order analysis of such attempts. Part II surveys the court decisions and commentary on the topic, finding the approaches and theories offered to date inadequate, either because they are logically deficient or because they are based on unsupported assumptions about the place of the Intellectual Property Clause's limits in the structure of the Constitution. After reviewing the outstanding treatment of the particular Intellectual Property Clause/Commerce Clause problem, I discuss in Part III the Supreme Court's handling of overlapping Section 8 powers (and their limitations) in other contexts. I develop from those cases an alternative approach to interpreting the reach of the Intellectual Property Clause's limits: In short, I ask whether there exist constitutional norms underlying the Intellectual Property Clause that require imposing similar limits on the commerce power. In Part IV, I apply that approach—an evaluation of precedent and historical context tempered by economic reasoning—which leads to one conclusion: The Intellectual Property Clause and its limits do not represent generally applicable constitutional norms and Congress may therefore legislate pursuant to the Commerce Clause without regard to the Intellectual Property Clause or its limits. Finally, in Part V, I consider the ramifications for both economic regulation and federalism of theories calling for the universal application of the Intellectual Property Clause's limits.

7. See infra Part IV.A.
8. See infra Part IV.C.
1. INTELLECTUAL PROPERTY AND THE COMMERCE CLAUSE

The potential for a conflict between the Intellectual Property Clause and the Commerce Clause has come to light over the last decade as Congress has attempted to fill what it perceives to be gaps in traditional intellectual property laws. But, like all constitutional powers, the Intellectual Property Clause has important and enforceable limits. The Supreme Court has made it abundantly clear that certain kinds of intellectual property regulation cannot be enacted pursuant to the Intellectual Property Clause. Thus, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court explained that the Copyright Clause does not permit Congress to extend copyright protection to facts or unoriginal compilations.\(^9\) Because the Copyright Clause allows Congress to extend protection only to "Writings" of "Authors," the Clause limits protection to "original" expression. Facts exist independently of the person who records them, so they are not "original" to the author and therefore cannot be protected by copyright.\(^10\) The Court has made similar statements with regard to the patent power: The Patent Clause "is both a grant of power and a limitation," which permits Congress to provide protection only in certain circumstances.\(^11\) For instance, Congress may not, pursuant to the Patent Clause, grant patent protection "without regard to the innovation, advancement or social benefit gained" from doing so, and the Court has suggested specifically that Congress may not grant a patent to an invention that is already in the public domain.\(^12\)

The problem has arisen in many contexts and has involved both extending protection to new forms of intellectual property and extending the scope of protection for existing forms of intellectual property. Thus, Congress has sought to extend protection to un-patentable boat hulls\(^13\) and semiconductor chip designs\(^14\) and to un-copyrightable musical performances.\(^15\) It has also extended the duration of protection granted to some patentable drugs\(^16\) and all copyrightable subject mat-

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10. Id. at 345-47.
12. Id. at 6.
ter\textsuperscript{17} and has restored the copyrights of some works that had fallen into the public domain.\textsuperscript{18}

The development that has aroused the most attention, however, has been Congress's repeated consideration of legislation that would extend copyright-like protection to databases.\textsuperscript{19} Since \textit{Feist}, it has been widely accepted that Congress cannot provide copyright protection to facts because they lack originality. Instead, Congress may extend protection to compilations of facts only to the extent that the \textit{compilation} displays originality by virtue of its selection, arrangement, or organization of those facts.\textsuperscript{20} As the Court made clear in \textit{Feist}, such protection is "thin"; it is only the selection, arrangement, and organization of the facts that are protectable.\textsuperscript{21} The facts themselves are not, the result being that, if the value of a particular database is not in its selection, arrangement, or


\textsuperscript{18} Uruguay Round Agreements Act § 514, 17 U.S.C. § 104A. Section 514 is currently subject to a constitutional challenge, see Memorandum in Support of Defendant's Motion to Dismiss at 45–46, Golan v. Ashcroft (D. Colo. filed Sept. 19, 2001) (No. 01-B-1854). If the Supreme Court meant what it said in dicta in Graham v. John Deere Co., 383 U.S. 1, 6 (1966), that Congress may not pursuant to the Patent Clause extend protection to an invention that has fallen into the public domain, \textit{Golan} may be the case that finally forces the Court to decide whether Congress may do so pursuant to another power.

In \textit{Golan}, the government has raised the Treaty Clause as another potential source of power to support intellectual property legislation, arguing under Missouri v. Holland, 252 U.S. 416 (1920), that the limitations on Article I powers do not apply to the treaty power. See Memorandum in Support of Defendant's Motion to Dismiss, \textit{Golan v. Ashcroft} at 30–31. But the only limits considered by the Court in \textit{Holland} were the limits imposed by federalism, which are not the limits implicated by extending exclusive rights in ways inconsistent with the Intellectual Property Clause's limits. Heald & Sherry, supra note 5, at 1182–83. Moreover, use of the treaty power as an independent basis for domestic law is a disputable proposition in its own right. See Curtis A. Bradley, The Treaty Power and American Federalism, 97 Mich. L. Rev. 390, 394–95 (1998); Graves, supra note 5. It is unnecessary for me to consider so contentious a question because any intellectual property regulation that would serve the United States' international interests would be a regulation of foreign commerce and therefore could also fall within the commerce power, rendering reference to the treaty power superfluous. Thus, I will ignore the treaty power as a potential source of power for Congress to enact intellectual property regulation.


\textsuperscript{21} Id. at 349. Again, it is not clear that the Court needed to remind Congress that this limitation is constitutional. Congress had \textit{statutorily} precluded copyright protection for the factual portions of compilations in the 1976 Copyright Act, fifteen years before the decision in \textit{Feist}. See 17 U.S.C. § 103(b) ("The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.").
ganization of facts but rather in the effort expended to collect the facts themselves, the compilers of the database cannot protect through copyright the bulk of their investment in creating the database.22 And if the selection, organization, or arrangement is not itself original, the database will receive no copyright protection at all.23 Databases lacking this originality remain economically valuable, but as a result of Feist, they probably cannot be granted protection pursuant to the copyright power.24 If Congress is going to provide intellectual property protection to databases, or to any number of other articles that do not rise to the constitutional level of "Writings" or "Discoveries," it will likely have to do so under another grant of authority, the most obvious candidate being the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."25

II. THE PROBLEM IN PARTICULAR: COURTS AND COMMENTATORS

The potential for an overlap between the intellectual property and commerce powers has arisen several times in the courts, as has the possi-

22. The desire to protect such investments led pre-Feist courts to adopt the "sweat of the brow" doctrine, which provided copyright protection for unoriginal works that nevertheless required the expenditure of substantial resources. Indeed, the issue of copyrightability was dealt with by the district court decision in Feist with two sentences ("The issue of whether telephone directories are copyrightable is well-settled. Courts have consistently held that telephone directories are copyrightable.") and an eight-case string cite. See Rural Tel. Serv. Co., Inc. v. Feist Publ'ns, Inc., 663 F. Supp. 214, 217-18 (D. Kan. 1987), rev'd, 499 U.S. 340 (1991). The Supreme Court's decision in Feist was an explicit rejection of the "sweat of the brow" doctrine. 499 U.S. at 354. For a summary of policy arguments both for and against data protection, see Victoria Smith Ekstrand, Drawing Swords After Feist: Efforts to Legislate the Database Pirate, 7 Comm. L. & Pol'y 317, 323-28 (2002) (collecting commentary).

23. In Feist, the Court decided that a telephone company's organization of its subscribers' telephone numbers and addresses alphabetically by last name was not original enough to warrant copyright protection. See Feist, 499 U.S. at 362-63. Thus, a typical telephone white pages listing receives no copyright protection. Id.

25. U.S. Const. art. I, § 8, cl. 3.

The Court in Feist left open the possibility that Congress could protect fact works through some form of "unfair competition" doctrine, Feist, 499 U.S. at 354, and one possibility for dealing with any constitutional tension is to design protection pursuant to the Commerce Clause that comprises elements different enough from copyright so that it would not be an "exclusive right" and therefore not raise a conflict with the Intellectual Property Clause. Such an enterprise starts on shaky ground, see Ginsburg, No Sweat, supra note 5, at 371-74, although some have offered guidance on how best to navigate the Intellectual Property Clause's shoals, see, e.g., Bender, supra note 5, at 148, 151-52 (arguing that, because Feist held facts outside of copyright, a Commerce-Clause-based database statute would not be a "copyright" regulation at all and therefore would present no conflict); Hughes, supra note 5, at 209-14 (describing the ways in which to alter a database statute in order to prevent a conflict). I have chosen, instead, to investigate whether the Intellectual Property Clause presents a problem at all. If not, then Congress may choose the form of database regulation that it deems best based solely on policy grounds, without having to alter what it deems to be optimal policy for purely legal reasons.
bility that the limits on the Intellectual Property Clause might apply to the Commerce Clause. Modern courts have largely permitted use of the Commerce Clause for regulations that relate to rights in intangible property. Commentators have offered responses to the caselaw and their own theories about how to approach the Intellectual Property Clause/Commerce Clause problem as a matter of general constitutional interpretation. This section provides a survey of these particularized approaches and evaluates—to the extent they claim to represent generically applicable rules of constitutional interpretation—whether such approaches can actually survive application to the rest of Section 8.

A. Caselaw Addressing the Intellectual Property/Commerce Overlap

The initial response of every court that has addressed the Intellectual Property Clause/Commerce Clause problem has been that Congress can rely on the Commerce Clause as a basis for providing protection not sanctioned by the Intellectual Property Clause.

The question first arose in 1879 in the Trade-Mark Cases, in which the Supreme Court considered the constitutionality of the first federal trademark acts. The Court quickly concluded that trademark legislation could not be adopted pursuant to the Intellectual Property Clause. As used in the Intellectual Property Clause, the words “Writings” and “Discoveries” both imply that the article being protected be original—that it originate with the party claiming the right. Trademark rights, on the other hand, are granted based not on the originality of the mark but rather on the mark’s use in commerce. Thus, protection could extend to unoriginal marks, which the Court concluded to be a grant not within the Intellectual Property Clause.

The Court—without commenting on the significance of relying on an Article I grant outside of the Intellectual Property Clause—next considered whether the Commerce Clause could support enactment of a federal trademark statute. In a decision reflecting both a nineteenth-century American economy and a pre-Wickard understanding of the Commerce Clause, the Court found that the statute was not merely a regulation of commerce among the States, with foreign nations, or with the Indian tribes, but rather an attempt to regulate commerce generally. As such, it was not within the powers granted by the Commerce Clause. While the

26. 100 U.S. 82 (1879).
28. The Trade-Mark Cases, 100 U.S. at 93–94.
30. The Court explained that the law was not limited on its face to trademarks used in interstate or international commerce, as one might expect of a law not intended to regulate commerce wholesale. Given the lack of such a limitation, and because “there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State,” the Court rejected the Commerce Clause as a basis for the statute. The Trade-Mark Cases, 100 U.S. at 96.
Trade-Mark Cases is inconsistent with a modern understanding of the commerce power,31 the case establishes that, even when the Intellectual Property Clause denies Congress the power to grant exclusive rights, other portions of Article I may provide it.32

The question has also come up under modern Commerce Clause jurisprudence, with courts finding congressional authority to grant or extend exclusive rights outside of the Intellectual Property Clause when authority cannot be found within it. Authors League of America, Inc. v. Oman33 addressed the constitutionality of the "manufacturing clause," section 601(a) of the Copyright Act, which made it illegal to import or distribute copies of nondramatic, English-language literary works printed outside of the United States or Canada if the work was protected by federal copyright.34 The statute was challenged both as a violation of the First Amendment and as an improper exercise of the copyright power because the statute did nothing to "promote[,] the progress of the useful arts."35 The Second Circuit correctly understood the statute to be a protectionist measure in favor of American printers and publishers rather than an incentive for American authors.36 In response to the plaintiffs' argument that the statute could not be enacted pursuant to the Intellectual Property Clause, the court did not hesitate to rely on the Commerce Clause to find the requisite authority:

What plaintiffs' argument fails to acknowledge, however, is that the copyright clause is not the only constitutional source of congressional power that could justify the manufacturing clause. In

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If [the law's] main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

Id. at 96–97.

31. The constitutionality of federal protection against traditional trademark infringement is widely accepted; there is also no doubt that the Court would find the necessary nexus with interstate commerce to support any commercially significant form of intellectual property protection. See Ginsburg, No Sweat, supra note 5, at 368; see also, e.g., United States v. Moghadam, 175 F.3d 1269, 1276–77 (11th Cir. 1999) (upholding anti-bootlegging statute as valid exercise of commerce power). My discussion of the Commerce Clause as a potential basis for granting exclusive rights in intellectual property assumes the existence of the requisite nexus.

32. See, e.g., Moghadam, 175 F.3d at 1277.

33. 790 F.2d 220 (2d Cir. 1986).


[T]he importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada.

The provision was permitted to sunset in 1986 and no longer applies.

35. Authors League, 790 F.2d at 224; see also Graham v. John Deere Co., 383 U.S. 1, 5 (1966) (emphasizing that Patent Clause limits congressional power).

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. See U.S. Const. art. 1, § 8, cl. 3.37

But the trademark law and Authors League examples can be, and have been, distinguished from a congressional attempt to grant something that resembles copyright or patent protection. Although it grants a right to exclude others from using a particular mark (and is thus arguably an "exclusive right"), trademark protection has a different goal than either copyright or patent protection, and the narrow scope of traditional trademark liability reflects that goal. While copyright and patent are traditionally concerned with providing incentives for the creation of works for their intrinsic value, the goal of trademark law is to reduce the cost of product differentiation and to reduce consumer confusion.38 Consequently, traditional trademark liability will lie only in cases in which two uses of the same mark are likely to lead to confusion as to the source or sponsorship of goods or services.39 The requirement of confusion arguably sets trademark law apart from copyright or patent law, more closely resembling consumer protection acts and regulation against disseminating false product information40 than the granting of exclusive rights to exploit a particular work or commodity.41 Whether this distinction is constitutionally significant is questionable, but it is at least colorable. Therefore I will assume that the distinction is strong enough to un-

37. Authors League, 790 F.2d at 224. See also Hughes, supra note 5, at 183–84 (discussing the constitutional space for two other close, but distinct forms of protection: trade secret law and rights of publicity).


40. Ginsburg, No Sweat, supra note 5, at 370–71 (arguing that Congress may legislate under the Commerce Clause "if the statute set[s] forth a scheme of protection qualitatively different from a copyright regime. Trademarks supply a pertinent analogy . . . ."); Patry, supra note 5, at 391–92 (arguing that trademark protection exemplifies permissible Commerce Clause legislation because it redresses consumer confusion only and does not provide an exclusive intellectual property right).

41. In 1996, Congress enacted the Federal Trademark Dilution Act, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified at 15 U.S.C. §§ 1125(c), 1127), which extended the protection afforded certain "famous marks" beyond that traditionally afforded by trademark. Under the FTDA, owners of famous marks are protected against uses that are not likely to result in confusion. See 15 U.S.C. § 1127 (defining "dilution" as "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of . . . likelihood of confusion, mistake, or deception"). The FTDA has been cited by some commentators as one example of an extension of intellectual property protection under the Commerce Clause that is forbidden by the Intellectual Property Clause. See Benkler, supra note 5, at 552; Latimer & Ablin, supra note 5, at 490–91; Patry, supra note 5, at 392–93; Jacobs, supra note 5, at 172–73.
dermine the argument that because the Commerce Clause serves as a basis for trademark protection, Congress may also use the Commerce Clause to grant copyright- or patent-like exclusive rights without regard to the Intellectual Property Clause's limitations.

The validity of section 601(a) provides even less support for the use of the Commerce Clause as a basis for intellectual property protection. The provision at issue in Authors League looked even less like copyright or patent protection than trademark does; it was not even a grant of exclusive rights. Rather, the provision merely banned the importation and distribution of copies of certain copyrighted works if they were printed outside of the United States and Canada. Although copyright owners also have the right to prevent the importation or distribution of their works, the manufacturing clause was not a grant of a right to the copyright owner; it was a prohibition enforceable by the government against all, including the copyright owner. Thus, it is difficult to conceive of the manufacturing clause as anything but the pro-printer, pro-publisher trade protection legislation it purported to be—a far cry from an attempt to grant intellectual property protection that would be impermissible under the Intellectual Property Clause.

Rather, the question raised by any congressional attempt to grant exclusive rights to articles that do not qualify as "Writings" or "Discoveries," to grant those rights to someone other than "Authors" or "Inventors," or to grant exclusive rights that are not for "limited Times" or do not "promote the Progress of Science and useful Arts," is whether the limitations on the Intellectual Property Clause's grant of power extend to

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42. See United States v. Moghadam, 175 F.3d 1269, 1278-79 (1999) (discussing the changed circumstances that have placed Congress's power to enact trademark protection pursuant to the commerce power beyond question).


44. If anything, the manufacturing clause operated as a restriction on the exclusive rights of the copyright owner. As the Second Circuit pointed out, the implementing regulations to the manufacturing clause permitted importation of the copies if the copyright owner was willing to surrender copyright protection for the work. Authors League of Am., Inc. v. Oman, 790 F.2d 220, 221 (2d Cir. 1986).

45. See Heald & Sherry, supra note 5, at 1193-94 (arguing that the manufacturing clause simply benefits "American printers at the expense of foreign printers," which does not implicate the limitations contained in the Intellectual Property Clause, and is an exercise of Congress's plenary control over international borders); Malla Pollack, Unconstitutional Incontestability? The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silstar Corp., 18 Seattle U. L. Rev. 259, 297-98 (1995) [hereinafter Pollack, Unconstitutional Incontestability] (arguing that section 601's favoritism toward domestic industry is a "core purpose of the Commerce Clause" and not an attempt to enact intellectual property legislation outside of the Intellectual Property Clause).
other grants of power under Article I. That issue was taken up recently by the Eleventh Circuit in *United States v. Moghadam.*

In 1994, as part of the Uruguay Round Agreements Act, Congress added a new form of copyright protection to the Copyright Act: protection against "unauthorized fixation" of musical performances, more commonly known as "bootlegging." By giving the performer the ability to authorize fixation, the anti-bootlegging provision essentially grants performers a new exclusive right: the right to control whether their live musical performances will be recorded. Ali Moghadam was charged with a criminal violation of the anti-bootlegging provision, and he challenged the constitutionality of the statute by arguing that Congress cannot, pursuant to its copyright power, grant a performer exclusive rights in a musical performance before the performance is recorded.

Moghadam's claim has some resonance in copyright law. Traditionally, expression that is not fixed in some tangible form, such as an extemporaneous speech that is never recorded, has not been accorded federal copyright protection. The fixation requirement has been a feature of the federal copyright statute since the original 1790 Act, which extended protection to "any map, chart, book, or books" but not to extemporaneous speech, and remains so today. Moghadam argued that the fixation requirement is not only a traditional requirement for federal statutory copyright protection; it is a constitutional requirement inherent in the Copyright Clause's use of the word "Writings" to describe the subject matter that Congress can protect pursuant to the Clause.

Although the Eleventh Circuit considered the issue, it did not decide it. Instead, relying on both the *Trade-Mark Cases* and *Heart of Atlanta Motel, Inc. v. United States,* the court found the authority for the anti-bootlegging provisions in the Commerce Clause. The court concluded that it need not reach the Copyright Clause's limits because it need not reach the Copyright Clause as a grant of power:

In general, the various grants of legislative authority contained in the Constitution stand alone and must be independently ana-

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47. "Fixation" is the making of a semi-permanent or permanent record of an expressive work. Thus, writing down a sentence is fixation, as is recording the sounds of a musical performance. See 17 U.S.C. § 101 (defining "fixed").
49. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802).
50. 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." (emphasis added)).
51. *Moghadam*, 175 F.3d at 1273.
52. 100 U.S. 82 (1879).
lyzed. In other words, each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another.\(^5\)

The court found that such an approach corresponded with that previously taken in the *Trade-Mark Cases* (described above) and *Heart of Atlanta*.\(^5\)

In *Heart of Atlanta*, the Supreme Court considered the use of the Commerce Clause as the basis for Title II of the Civil Rights Act of 1964, a prohibition against private discrimination in the provision of public accommodations. The Court had previously held in the *Civil Rights Cases* that the prohibition of private discrimination could not be maintained under the grant of congressional authority in the Thirteenth or Fourteenth Amendments.\(^5\) But the *Civil Rights Cases* Court never addressed the possibility that the same regulation could have been enacted pursuant to the Commerce Clause.\(^5\) As such, the *Heart of Atlanta* Court decided that the *Civil Rights Cases* were simply inapplicable to an identical law enacted pursuant to the commerce power.\(^5\) From this the Eleventh Circuit in *Moghadam* deduced:

The Court's reasoning [in *Heart of Atlanta*] illustrates that, as a general matter, the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on whether it can be sustained under another.\(^5\)

As applied by the Eleventh Circuit, the *Heart of Atlanta* approach to enumerated powers implies that Congress can, "as a general matter" (more on that below), grant exclusive rights pursuant to the Commerce Clause without any attention to the Intellectual Property Clause's limitations.

That conclusion, while both logical and consistent with the *Heart of Atlanta/Trade-Mark Cases* preference for finding a constitutional grant if one applies, is somewhat unsatisfying because it does little to explain why we should read the Section 8 powers in isolation. And *Heart of Atlanta*

\(^5\) *Moghadam*, 175 F.3d at 1277.

\(^5\) "[T]he Supreme Court's analysis in the *Trade-Mark Cases* stands for the proposition that legislation which would not be permitted under the Copyright Clause *could* nonetheless be permitted under the Commerce Clause, provided that the independent requirements of the latter are met." Id. at 1278.

\(^5\) *The Civil Rights Cases*, 109 U.S. 3, 25 (1883); *Heart of Atlanta*, 379 U.S. at 251-52; see also the companion case to *Heart of Atlanta*, Katzenbach v. McClung, 379 U.S. 294, 301-03 (1964) (relying on *Heart of Atlanta*'s analysis of Congress's power under the Commerce Clause).

\(^5\) The government did not rely on the Commerce Clause as a basis of authority in the *Civil Rights Cases*, and even if it had, it is unlikely a court in 1875 would have found the requisite nexus with interstate commerce, which the Court had no problem finding in 1964. See *Heart of Atlanta*, 379 U.S. at 252 (finding the *Civil Rights Cases* "devoid of any authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce").

\(^5\) Id. at 250-52.

\(^5\) *Moghadam*, 175 F.3d at 1277.
seems somehow to be an easier case than Moghadam. The Reconstruction Amendments do not on their face address racial discrimination in the conduct of interstate commerce by private parties, while the Intellectual Property Clause (along with its limits) does address the granting of exclusive rights. The Moghadam conclusion is just a little too pat.

This portion of the Moghadam decision, unsurprisingly, has aroused criticism from a variety of commentators for its failure to consider adequately the relationship between the Intellectual Property Clause (and its limitations) and the Commerce Clause. Indeed, as discussed below, the Moghadam court itself chose not to rely solely on so simple and absolute an approach. Viewing the two grants in isolation arguably ignores that they are both part of a single integrated document that establishes a single federal government. This approach also sidesteps the ultimate question that arises when Congress attempts to fill gaps in intellectual property law by adopting nontraditional intellectual property legislation pursuant to its commerce power: What implications does the very circumscribed grant of power in the Intellectual Property Clause have for the seemingly broad grant of power contained in the Commerce Clause? Commentators have offered several theories to address the problem.

B. Scholarly Responses Part I: The Rhetoric of Structure

Several commentators have attempted to resolve the problems posed by the Intellectual Property Clause/Commerce Clause overlap by relying on the "structure" of the Constitution. Some have sought to demonstrate that other generally applicable limitations on congressional power (and specifically the commerce power) can be implied from the structure of the Constitution and consequently that the limits contained in the Intellectual Property Clause must also limit Congress's authority under the Commerce Clause. Those who claim that the Intellectual Property Clause limits the Commerce Clause have pointed to a number of generally applicable limits that can be implied from the structure of the Constitution, with the most thorough comparisons being made to the reservation of state power described in the Tenth Amendment and the Court's implication of state sovereign immunity from suit in federal court in Hans v. Louisiana. Others arguing for Intellectual-Property-Clause-based limits on the Commerce Clause have made "structural" arguments based on Laurence Tribe's work describing the implied limits on Congress's power created by the treaty power contained in Article II and the amendment

60. See, e.g., Benkler, supra note 5, at 547; Heald & Sherry, supra note 5, at 1191–92; Quinn, supra note 5, at 78–82; Edward C. Walterscheid, To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power, 43 IDEA 1, 77–78 (2002) [hereinafter Walterscheid, Anatomy]; Merschman, supra note 5, at 662.

61. See infra text accompanying note 172.

62. See Heald & Sherry, supra note 5, at 1127–28, 1139; Pollack, Unconstitutional Incontestability, supra note 45, at 271–72.

63. 134 U.S. 1, 14–15 (1890); see Heald & Sherry, supra note 5, at 1126–27, 1138–39.
provisions of Article V. However, neither form of the argument can be sensibly extended to the limitations contained in the Intellectual Property Clause.

Professors Heald, Sherry, and Pollack point out that the Court has been willing to find implied limitations on the commerce power based on the structure of the constitutional scheme primarily in two contexts: attempts by the federal government to regulate through the States and cases involving the States' immunity from lawsuit. These cases, they argue, demonstrate a structural approach to constitutional interpretation that requires one to consider grants of power in their constitutional context. Doing so, they maintain, demonstrates that the seemingly freestanding grant of power in the Commerce Clause must be subject to the Intellectual Property Clause's limits.

It is well-established constitutional law that, while the federal government has some power to regulate activity by the States, it may not "compel the States to enact or administer a federal regulatory program." Although embodied in the text of the Tenth Amendment, the Court has repeatedly explained that the source of the limitation is not the Tenth Amendment but rather a combination of the system of dual sovereignty established by the Constitution and the nature of the federal government as a government of enumerated powers. As explained by Justice Story, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution." This focus on the Constitution's structure, and not any statement in the Tenth Amendment, persists throughout the Court's modern Tenth Amendment jurisprudence.

Similarly, while the Eleventh Amendment by its terms only provides States with immunity from lawsuits "by Citizens of another State, or by Citizens or Subjects of any Foreign State," the Court has implied a much broader vision of state sovereign immunity by virtue of constitutional structure: "The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."

64. See, e.g., Patry, supra note 5, at 374-75; Merschman, supra note 5, at 685-86.
66. Id. at 156 (quoting 3 J. Story, Commentaries on the Constitution of the United States 752 (1833)).
67. Id. at 156-57.
68. U.S. Const. amend. XI.
69. Alden v. Maine, 527 U.S. 706, 728 (1999) (describing "a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the Constitution itself").
70. Id. at 728-29.
Using the Tenth and Eleventh Amendment jurisprudence as examples of cases in which the Court has "explored broader constitutional structures," Professors Heald, Sherry, and Pollack argue that the same principles of constitutional structure imply that the limits contained within the Intellectual Property Clause must also limit the Commerce Clause. As asked by Heald and Sherry, the structural question answers itself in the Tenth and Eleventh Amendment contexts: "Why would the framers have carefully crafted a federal system, with powers and responsibilities shared by both the state and national governments, if Congress were to retain an ultimate trump card of such coercive magnitude?" Similarly, they posit, why would the Framers put limitations in the Intellectual Property Clause if those limitations could be circumvented through reliance on the Commerce Clause? From her evaluation of the Tenth and Eleventh Amendment cases, as well as other provisions, Professor Pollack concludes that "[s]eemingly, if a separate constitutional phrase (1) includes a limit by negative implication, and (2) this limit has not been interpreted out of the clause, Congress cannot [bypass] the limit through the Commerce Clause."

Other structural claims have been advanced based on Professor Laurence Tribe's *Taking Text and Structure Seriously.* Although Tribe himself does not address the relationship between the Intellectual Property Clause's limits and the Commerce Clause, he does address limits imposed in the context of potentially conflicting grants of power: the Treaty Clause of Article II and the amendment provisions of Article V. Professor Tribe analyzes the claim that Congress can ignore the Treaty Clause's requirement of a two-thirds vote of the Senate and ratify treaties by the same bicameral majority vote required for legislation and that the Constitution can be amended without following the procedure described in Article V. He explains that reading the Treaty Clause or Article V as

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71. Heald & Sherry, supra note 5, at 1138.
72. Id.
73. Id. at 1168.
74. See Pollack, Unconstitutional Incontestability, supra note 45, at 273 (considering the Fifth Amendment's Due Process Clause, the Sixth Amendment's right to trial by jury, and the Twenty-First Amendment). I believe that, to the extent that Professor Pollack's claims are based on express limitations imposed by amendments, they are not structural arguments but rather textual ones. That the Intellectual Property Clause limits the Commerce Clause requires an inference that is not necessary when considering express general limitations such as the First Amendment.
75. Id. at 274.
77. See U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").
78. On the Treaty Power claims, see Tribe, supra note 76, at 1225–26 (citing 1 Bruce Ackerman, We the People: Foundations 6–7, 266–94 (1991), and Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995)). On the Article V
tions for making treaties or amending the Constitution ignores the role that each set of limitations plays in the constitutional framework. Each constitutional provision must be read in context in order to be understandable. "Read in isolation, most of the Constitution's provisions make only a highly limited kind of sense. Only as an interconnected whole do these provisions meaningfully constitute a frame of government for a nation of states."79

Building on Professor Tribe's work, William Patry advances a "structural argument . . . that Article I, Section 8, Clause 8 can act as a limitation on Congress's power to legislate under the Commerce Clause."80 Describing the concept as "Tribean Peripheral Vision," Patry explains, "[p]ractically applied, Professor Tribe's argument mandates that we take into account restrictions in one clause of the Constitution when we analyze congressional power under a different clause."81 A contrary view may comport with a "literal" reading of the different clauses in Section 8, but a literal reading is not necessarily an accurate one.82

While it is impossible to deny that constitutional structure can serve as a guide on how to interpret or imply limits on federal power, the examples provided do not translate to the Intellectual Property Clause. As an initial matter, arguments about the reach of the Intellectual Property Clause's limits based on the "structure" of Article I make a hash of the concept of enumerated powers. Indeed, use of the Tenth Amendment as an example for the Intellectual Property Clause illustrates the incoherence of the position. The Tenth Amendment stands for the proposition that the limits on the federal government correspond to the powers of state governments.83 The Commerce Clause's grant of power to regulate foreign, Indian, and interstate commerce limits Congress's power by preventing the regulation of purely intrastate matters. But the upshot is not that intrastate matters are beyond the reach of government regulation; it is simply an area of regulation reserved to the States.84 The most

claims, see id. at 1228-29 (citing Bruce Ackerman, Higher Lawmaking, in Responding to Imperfection 63, 72 (Sanford Levinson ed., 1995)); id. at 1245-48 (citing Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 459 (1994)).

79. Tribe, supra note 76, at 1235.
80. Patry, supra note 5, at 371.
81. Id. at 374.
82. Id. at 374-75. Another commentator has adapted Professor Tribe's arguments to demonstrate that the simplified Moghadam approach is flawed because it fails to read the Commerce Clause in light of the Intellectual Property Clause's limitations. See Merschman, supra note 5, at 685 ("That a prohibition to enact certain legislation under one clause would prohibit Congress from enacting the legislation under another clause is logical if one views the Constitution as a whole.").
84. See United States v. Morrison, 529 U.S. 598, 617-18 (2000). But see Graves, supra note 5, at 253-54 (arguing that an increase in federal power even in areas of regulation from which the States are completely excluded alters the federal/state balance of power and therefore violates the enumerated powers doctrine).
obvious implication of the Copyright Clause's limitation that exclusive rights be granted only to "Writings" of "Authors" is not that the federal government may not protect facts (by granting exclusive rights under some other power), it is that the States can.85

Even if one were to take the Tenth and Eleventh Amendments as absolute limits on federal power without reference to their implications for state power, neither they nor Professor Tribe's examples support the kind of "structural" interpretive leap proposed by those who would read the Intellectual Property Clause's limits as applying to all of Congress's Article I powers.

There is simply no way to characterize the limits in the Intellectual Property Clause as so fundamental to the constitutional order as to warrant their inference as a matter of structure. As the Court has repeatedly explained, the protections at issue in the Tenth and Eleventh Amendment cases are so fundamental that they are necessary inferences even in the absence of any text. "Tenth Amendment" and "Eleventh Amendment" are shorthand expressions; neither amendment is the source of the limits that the Court has applied in both contexts.86 The Intellectual Property Clause's limits reflect a policy choice about the reach of a relatively insignificant form of economic regulation allocating quasi-property rights between private entities.87 Even a reading of the Intellectual Property Clause that assumes it was the result of deep and considered thinking on the part of the Framers (which it does not appear to have been) regards it as but a single policy-driven choice in a single area of economic regulation, which cannot be significant to the "structure" of the federal govern-

85. Of course, such an interpretation would render unconstitutional section 301 of the Copyright Act, which purports to preempt state rights "equivalent to any of the exclusive rights within the general scope of copyright" to fixed works falling in "the subject matter of copyright" and includes facts. See ProCD v. Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996) (Easterbrook, J.). If non-writings and non-inventions are beyond Congress's power to regulate under the Intellectual Property Clause, then there is at least some argument (precluded for all practical purposes by the preemption analysis adopted by the Court in Goldstein v. California, 412 U.S. 546, 559 (1973)) that preventing the States from granting exclusive rights in such items is similarly beyond federal power. When the Court considered the possibility in Goldstein that Congress might need to prevent States from granting exclusive rights in certain kinds of intellectual goods, it mentioned a combination of the Commerce and Intellectual Property Clauses as the sources of the power to do so. See id. ("Where the need for free and unrestricted distribution of a writing is thought [by Congress] to be required by the national interest, the Copyright Clause and the Commerce Clause would allow Congress to eschew all [state] protection.").

86. New York v. United States, 505 U.S. at 156-57 (Tenth Amendment); Alden v. Maine, 527 U.S. 706, 712-13 (1999) (Eleventh Amendment). Of course, there is no sustainable argument that, in the absence of the Intellectual Property Clause's textual limitations, Congress could not (subject to generally applicable constraints such as the Takings Clause and the First Amendment) extend perpetual exclusive rights to any article it wished. Under modern Commerce Clause jurisprudence, it could do so under the Commerce Clause if the Intellectual Property Clause had been omitted in its entirety.

ment in the same way as maintaining the residual sovereignty of the States.88

Nor is the history of the Clauses comparable. The possibility that the federal government might regulate through the States was the source of extensive debate during both the drafting and ratification of the Constitution. Indeed, the Federal Convention itself was the result of problems encountered under the Articles of Confederation (which relied on regulation through the States), and the adoption of the Virginia Plan over the New Jersey Plan was a rejection of that mode of government.89 Similarly, the possibility that the States may be made subject to private suits in federal courts was the source of extensive discussion during the Federal Convention and the ratification debates, with universal agreement that the States’ sovereign immunity would be preserved under the new Constitution.90 As described in more detail below, the Intellectual Property Clause and its limitations received practically no attention during either the Federal Convention or the ratification debates.91

Professor Tribe’s examples provide a slightly better analogy to the Intellectual Property Clause/Commerce Clause problem; they at least rely on the enumeration of a power or procedure, with its limitations, for finding a limit on another power,92 and they are not superficially incoherent applications of the enumerated powers doctrine. In the end, however, neither example does much to further the question of the applicability of the Intellectual Property Clause’s limits to the Commerce Clause.

The Article V example is readily distinguishable because no other provision facially reaches the same subject matter—amendment of the Constitution—which is not the case with either the Treaty Clause or the Intellectual Property Clause/Commerce Clause problem.

88. Professors Heald and Sherry similarly raise the Court’s Article III jurisprudence as a source of implied limits. See Heald & Sherry, supra note 5, at 1128. But the Article III context is similarly distinguishable. The Article III limits are necessary in order to prevent dismantling the system of checks and balances described by the Constitution. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 222–25 (1995). The same cannot be said of a reading that would permit, for example, perpetual patents.


90. Alden, 527 U.S. at 715–19.

91. See infra text accompanying notes 281–302. Similarly, the kind of broad and lengthy historical basis for sovereign immunity is absent with regard to the limitations described in the Intellectual Property Clause. Protection of writings for a limited duration, for example, were adopted by statute only eighty years before the ratification, and then only in England—hardly the “established principle of jurisprudence in all civilized nations,” Hans v. Louisiana, 134 U.S. 1, 17 (1890) (internal quotations omitted) (referring to state sovereign immunity), that “has been enjoyed as a matter of absolute right for centuries,” Alden, 527 U.S. at 715 (quoting Nevada v. Hall, 440 U.S. 410, 414 (1979)), at the root of the Supreme Court’s Eleventh Amendment cases.

92. Cf. Patry, supra note 5, at 374 n.82 (“This Article focuses not on the relationship between two articles of the Constitution, but instead focuses only on relationships among the [clauses] of Article I, Section 8. The principle is the same, though: any claim of rights under Clause 3 must be considered in conjunction with Clause 8.”).
The Treaty Clause, however, does seem to provide a rough analogy. As an initial matter, Professor Tribe's own conclusions—even as applied to the Treaty Power—are not universally accepted. But even accepting for the purposes of argument that Professor Tribe is correct, the application of the Treaty Clause's restrictions to Congress's Article I power is—like the Tenth and Eleventh Amendment contexts—supported by constitutional interests implicating the sharing of power between different parts of the federal government. As Professor Tribe points out, the extension of Article I to permit ratification of treaties under the commerce power fails to "adequately consider[] how [that] position would mesh with the terms of other constitutional provisions and with the architecture of decisionmaking that those provisions interact to define." The implications for the structure of the federal government are enormous:

Because the constitutional allocation of responsibility for these various actions is part of a larger framework of separated and divided powers, it is possible that changing any of these processes will upset the overall balance and thereby fundamentally alter the constitutional configuration . . . . Modes of constitutional interpretation that would allow Congress to give itself a role in the approval of international agreements embody precisely such improper topology-altering moves.

Defeating the limits of the Treaty Clause would not simply alter the substance of federal law in a single area of economic regulation or even the terms of the debate over that regulation. It would alter the procedure for making treaties in a way that would seriously disadvantage both the President and, at the time of the framing, the States. The Intellectual Property Clause's limitations, on the other hand, do nothing to alter the nature of federal lawmaking or the balance of power among the various branches of government. Like claims based on the Tenth and Eleventh Amendments, the call upon "structure" does not translate well to a part of the Constitution that has nothing to do with the structure of the federal government. In all three of the applicable examples, the particular limitation can be inferred from everything around them, but there is no reason to infer from the whole of the Constitution the existence of a prohibition against, for instance, granting a patent to an existing invention.

Arguing that the limits in the Intellectual Property Clause must apply to all of Congress's powers as a matter of constitutional structure suggests that any limitation on an enumerated power is "structural" and consequently must bind all enumerated powers. The Trade-Mark Cases and Heart of Atlanta at the very least mean that when one power does not

94. Tribe, supra note 76, at 1250–51.
95. Id. at 1237–38.
support legislation, Congress can look to another; this would not be the case if the structural approach offered by others were actually the law. Instead, structural arguments about the reach of the Intellectual Property Clause's limits mean that one must take surrounding text into account when interpreting the text of any particular power. Such common sense cannot be denied, but it does little to explain whether the Intellectual Property Clause's limits should be read across all of Article I.

C. Scholarly Responses Part II: Affirmative Limitations and Enumerated Powers

A trio of commentators have distinguished the issue at play in Moghadam from that in Heart of Atlanta based on a difference between the types of constraints on Congress's power arising in the two cases. As one has explained:

The issue before the court in Moghadam was whether an affirmative limitation that prohibited Congress from enacting legislation under one clause of the Constitution also constrained Congress's power to enact the legislation under another clause. By contrast, in Heart of Atlanta Motel the issue was simply a lack of authority to legislate. . . . Moghadam did not involve a piece of legislation that was beyond the limits of a particular legislative power, but rather, it involved a piece of legislation that was forbidden by a positive limit on that power.96

The requirement of fixation, the argument goes, is an affirmative limitation on Congress's power to grant exclusive rights and that Congress's enactment of the anti-bootlegging statute pursuant to the Commerce Clause to avoid the Copyright Clause's fixation requirement is "forbidden by" that positive limit.97 Patry has similarly pointed to "specific restrictions" in the Intellectual Property Clause whose importance is emphasized by the fact that parallels for them can be found in only two other Section 8 clauses.98

But it's not clear that such distinctions further the inquiry.

96. Merschman, supra note 5, at 684–85 (footnotes omitted); see also Heald & Sherry, supra note 5, at 1124 (distinguishing cases in which "Congress's power just runs out" from those in which it "runs into barriers").
97. Merschman, supra note 5, at 685.
98. The two other cases are the Naturalization and Bankruptcy Clause's uniformity requirement and the Army Clause's limitation of appropriations to periods of two years or less. Patry, supra note 5, at 374; see also Dan T. Coenen & Paul J. Heald, Means/Ends Analysis in Copyright Law: Eldred v. Ashcroft in One Act, 36 Loy. L.A. L. Rev. 99, 106 (2002) (noting that Intellectual Property Clause is the only "clause in the Constitution that is structured in this sort of way"); Lawrence B. Solum, Congress's Power to Promote the Progress of Science: Eldred v. Ashcroft, 36 Loy. L.A. L. Rev. 1, 19 (2002) (noting that the Intellectual Property Clause and Militia Clause are the only clauses in Section 8 that "express a grant of power and limitations of that power through the specification of a means-ends relationship").
The Intellectual Property Clause is not so special. All of the Article I, Section 8 grants have express limits; the concept of the federal government as one of enumerated powers would be meaningless if any of the powers were without limitation. Along with offenses against the law of nations, the tenth clause permits Congress to “define and punish Piracies and Felonies,” but that power is expressly limited to felonies “committed on the high Seas.” Does that mean that Congress cannot punish landlubbers’ felonies pursuant to its commerce power? The Commerce Clause itself contains limitations, permitting the regulation of only foreign commerce, Indian commerce, or commerce “among the several States,” a limitation that has actually been applied to strike down a law granting exclusive rights.

Because the federal government is one of enumerated powers, it is easy to restate any “affirmative limitation” on a grant of Congress’s power as a “lack of authority to legislate,” and vice versa. Do the principles of state sovereign immunity represent an “affirmative limitation” on Congress’s ability to subject the States to litigation or do they simply describe a “lack of authority to legislate” in ways that abrogate the States’ sovereignty? The second Militia Clause authorizes Congress to provide for, regulate, and determine the training that the militia is to receive but reserves to the States the authority to appoint the officers of the militia and to train the militia according to Congress’s plan. Is Congress’s inability to appoint the officers of the militia an “affirmative limitation” on its militia power or merely a “lack of authority to legislate” the appointment of officers? Because the federal government is a government of enumerated powers, the difference between an “affirmative limitation” on Congress’s power and a “lack of authority to legislate” lacks meaning.

99. Others have devoted considerable attention to the text and grammatical structure of the Intellectual Property Clause. See, e.g., Solum, supra note 98, at 11–25 (providing, in thirteen pages, a word-by-word examination of the textual structure of the Intellectual Property Clause); Walterscheid, Anatomy, supra note 60, 8–18 (examining the language and structure of the Clause from an historical perspective). But focusing on the description of a constitutional power would seem to be a much more profitable approach to constitutional interpretation than attention to the text or grammatical structure of a particular clause. The power to field armed forces, which is the subject of several clauses in Articles I and II as well as the Second and Third Amendments, appears far more circumscribed than the power to grant exclusive rights, regardless of the placement or the parts of speech in which the Intellectual Property Clause’s restrictions are stated. See infra text accompanying notes 314–320.

100. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819) (describing Section 8 powers as enlarging, not restricting, the powers of Congress).

101. See The Trade-Mark Cases, 100 U.S. 82, 96–98 (1879).

102. U.S. Const. art. I, § 8, cl. 16:
To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .
Putting aside their troublesome rhetoric, the heart of arguments of this kind is that the lack of a grant in one provision can sometimes indicate the existence of a general prohibition. The Copyright Clause authorizes Congress to grant exclusive rights to "Writings." It does not explicitly state that Congress cannot provide exclusive rights in articles that are not "Writings"; the inference at work is that restricting the authority to grant exclusive rights to "Writings" embodies a prohibition against granting exclusive rights to "non-Writings."

Such arguments, however, ignore rather than confront the operating principles most clearly at work in *Heart of Atlanta* and the *Trade-Mark Cases*: that the absence of a grant in one power-conferring provision is not indicative of the denial of that grant under another provision. It's hard to criticize the application of *Heart of Atlanta* to the situation in *Moghadam* without a coherent theory about why the particular power is missing in the Intellectual Property Clause; there is nothing, linguistically, to separate the grants and limitations at issue in *Heart of Atlanta* from the limitation at issue in *Moghadam*. The Fourteenth Amendment grants Congress the power to correct certain kinds of discrimination, but not private discrimination on the basis of race. Is that denial of power an affirmative limitation on Congress's other powers or merely a lack of authority to regulate private discrimination under the Fourteenth Amendment, leaving open the possibility that there is another grant under which Congress can legislate? Similarly, the Copyright Clause only permits Congress to grant exclusive rights in "Writings," and we can assume for the purposes of argument that the "Writings" requirement prevents Congress from using the Copyright Clause as a basis for granting exclusive rights in un-fixed musical performances. But recognizing that the Copyright Clause does not permit protection for certain types of works tells us very little about whether the Commerce Clause does, just as recognizing that the Fourteenth Amendment does not permit regulation of private discrimination tells us very little about whether the Commerce Clause does.

The "affirmative limitation" argument could be deployed more forcefully with regard to other limitations in the Intellectual Property Clause. The Intellectual Property Clause authorizes Congress 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. The limitation that exclusive rights be granted "for limited Times" seems far more "affirmative" than the limitation of the grant to "Writings" and "Discoveries." The limited times constraint is not only explicit, but also reflects consideration and rejection of the alternative. It addresses itself to the amount of "time" that a grant may last and makes that amount of time "limited." The writing and discovery requirements do not address

the possibility that non-writings and non-discoveries could be the subject of exclusive grants; unlike the universe of perpetual grants, the universe of non-writing, non-discovery grants is never addressed by the Clause, nor is the possibility of grants that do not "promote the Progress of Science and the useful Arts." Thus, although I would argue against doing so for reasons discussed below, there is a stronger textual argument for applying the "limited Times" restriction to the whole of Section 8 than there is for any of the Intellectual Property Clause's other limits; the literal consideration and rejection of perpetual grants sets this restriction apart.

Ironically, the only limitation in the Intellectual Property Clause that the Supreme Court has actually imposed on Congress is the limitation of copyright and patent protection to "Writings" and "Discoveries," which the Court has interpreted to mean that Congress cannot extend copyright protection to facts or other unoriginal expression. But the "Writings" requirement is not so clearly stated as an affirmative limitation (or a "specific restriction"); it is a description of Congress's power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." Similarly, Congress has the power "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States." Does that mean that Congress cannot punish the counterfeiting of foreign currency? Of course not.

There is nothing about the arrangement of powers and limitations in the Intellectual Property Clause to suggest that its limitations, even its express limitations, reach beyond the Clause itself. The limitation is on a power, which in turn is bounded by the grant.

A distinction more helpful than that between affirmative limitations and cases in which Congress merely lacks the power to legislate is the distinction between limits that are internal to a particular constitutional provision and limits that apply throughout the Constitution or are, for lack of a better term, external. Some limitations may be easy to identify as either internal or external. Freestanding limitations on governmental authority, such as the First Amendment, would be nonsensical if not read as applying externally. But limitations—whether affirmative or simply rep-

105. See The Trade-Mark Cases, 100 U.S. at 94.
108. U.S. Const. art. I, § 8, cl. 6 (emphasis added).
109. See 18 U.S.C. §§ 478–489 (2000) (criminalizing manufacture, possession, and use of counterfeit foreign currency); United States v. Arjona, 120 U.S. 479, 483–84 (1887) (upholding predecessor to § 480). The statute at issue in Arjona was upheld as a valid exercise of congressional power under Section 8, Clause 10 ("To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"), because the United States has an obligation under the law of nations to exercise due diligence to protect the currency of foreign nations against counterfeiting. Arjona, 120 U.S. at 483–84. The Court also hinted that the defendant's counterfeiting activity was itself a violation of the law of nations. Id. at 488.
resenting a boundary of power—that are mixed with grants of power are not so readily categorized. It is possible to craft text to create an externally applicable limit within a grant of power, but the Intellectual Property Clause is not a good example. One such explicit external limit is embodied in the first clause of Section 8 (conferring the power “[t]o lay and collect Taxes, Duties, Imposts and Excises”) and its limit that “all Duties, Imposts and Excises shall be uniform throughout the United States.”

The comparatively meekly worded limits on the intellectual property power, none of which on their face apply to “all” exclusive rights, present a much weaker textual case for being read so broadly. In the end, the distinction between affirmative limitations and boundaries of power does little to answer the real question of whether the Intellectual Property Clause’s limitations—be they express or implied—are limited in their effect to the Clause itself or apply to the Constitution generally.

As is commonly the case, a little bit of generally applicable doctrine can shed more light than the most robust particularized theories. The Supreme Court has confronted the problem of overlapping Section 8 powers and limitations in other contexts, and it is to these cases that I now turn.

III. OVERLAPPING SECTION 8 POWERS AND LIMITATIONS IN OTHER CONTEXTS

The Supreme Court has confronted the problem of overlapping Section 8 limits in other contexts, some of which have been focused upon by commentators in the intellectual property field and some of which have not. The most informative cases originate from two different time periods. In the early twentieth century, several cases addressed Congress’s ability to regulate using the taxing power and, in the 1980s, the Court decided a single case asking whether Congress could avoid the Bankruptcy Clause’s uniformity requirement by legislating pursuant to the Commerce Clause. These cases reach conclusions as disparate as the times in which they were decided, but behind them rests a similar intuition: The key to understanding the problem of overlapping Section 8 powers is to understand the constitutional interests at work in defining them.

110. U.S. Const. art. I, § 8, cl. 1 (emphasis added). On the possibility of using another power in Section 8 in order to avoid the limits in the Tax Clause, see Pollack v. Farmers’ Loan & Trust Co., 157 U.S. 429, 557 (1895):

[Although there have been, from time to time, intimations that there might be some tax which was not a direct tax nor included under the words ‘duties, imports and excises,’ such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.]
A. Regulatory Taxation: What Is a "Tax"?

The late nineteenth and early twentieth centuries saw Congress take an increasing interest in regulating economic affairs; Congress attempted to make its mark on a wide range of industries, from gambling to commodities trading, and from matches to margarine. But the *Wickard v. Filburn* "substantial effects" test for application of the commerce power was decades away.\(^{111}\) The prevailing constitutional thought during this period, shared by justices and legislators alike, was that the commerce power authorized only the regulation of activity that was interstate in nature (and was "intercourse"—activities such as manufacturing did not fall under the Clause\(^{112}\)). Yet Congress had a collective desire to regulate, and the question remained how to do so.

The commerce power itself was not entirely useless in addressing commercially related social ills. That Congress could not regulate matters, commercial or otherwise, of purely local concern was widely accepted. The federal structure of the Constitution (as highlighted by the Tenth Amendment and reinforced by the enumeration of specific powers in Section 8) prevented the exercise by Congress of a general police power in the States. At the same time, the Commerce Clause authorized regulation of commerce taking place across state boundaries.\(^{113}\) Congress was able to have some impact on the social ills of gambling and prostitution by prohibiting the interstate carriage of the articles—lottery tickets\(^{114}\) and women\(^{115}\) respectively—of the disapproved trades. The Supreme Court upheld both regulations, holding that the State's retention of local police powers did not reduce Congress's absolute power to control commerce among the States. Congress had the power to control what was carried over state borders,\(^{116}\) even if the exercise of that power had an impact on intrastate commerce resembling the impact of a local police regulation.\(^{117}\) While Congress could not effect regulation of activity taking place within the States, by using Commerce-Clause-based interstate-transit bans it could affect local conditions by limiting the supply and demand of illicit goods and services to individual intrastate markets.

But the value of such bans was limited by the degree to which a particular industry depended on interstate transit; they had no effect if the

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111. See 317 U.S. 111, 125–29 (1942).
112. See United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).
117. *Hoke*, 227 U.S. at 320 ("If the statute be a valid exercise of [the commerce] power, how it may affect persons or States is not material to be considered.").
scorned activity could be carried out entirely within the borders of a single State. Congress would never be able to eliminate a social ill using a transit ban. All Congress could do was increase the cost, and thereby hopefully reduce consumption, of particular goods and services. Transit bans were also blunt instruments. If Congress wanted to discourage a particular practice, rather than to prevent production of a particular good or service, it was difficult to formulate an appropriate travel ban. For example, when Congress enacted the Keating-Owen Act, a closely calibrated ban on the interstate transportation of goods produced by child labor,\textsuperscript{118} the Court balked and struck it down as an unconstitutional attempt to regulate local production, in part because the articles were not themselves objectionable.\textsuperscript{119} Congress did have some success using the commerce power to regulate commercial enterprises of national importance in the 1920s,\textsuperscript{120} but it was not until after 1942 and \textit{Wickard}, in which the Court upheld the federal regulation of wheat that had been consumed on a private farm,\textsuperscript{121} that Congress could use the commerce power freely to regulate run-of-the-mill intrastate commercial activity.

Nevertheless, long before \textit{Wickard}, Congress enacted laws that permitted it to operate directly on the intrastate activities it wished to regulate. It did so—with mixed constitutional success—by turning to another Section 8 power: the power under Clause 1 "[t]o lay and collect Taxes, Duties, Imposts and Excises."

\begin{flushleft}
\textsuperscript{118} The Act prohibited the interstate transportation of:
any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian . . . .
\end{flushleft}


\textsuperscript{119} Hammer v. Dagenhart, 247 U.S. 251, 272–73 (1918).

\textsuperscript{120} In the 1920s, Congress began to have success regulating interests "affected with a public interest" and which were located "in a current of interstate commerce," like the stockyards in Stafford v. Wallace, 258 U.S. 495 (1922), and—after an unsuccessful attempt to use the tax power to regulate them—commodities exchanges in Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923). See Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution 143–55 (1998).

\textsuperscript{121} Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

\textsuperscript{122} U.S. Const. art. 1, § 8, cl. 1. The full text reads, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." I shall refer to the portion of Clause 1 pertaining to the levying of taxes as the "Tax Clause."
1. Regulatory Taxes as a Way Around Limits on the Commerce Power. — Congress had used taxes to effect commercial regulation since shortly after the Civil War, when Congress established federal currency as the single, national standard by imposing a prohibitively high tax on state bank notes.\textsuperscript{123} Congress continued to use the taxing power a number of times during the late nineteenth and twentieth centuries to eliminate or control a variety of products. For example, Congress taxed out of existence white phosphorous matches and colored (but not white) oleomargarine. Some of these regulations had very little to do with raising revenue. The legislative history makes clear that the tax on white phosphorous matches, for instance, was prompted by the health risks confronting workers in factories producing white phosphorous matches and was aimed at transitioning the American market toward red phosphorous matches (whose manufacture did not present the same risks).\textsuperscript{124} The tax on oleomargarine was specifically engineered to insulate the dairy industry from competition by colored oleomargarine. The tax on uncolored oleomargarine was one-quarter of a cent; the tax on colored oleomargarine was forty times higher, an amount roughly equal to the price differential between oleomargarine and butter.\textsuperscript{125} When the Court struck the Keating-Owen Act's prohibition against interstate transit of goods made with child labor, Congress responded not by giving up on regulating child labor but rather by imposing a high (10\%) tax on the profits of any person operating an establishment meeting criteria identical to those used in the Keating-Owen Act's ban.\textsuperscript{126} It's hard to imagine the Congress of 1919 concluding that, if it could not ban child labor, it might as well benefit from it by taking a slice of the child-labor pie.\textsuperscript{127}

\textsuperscript{123} See Veazie Bank v. Fenno, 75 U.S. (1 Wall.) 533, 549 (1869) (upholding tax on state bank notes).
\textsuperscript{125} See infra text accompanying notes 340–343.
\textsuperscript{126} Compare the definition of the class of articles subjecting producers to the excise tax in the child labor tax:
   (a) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian. . . .

Revenue Act of 1918, ch. 18, § 1200, 40 Stat. 1057, 1138 (1919), with the age definition used for the Keating-Owen Act, recited supra note 118. On the well-understood connection between the Keating-Owen Act and the child labor tax, see Lee, supra note 124, at 131–35.

\textsuperscript{127} Similarly, it is impossible to view the decision to tax colored and plain oleomargarine differentially as a revenue-raising measure. The $0.02 tax on all oleomargarine that preceded the coloring-based tax produced $2,463,615 in its last year. In the first year of the differential tax, the amount produced by the oleomargarine tax fell
But Congress's creativity in using the taxing power was not limited to taxing particular goods out of existence. Congress used the power to tax as a way to regulate, not merely destroy, markets. In 1896, Congress regulated the market for filled cheese (a product produced by adding non-dairy fat to low-fat dairy products) by placing a nominal tax on filled cheese and requiring, ostensibly in aid of collection, that all packages of filled cheese be labeled "FILLED CHEESE" in two-inch black letters. The result was that filled cheese could not be passed off as unadulterated cheese. Congress also used taxation—in the form of the Harrison Anti-Narcotic Act—as the basis for establishing detailed reporting requirements in an attempt to prevent the sale of narcotics for non-medical purposes. The 1919 child labor tax was likewise aimed at stopping a practice rather than a good. And when Congress decided to correct what it considered to be unfair practices in commodities markets, but use of the commerce power seemed unsustainable, it turned again to the taxing power. In 1914, Congress passed the Cotton Futures Act, which imposed a prohibitorily high tax ($0.02 per pound of cotton) on cotton futures contracts, but exempted all contracts made in markets that complied with a detailed set of conditions. It took a similar approach in 1921, with the Futures Trading Act, which applied the same strategy to futures contracts in other commodities. Some of the New Deal measures, such as the Agriculture Adjustment Act (AAA), were based on the power to tax in conjunction with the spending power. The AAA permitted the Secretary of Agriculture to identify commodities for which there was a surplus (as measured by a decrease in prices), place a tax on processors of that commodity, and use the proceeds of the tax to compensate farmers by making up for the decline in prices.
These efforts met with mixed success in the courts. The Supreme Court upheld the prohibitory taxes imposed by the state bank note and colored oleomargarine statutes. The use of nominal taxes to bring filled cheese (and flour) under federal regulation went largely unchallenged, but the detailed recording and dispensing regulations made possible by the tax on narcotics were upheld against constitutional challenge on several occasions.\textsuperscript{135} The Cotton Futures Act’s use of prohibitory taxes to force compliance with trading practices in cotton futures markets was never challenged (the cotton exchanges simply adopted the practices dictated by Congress without dispute),\textsuperscript{136} but the Futures Trading Act and the child labor tax were struck down by the Court on the same day in 1922, and the New Deal’s AAA was held unconstitutional in 1936.\textsuperscript{137}

Others have devoted considerable effort explaining both the seemingly quizzical outcomes in these cases and the decades-long thrust-and-parry between Congress and Court over these attempts to expand the federal regulatory envelope.\textsuperscript{138} I will do neither. What matters for the Commerce Clause/Intellectual Property Clause question is not the outcome or historical basis for the regulatory taxation cases but rather the nature of the Court’s inquiry when considering the overlap in Section 8 powers that they raise. Although they spanned several decades during which the constitutional limits on Congress’s ability to regulate were the

canals by imposing a 15% tax on all coal production and then providing a rebate of 90% of the tax to producers complying with a coal code authored by an independent commission. Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991. However, by the time the act came up for review, the writing was on the wall: The government conceded that the Bituminous Coal Act could not be sustained under the Tax Clause and instead sought to justify it under the Commerce Clause. The Court did not bite. See Carter v. Carter Coal Co., 298 U.S. 238, 289 (1936).

135. See Nigro v. United States, 276 U.S. 332, 354 (1928); Alston v. United States, 274 U.S. 289, 294 (1927); United States v. Wong Sing, 260 U.S. 18, 21 (1922); United States v. Doremus, 249 U.S. 86, 95 (1919). But see Linder v. United States, 268 U.S. 5, 22-23 (1925) (holding that the Act could not be enforced against a doctor prescribing medicine to a patient who had fabricated symptoms because the Act, as a revenue measure, could not be used to control the practice of medicine); United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916) (holding that because of its limited purpose as a revenue measure, the Act should be construed to apply only to those in the business of handling drugs).

136. See Lee, supra note 124, at 89.


138. See Lee, supra note 124, at 216–17 ("The subsequent course of Court interpretations of the tax laws lent credence to the concept that judicial review is little more than 'another step in the legislative process.' The justices either approved or vetoed the tax policies enacted by the peoples' representatives." (citation omitted)); Robert Post, Federalism in the Taft Court Era: Can it be "Revived"?, 51 Duke L.J. 1513, 1518-19 (2002) (noting that the Court's pre-New Deal cases reflect a combination of wariness toward the federal legislative power combined with a willingness to impose uniformity through federal common law). See generally Cushman, supra note 120 (describing the fault lines in the Court's jurisprudence of the '20s and '30s that led to the eventual liberalization of Commerce Clause and Due Process review).
subject of considerable debate, the Court’s regulatory taxation cases consistently took a unitary approach when evaluating statutes passed pursuant to the taxing power, looking only at the scope of the power to tax without regard to any of the restrictions on the power to regulate commerce. Throughout the period, the Court consistently rejected the possibility that a tax might be invalid because it regulated economic activity in a way not authorized by the Commerce Clause. In the end, the Court’s response to the constitutional dilemma presented by regulatory taxation was to ask whether the tax in question could fairly be called a “tax.” The rest of the Section 8 powers, and their limitations, were irrelevant.

2. “Taxes” and Regulatory Motives. — The Court had some help in defining what could and could not be a “tax.” After all, “tax” is a word with a well-established meaning in common usage: “An enforced, usually proportional, contribution, esp. of money, levied on persons, income, land, commodities, etc., for the support of the government and for the public needs . . . .”139 In legislative terms, a tax is a revenue-raising measure. But understanding the common meaning of the term only goes so far in determining whether any particular measure is a constitutional exercise of the taxing power. The question is what to make of a measure that both raises revenue and has some other regulatory purpose or effect, and this is the question the Court confronted in the regulatory taxation cases. One extreme is to ignore any other regulatory purpose or effect if the measure, taken on its face, raises revenue; the other is to insist that the regulatory effects of a tax fall within Congress’s other regulatory powers. As it happens, the Court took neither approach.

The Court began its experience with regulatory taxation well toward the extreme of ignoring the rest of the Constitution. In *Veazie Bank*, the Court upheld the tax on state bank notes without reference to the regulatory effect of the tax. The Court simply accepted that the power to tax is the power to destroy and, Congress having been given the power to tax, it could exercise it to destroy. As the Court saw it, the explicit limits on the tax power itself and the political process were the only checks on the use of taxes to regulate.140 In *McCray*, the 1904 case upholding the differential oleomargarine tax, the Court similarly refused to inquire as to Congress’s purpose in imposing the tax.141 If the tax was facially valid, Congress’s regulatory purpose was irrelevant.


140. *Veazie Bank* v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869). The bulk of *Veazie Bank* is consumed with the internal limits of the Tax Clause—whether the tax was a “direct tax,” and therefore subject to the requirement of apportionment. Id. at 540–47.

141. *McCray* v. United States, 195 U.S. 27, 56 (1904) (“The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.”).
The Court eventually adopted a more restrictive approach. In the *Child Labor Tax Case*, the Court struck the child labor tax because, even though it was ostensibly a revenue measure, it was more fairly described as a "penalty" than a "tax":

The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are important. . . . Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.\(^{142}\)

Deciding whether a putative tax was in fact a penalty was no easy matter. In the *Child Labor Tax Case*, the problem with the measure as the Court saw it was that it was a prohibitively high tax for intentional "departure from a detailed and specified course of conduct in business," and that its enforcement was delegated not only to the Treasury Department but also to the Secretary of Labor.\(^{143}\) *Hill v. Wallace*, decided the same day, cited similar problems with the Futures Trading Act. The Act imposed a prohibitively high tax on certain practices in boards of trade, divided enforcement responsibility (this time to the Secretary of Agriculture and a commission made up of the Secretaries of Agriculture and Commerce and the Attorney General), and imposed regulations (such as prohibitions against disseminating false market information and manipulating prices) having nothing to do with the collection of the tax.\(^{144}\)

Although it used the rhetoric of purpose and intent, the Court was not setting itself the impossible task of divining Congress's purpose.\(^{145}\) Three years before the *Child Labor Tax Case* and *Hill*, the Court upheld the Harrison Act as a tax, even though the tax imposed was $1 per year on registered manufacturers, importers, and dispensers of drugs and required registration and record-keeping for each drug transaction.\(^{146}\) When the constitutionality of the statute was again challenged in 1928, the Court cited the *Child Labor Tax Case* for its purpose-based test and

\(^{142}\) Child Labor Tax Case, 259 U.S. at 38.

\(^{143}\) Id. at 36–37, 41. The Court specifically distinguished mere use of a high tax, which it had upheld in *Veazie Bank*, from one mixed with a detailed set of requirements for compliance.


\(^{145}\) See Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs' . . . . Each member may or may not have a design. The body as a whole, however, has only outcomes.").

then palpably sighed relief at Congress's 1918 increase in the annual tax and imposition of a one-cent-per-ounce tax on the sale of the drugs themselves.147 Review of the legislative history of either narcotics act would have made it impossible to conclude that the acts' primary purposes were revenue-related. The 1914 Act's face denied a revenue-raising purpose; the Court was apparently willing to look past the purpose evident in the 1914 Act's nominal tax, even though the only substantive changes to the 1918 tax were to increase the tax rates. What the Court was looking for in tax measures were elements that contributed to the collection of revenue, from which it was willing to infer constructive "purpose":

Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power . . . is invalid and cannot be enforced.149

Regardless of one's take on the regulatory taxation cases as a body of law, one shining point of consistency among them is the absence of any suggestion that the Tax Clause is somehow "limited" by either the Commerce Clause or any of the other Section 8 clauses. Not even the Court's most restrictive cases took such a narrow view of Congress's powers. In United States v. Butler, for instance, even as it was striking the AAA as beyond the power to tax and spend, the Court disavowed any relationship between the Tax Clause and any of the other Section 8 powers.150 Rather than attempting to make all of Section 8 read as one, the Court instead focused throughout on identifying whether the measure in question could fairly be called a "tax." If it could, the fact that it reached beyond the limits imposed on the commerce power had no bearing on the tax's validity. Nor was the Court merely solicitous of taxes with regulatory effects; regulatory purposes were legitimate so long as the tax's "primary

147. Nigro v. United States, 276 U.S. 332, 353 (1928) ("If there was doubt as to the character of this Act [as an alleged subterfuge], it has been removed by the change whereby what was a nominal tax before was made a substantial one."); see Revenue Act of 1918, ch. 18, § 1006, 40 Stat. 1057, 1130 (1919) (raising the annual tax to between $3 and $24, depending on the individual).

The Court was also careful to point out that the tax had raised approximately $1,000,000 per year over the last nine years. Nigro, 276 U.S. at 353.

148. See Lee, supra note 124, at 113–19.


150. The Court explained:

While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of [Section] 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

purpose" was revenue-related, and the primary purpose requirement was satisfied (most notably in Nigro) not by direct evidence of Congress's intent but by the logical possibility that any particular provision could actually contribute to the raising of revenue. The possibility that a tax might overlap with another Section 8 power in a way that would result in regulation not permitted under another power bothered the Court not one whit. To the contrary, the Court was more than happy to consider the possibility of overlapping powers without corresponding overlapping limitations. More than once the Court asked itself whether the measure under review could be upheld conversely as an exercise of the commerce power, just as it had done before in the Trade-Mark Cases and would do again in Heart of Atlanta, without considering that the failure to satisfy the Commerce Clause might conversely spell problems for the tax. Congress was free to regulate through the tax power, without any regard to the limits on the commerce power, so long as it did so by using a measure that, in addition to its regulatory effect, was "naturally and reasonably adapted" to raising revenue.

151. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 412 (1928) ("So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate [c]ongressional action."); Child Labor Tax Case, 259 U.S. 20, 38 (1922) ("Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive."); Doremus, 249 U.S. at 94 ("The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it."); A. Magnano Co. v. Hamilton, 292 U.S. 40, 47 (1934) (upholding state tax but citing the Child Labor Tax Case) ("From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.").

152. See Nigro, 276 U.S. at 353-54; Linder, 268 U.S. at 17-18.

153. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 297 (1936) ("Proceeding by a process of elimination, which it is not necessary to follow in detail, we shall find no grant of power which authorizes Congress to legislate in respect of these general purposes unless it be found in the commerce clause . . ."); Butler, 297 U.S. at 63-64; Hill v. Wallace, 259 U.S. 44, 69-70 (1922); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548-49 (1869) (finding, in addition to the tax power, authority to levy a tax on state bank notes in the power to establish a national currency).

Chief Justice Taft's rejection in Hill of the Commerce Clause as a basis for the Futures Trading Act included a detailed description of the legislative evidence and findings that would be necessary to support a similar Commerce-Clause-based regulation. 259 U.S. at 69-70. Congress took this as an invitation to try direct regulation where indirect had failed and, after having made the relevant findings, passed such a regulation immediately, The Grain Futures Act, ch. 369, 42 Stat. 998 (1922), which the Court upheld the following year in Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923). See Cushman, supra note 120, at 149-50; Lee, supra note 124, at 137-38.

154. Linder, 268 U.S. at 17.
Application of the lessons of the regulatory taxation cases would seem to indicate that there is no Intellectual Property Clause/Commerce Clause "problem" as I've termed it. Translated, the Court would merely ask itself whether a measure that resulted in the granting of an "exclusive right" as that term is used in the Intellectual Property Clause is an exercise of the power to "regulate" interstate commerce, or a "regulation." While there might be some regulations that are not "taxes," any statute granting a private right to exclude others from engaging in certain behavior (an "exclusive right") is also, necessarily, a "regulation." The Court did not believe that a tax stopped being a "tax" for constitutional purposes when it regulated; there is no reason to think a regulation stops being a "regulation" when it grants exclusive rights. The regulatory taxation cases seem to permit as broad an application of the Commerce Clause as is suggested by the *Trade-Mark Cases* and *Heart of Atlanta*. But there is another, more recent Supreme Court case addressing the issue, and no discussion of the question would be complete without consideration of that case.

B. Gibbons and the Search for Constitutional Interests

Several decades after the regulatory taxation cases, the Court again confronted the possibility that limits on one Section 8 power might apply to another. In *Railway Labor Executives' Ass'n v. Gibbons*, the Court considered the problem of Congress's use of the commerce power to pass what appeared to be bankruptcy legislation in order to avoid the limits on the Bankruptcy Clause. The Court's reasoning in *Gibbons* has served as the basis for many of the structural and textual arguments advanced by courts and commentators in the Intellectual Property Clause/Commerce Clause context. But the case not only provides fuel for such arguments, it also highlights the difficulties with them. Although the *Gibbons* Court did not apparently recognize the case's similarity to the regulatory taxation cases, and although its outcome is facially inconsistent with them, the decision was ultimately driven by the same intuitions present in the regulatory taxation cases, intuitions that deny the availability of universally applicable answers to the problem of overlapping Section 8 powers.

1. Bankruptcy for an Instrumentality of Interstate Commerce. — Throughout the latter half of the 1970s, the Rock Island Railroad languished in bankruptcy. The Rock Island's lines were eventually bought by a variety of other railroads, and the railroad unions and the acquiring carriers reached an agreement covering hiring preferences, seniority, and compensation for those employees hired by other railroads. However, no provision was made for Rock Island employees not hired by other carriers.  

156. Id. at 459–60.
“[I]n order to avoid disruption of rail service and undue displacement of employees,” Congress enacted a compensation plan for the leftover Rock Island workers, the Rock Island Railroad Transition and Employee Assistance Act (RITA).\(^{157}\) RITA, in rough terms, provided a mechanism through which the Rock Island and its employees could reach an “employee protection agreement,”\(^ {158}\) but section 106(e)(2) of RITA specified that “claims of employees for . . . benefits and allowances [pursuant to such agreements] shall be treated as administrative expenses of the estate of the Rock Island Railroad.”\(^{159}\) RITA limited the potential liability of the Rock Island for liabilities arising from an employee assistance agreement to $75,000,000,\(^ {160}\) but because administrative expenses of the estate are given priority over other unsecured claims,\(^ {161}\) the Act effectively pushed $75,000,000 worth of claims by other unsecured creditors further down the priority ladder and thereby jeopardized their satisfaction.

Unamused by Congress’s tinkering with the queue of Rock Island creditors, the bankruptcy trustee filed suit seeking to enjoin RITA’s operation. The reorganization court granted the injunction on the ground that Congress’s reallocation of the Rock Island’s assets in furtherance of national rail policy violated the Fifth Amendment’s Just Compensation Clause. After some additional legislative and judicial wrangling, the district court’s decision was affirmed without opinion by an equally divided Seventh Circuit sitting en banc.\(^ {162}\)

Pushing aside the Fifth Amendment claim, the Supreme Court upheld the injunction on the ground that RITA violated the Bankruptcy Clause’s requirement that federal bankruptcy laws be “uniform.”\(^ {163}\) In so doing, the Court rejected the possibility that Congress could have avoided the Bankruptcy Clause’s uniformity requirement by acting pursuant to the Commerce Clause.

First, looking at the import of the statute rather than its title, the Court rejected the government’s assertion that RITA was railroad regula-

\(^{158}\) Id. § 106(a).
\(^{159}\) Id. § 106(e)(2) (quoted in Gibbons, 455 U.S. at 461 n.2 (emphasis in Gibbons)).
\(^{160}\) Id. § 110(d).
\(^{162}\) Responding to the Takings Clause basis of the district court’s opinion, Congress enacted as part of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, a new section 124 of RITA confirming that RITA did not prevent the creditors from suing the United States under the Tucker Act in order to pursue their takings claims. Staggers Act § 701. The Staggers Act also re-enacted the substantive portions of RITA while shortening some of RITA’s time limits. One day after the Staggers Act went into effect, the reorganization court enjoined operation of it as well. It was this second injunction that was affirmed by the Supreme Court. See Gibbons, 455 U.S. at 463–65 & n.8.
\(^{163}\) See U.S. Const. art. I, § 8, cl. 4 (“To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”).
tion enacted pursuant to the Commerce Clause\textsuperscript{164} and found RITA to actually be a bankruptcy law: The Act created rights for a certain class of creditors; it required the bankruptcy court to direct the implementation of the eventual employee protection agreement; it altered the priority of claims against the estate; it altered the availability of other bankruptcy remedies for employees taking part in employee protection agreements; and it applied to an entity that had already entered bankruptcy proceedings.\textsuperscript{165} Furthermore, the legislative history of the Act revealed that continuation of rail service was not Congress's only objective. "Congress wanted to make liquidation of a railroad costly for the estate"\textsuperscript{166} by imposing additional obligations on railroads that failed to find new carriers to take over their obligations to "employees and the public interest."\textsuperscript{167}

Second, the Court addressed the possibility that Congress could avoid the Bankruptcy Clause's uniformity requirement by relying on its commerce power:

We do not understand either appellant or the United States to argue that Congress may enact bankruptcy laws pursuant to its power under the Commerce Clause. Unlike the Commerce Clause, the Bankruptcy Clause itself contains an \textit{affirmative limitation} or restriction upon Congress's power: bankruptcy laws must be uniform throughout the United States. . . . [I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we \textit{would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.}\textsuperscript{168}

As recounted by the Court, the uniformity requirement had been included in the Bankruptcy Clause to prevent Congress from recreating the hopeless tangle of insolvency laws that had been created by the States under the Articles of Confederation and to prevent Congress from abusing its power by passing private bankruptcy bills.\textsuperscript{169} RITA's application to only the Rock Island—by name—failed the test of uniformity under the Bankruptcy Clause, rendering it unconstitutional.\textsuperscript{170}

It is the second step in the \textit{Gibbons} Court's analysis that touches on whether the Intellectual Property Clause's limits must apply to the Commerce Clause. The Court's approach seems to recognize the importance of considering other limitations on Congress's power, and its reference to an "affirmative limitation" recognizes the potential importance of that distinction as well.


\textsuperscript{165} \textit{Gibbons}, 455 U.S. at 466–68.

\textsuperscript{166} Id. at 468.


\textsuperscript{168} Id. at 468–69 (citations omitted) (emphasis added).

\textsuperscript{169} Id. at 472.

\textsuperscript{170} Id. at 471.
2. Gibbons Applied to the Intellectual Property Clause. — And so we return to Moghadam. Recognizing the significance of Gibbons, the Eleventh Circuit in Moghadam chose not to rest on the Heart of Atlanta/Trade-Mark Cases approach of viewing constitutional grants of authority in isolation.\(^{171}\) Rather, the court upheld the anti-bootlegging provisions only after applying Gibbons and determining that a Commerce-Clause-based grant of protection for un-fixed works was not inconsistent with the limits contained within the Intellectual Property Clause.\(^ {172}\) Commentators have latched onto the Court’s statement in Gibbons as axiomatic, applying it without reservation to the Intellectual Property Clause/Commerce Clause question.\(^ {173}\) "[I]f we were to hold that Congress had the power to

171. See supra text accompanying notes 51-59.
172. United States v. Moghadam, 175 F.3d 1269, 1280-81 (11th Cir. 1999). Thus Moghadam's "as a general matter" caveat to the Heart of Atlanta rule.
Moghadam recognized the "tension" between the Heart of Atlanta/Trade-Mark Cases rule and the Gibbons rule by assuming "that in some circumstances the Commerce Clause cannot be used to eradicate a limitation placed upon a Congressional power in another grant of power." Moghadam, 175 F.3d at 1279-80 & n.12. The court adopted the amalgamated rule that "in some circumstances the Commerce Clause indeed may be used to accomplish that which may not have been permissible under the Copyright Clause." Id. at 1280 (emphasis added). Under this rule, the court found the anti-bootlegging statute was such a circumstance. Id. at 1280. Explaining that "fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power," and that "the anti-bootlegging law seems to us like more of an incremental change than a constitutional breakthrough," the court concluded that providing protection for un-fixed works was "not fundamentally inconsistent with the fixation requirement of the Copyright Clause." Id. at 1280-81. Thus, the court felt it could reconcile Gibbons with Heart of Atlanta. The court refused to address the applicability of its analysis to the other limitations contained within the Copyright Clause. See id. at 1281 n.14.
173. See, e.g., Benkler, supra note 5, at 546 ("Congress may no more enact an exclusive right in information that conflicts with the limitations imposed by the Intellectual Property Clause than it may... aid the employees of a single railroad by enacting special provisions for the distribution of the assets of their employer." (citing Gibbons)); Coenen & Heald, supra note 98, at 99 ("If you recall, the Court has held that a specialized grant of power—like the bankruptcy power—may restrain Congress from regulating the subject matter of that power under other grants-like the Commerce Clause." (citing Gibbons)); Dreyfuss, supra note 5, at 230 ("Restrictions on constitutional grants of legislative power, such as the Copyright Clause, would be meaningless if Congress could evade them simply by announcing that it was acting under some broader authority." (citing Gibbons)); Hughes, supra note 5, at 179 (citing Gibbons and its rejection of resort to the commerce power as "[t]he most important precedent in this area"); Latimer & Ablin, supra note 5, at 508-09 ("Like the Bankruptcy Clause in [Gibbons], the Patent Clause in the FTDA context imposes a limitation on Congress' power that the Commerce Clause cannot override."); Merges & Reynolds, supra note 5, at 64 ("[T]he Court's approach in Gibbons should apply to efforts to override the restrictions imposed upon Congress by the Copyright and Patent Clause."); Patry, supra note 5, at 375-76 ("Gibbons supports the proposition that constitutional limitations placed on Congress by a specific clause do not act only as a limitation on Congressional power when Congress is legislating under that clause; such limitations also serve, in at least some circumstances, to bar Congress from circumventing their application by legislating under a different clause."); Pollack, The Right to Know, supra note 5, at 56 ("[Gibbons held that] the Commerce Clause was not sufficient to override the express limitation in another constitutional clause."); Quinn, supra note 5, at
enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws,174 is a bold and sweeping claim that would seem to settle the issue with regard to any limitation within any of the Section 8 grants. But bold and sweeping claims don’t always hold up, and deeper reading of Gibbons reveals that its rule may not be as sweeping as its logic.

Just as was the case with the “structural” and “affirmative limitations” responses to the Intellectual Property Clause/Commerce Clause overlap,175 an absolutist view of Gibbons is unsatisfying in the same way as an

81-82 (“Gibbons teaches that when one enumerated power forbids action, Congress cannot simply do an end-run around that power and rely upon their power to regulate interstate commerce.”); Dennis Harney, Note, Mickey Mousing the Copyright Clause of the U.S. Constitution: Eldred v. Reno, 27 U. Dayton L. Rev. 291, 306 (2002) (“[i]n Gibbons, the Supreme Court struck down the [RITA] as unconstitutional because it conflicted with the Bankruptcy Clause . . . Thus justification under the Commerce Clause is not sufficient to salvage [an extension of the copyright term] if it conflicts with the Copyright Clause.”); Jacobs, supra note 5, at 172 (arguing that “[t]he best guidance on this point comes from Gibbons,” but noting that “[t]his reasoning might apply in the intellectual property context” (emphasis added)); Merschman, supra note 5, at 687-88 (“The Supreme Court, in Gibbons, rejected outright the proposition that Congress could use its commerce power to enact legislation forbidden by the Bankruptcy Clause. The same logic applies in the context of the Copyright Clause. Congress cannot use its commerce power to enact legislation forbidden by the Copyright Clause.”); see also Pollack, Unconstitutional Incontestability, supra note 45, at 289 (noting that Gibbons describes how to determine under which clause a piece of legislation is enacted and how the legislation must then comply with the limits in that clause). But see Ginsburg, No Sweat, supra note 5, at 370-72 (accepting the application of Gibbons to Intellectual Property Clause/Commerce Clause question, but challenging conclusions to be drawn from Gibbons); Heald & Sherry, supra note 5, at 1131, 1133, 1139-40 (citing Gibbons for principles of constitutional interpretation evidenced by the case but not the case’s axiomatic application to all of Section 8).

One commentator has taken a slightly different approach, focusing on the language used in Gibbons to argue for its limited application, at least in the context of the Copyright Clause and database protection:

The basis for Gibbons was the Supreme Court’s express holding that the legislation challenged in that case was, in fact, federal bankruptcy legislation. . . Feist, however, holds that the data in databases are not, and never have been, the proper subjects of copyright. Database protection legislation, i.e., legislation that protects non-copyrightable data against unfair and destructive commercial practices, is, therefore, not copyright legislation. Gibbons [therefore] . . . simply does not apply. Database protection legislation is not copyright legislation and it need not be treated as if it were.

Bender, supra note 5, at 148. It’s not clear to me that the Intellectual Property Clause’s subject-matter requirements can be read to cast so narrow a shadow, but even so, Professor Bender acknowledges Gibbons as providing the rule for cases in which the overlap is clear. See id. (“Under Gibbons, Congress cannot use its commerce power to give copyright protection for an unlimited time, just as it cannot use the commerce power to enact bankruptcy legislation that is not uniform.”).


175. See supra Part II.B (discussing structural responses) and Part II.C (discussing affirmative limitations).
absolutist view of *Heart of Atlanta* or the *Trade-Mark Cases*. Juxtaposing these approaches highlights how each one represents an incomplete view of constitutional limitations. An extreme logical extension of *Heart of Atlanta* would make mincemeat of the Constitution’s careful allocation of enumerated powers. For example, such an interpretation would permit Congress to fund an army indefinitely\(^{176}\) or to appoint the officers of the state militias.\(^{177}\) But *Gibbons* is also subject to failure if broadly applied. As applied to the taxation power, a strong reading of *Gibbons* makes it an overruling, sub silencio, of the Court’s regulatory taxation jurisprudence, an event the Court did not notice when it decided *South Dakota v. Dole* five years later.\(^{178}\) That one of the Section 8 limitations must be read externally does not, as a matter of logic, dictate that they all must be; to so infer would lead to impossible results. Fixated, perhaps, on the particular restrictions in the Bankruptcy Clause, the Court in *Gibbons* failed to recognize that the commerce power is also subject to very carefully defined limits. Thus, blindly applying *Gibbons* would prevent federal regulation of purely intrastate commercial conduct (such as sales or distribution) involving intellectual property\(^{179}\) because to allow such regulation would be to “eradicate from the Constitution a limitation on the power of Congress to”\(^{180}\) regulate commerce. After all, “unlike” the Intellectual Property Clause, the Commerce Clause “itself contains an affirmative limitation or restriction upon Congress’ power”\(^{181}\): The commerce being regulated must be interstate, international, or Indian commerce. Viewed as a blanket rule, the *Gibbons* rule is an empty one because it ignores the differences between the various Section 8 limits and does nothing to indicate which of the Section 8 limitations should be applied generally. But there is an additional element to *Gibbons*, one reminiscent of the interests driving the Court's approach in the regulatory taxation cases of fifty years before.

\(^{176}\) U.S. Const. art. I, § 8, cl. 12 (“To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . .”).

\(^{177}\) U.S. Const. art. I, § 8, cl. 16:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.


\(^{179}\) Bender, supra note 5, at 149:

The limitations on the subjects that Congress can regulate under the Commerce Clause plainly do not limit the subjects that Congress can regulate under other Article I powers that authorize Congress to act whether or not commerce is affected. Presumably, the analysis applies in the opposite direction as well . . . .


\(^{181}\) Id. (emphasis added).
3. Gibbons and Constitutional Context. — Argued weakly in the briefs, the Bankruptcy Clause basis for the decision came up early during the oral argument in Gibbons:

QUESTION: -do you think that Congress acting under its commerce power can impair the obligation of contracts which the state is specifically prohibited from doing by the Constitution?

MR. CLARKE: No, Your Honor. We do not believe that Congress has that power under the commerce clause to impair the obligation of contracts . . . .

The question was a reference to the Contracts Clause, Article I, Section 10's prohibition against any State enacting a “Law impairing the Obligation of Contracts.”

Justice Rehnquist reiterated the constitutional interest he perceived to be at issue in the opinion, in which he explained that the bankruptcy “grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do.”

The Justice continued:

Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State. Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. . . . [T]he Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws.

One can easily criticize Justice Rehnquist’s use of an explicit restriction on the States as the basis for finding an implicit limitation on the federal government. As Douglas Baird has pointed out, Gibbons' “historical interpretation . . . assumes a connection between state insolvency law and bankruptcy law that the Framers may not have made.”

As he explains, “bankruptcy laws” at the time were generally considered protections for creditors. Debtors could not initiate bankruptcy proceedings until the mid-nineteenth century. Rather, laws that could be invoked by debtors for protection were “insolvency acts,” of which Section 8 makes

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182. See Brief for the Rock Island Appellees at 50-53, Gibbons (Nos. 80-415 & 80-1239); Reply Brief for Appellant at 16-17, Gibbons (Nos. 80-415 & 80-1239); Reply Brief for the Federal Appellees at 5-6, Gibbons (Nos. 80-415 & 80-1239).

183. Transcript of Oral Argument at 6-7, Gibbons (Nos. 80-415 & 80-1239); see also id. at 61-67.


185. Gibbons, 455 U.S. at 466 (quoting Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902)).

186. Id. at 472 (citations omitted).

no mention.188 Indeed, the Court never explained how the uniformity requirement addressed the potential for legislative abuse given Congress’s ability to alter the rights of creditors retroactively189 and the narrow concept of uniformity applied eight years earlier to a bankruptcy law that by its terms applied to only eight railroads (which eventually became a single one: Conrail).190

Even if it was somewhat misguided, the opinion’s effort to situate the uniformity requirement as the federal analog of the Contracts Clause indicates that the Gibbons rule may not be so broad as it first appears. Although not implicating the balance of constitutional powers, the Contracts Clause prohibited a form of regulation for which the democratic process had failed to provide an adequate check (largely because abuses were aimed at non-citizen creditors191). Rightly or wrongly, the Court perceived the uniformity requirement as mirroring an explicit (and

188. Id. at 33-34 & n.26. According to Dean Baird, the concern of the Framers was not abuse of bankruptcy laws in favor of particular debtors; it was the harm to interstate commerce from not having a single set of bankruptcy laws for the entire country. In addition to making historical sense, this reading of the uniformity requirement explains why the grant of power for uniform bankruptcy laws was included in the same clause as the grant of power for uniform laws of naturalization, a requirement aimed not so much toward any particular substantive outcome as toward uniformity as an end in itself. Id. at 32–33. Congress has occasionally passed private naturalization bills granting individuals either citizenship or some other favorable immigration status. Id. at 33 n.24. 189. Retroactive debtor-creditor laws are the impairments of the obligation of contracts prohibited by the Contracts Clause, Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 262 (1827), and that Clause does not apply to the federal government.

Indeed, Gibbons is likely mistaken about the meaning of the uniformity requirement even as a limitation internal to the Bankruptcy Clause. Justice Rehnquist’s opinion takes the uniformity requirement as a prohibition against private bankruptcy laws, but, as Dean Baird has explained, that perception is likely wrong. The Bankruptcy Clause was raised during the Federal Convention of 1787 in the context of the Full Faith and Credit Clause as a response to problems arising from enforcement of state bankruptcy judgments in jurisdictions having different bankruptcy laws. Indeed, the discussion leading up to the introduction of the Clause was about the need to expand the Full Faith and Credit Clause from its analog in the Articles of Confederation to include legislative acts in order to facilitate interstate enforcement of state private bankruptcy bills, especially given the broad disparities between the bankruptcy laws of the several States. “Rather than preventing Congress from passing private bills, the uniformity requirement was intended to ensure that Congress enacted laws that were applicable across jurisdictions.” See Baird, supra note 187, at 32–33.

190. The Regional Rail Reorganization Act Cases (The 3R Act Cases), 419 U.S. 102, 156–57 (1974). As Justice Marshall noted in his Gibbons concurrence, “It is difficult to understand why legislation affecting the eight railroads passed constitutional muster in the 3R Act Cases, yet legislation affecting their successor might not.” Gibbons, 455 U.S. at 477 n.2 (Marshall, J., concurring) (citation omitted). Gibbons may not be irreconcilably inconsistent with the 3R Act Cases, but given the acceptance of bankruptcy legislation affecting only eight railroads, the limitation of the uniformity requirement that the Court went to the trouble of enforcing in Gibbons is not much of a limitation at all.

therefore generally applicable) limitation that was adopted in response to a breakdown in the legislative process.

It should be of little surprise to find a similar intuition present in the Court's approach to regulatory taxation in the 1920s and 30s. While the Court assiduously avoided reference to the limits internal to the Commerce Clause, it did identify which element of the Constitution required them to scrutinize regulatory taxes to assure that they qualified as exercises of the taxing power. That element was federalism. As the Court explained in the Child Labor Tax Case:

Grant the validity of [the child labor tax], and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.192

The Court would carry this theme throughout its regulatory taxation jurisprudence.193 While the Court never did cite the Commerce Clause as a limit on the Tax Clause, it did cite the Tenth Amendment as mandating that the tax power not be used to usurp state power.

That is not to say that even the Tenth Amendment served as a "limit" on the tax power. After all, the Court upheld several taxes that were intended to, and did, regulate in areas otherwise reserved to the States. But the Tenth Amendment, and more directly the federal constitutional structure for which it serves as a reminder,194 is what requires that the taxing power's limits be meaningfully enforced. Even if the Tax Clause is read without regard to the other Section 8 powers, it is not read in isolation. The Tenth Amendment represents an enforceable constitutional norm, federalism, that guides our inquiry into the reach of the Tax Clause. The Commerce Clause also reflects norms of federalism—its limits manifest the federalist impulse against national regulation of local matters. But the Court's choice to point to the Tenth Amendment rather

193. See, e.g., Hill v. Wallace, 259 U.S. 44, 67-68 (1922) (quoting above language from Child Labor Tax Case). The theme was repeated fourteen years later in United States v. Butler, 297 U.S. 1, 68 (1936) ("The act invades the reserved rights of the states."). See also United States v. Constantine, 296 U.S. 287, 296 (1935) (holding that the imposition of a tax on those trafficking in liquor in violation of state law is unconstitutional because "[t]he regulation of the conduct of its own citizens belongs to the State, not to the United States"). The same sentiment is readily found in many dissents in cases upholding regulatory taxes. See, e.g., Nigro v. United States, 276 U.S. 332, 356 (1928) (McReynolds, J., dissenting) ("The plain intent is to control the traffic within the States by preventing sales except to registered persons and holders of prescriptions, and this amounts to an attempted regulation of something reserved to the States.").
194. See supra note 86 and accompanying text.
than the much more proximate Commerce Clause as driving its review of regulatory taxation is at least a hint that, while constitutional norms may help define Section 8 powers, they seldom reside there.

C. Structure, Text, and Constitutional Norms

Reliance on interpretive stand-bys like structure or on purportedly clear text does little to further the inquiry into whether to apply limitations in Section 8 powers, including those in the Intellectual Property Clause, externally to all of Congress’s Article I powers. Attempts to apply a single rule of interpretation to the Section 8 limitations fail to recognize the variety of values served by the limitations; the fact that some of the Section 8 limitations must be read externally does not mean that they all must be. After all, the Heart of Atlanta/Trade-Mark Cases and Gibbons-as-blanket-rule approaches are both equally plausible interpretations of the Constitution’s structure and equally true to its text.

The first step toward an intelligent response to the problem of overlapping constitutional powers and limitations is recognizing that the Heart of Atlanta/Trade-Mark Cases and Gibbons approaches do not represent the universe of responses; they represent the extremes. In between, there is a wide variety of solutions, solutions that require consideration of the particular power, and the particular limitation, at issue. Whether a specific restriction on a specific Article I power must be read externally depends on whether it reflects an enforceable constitutional norm. By “constitutional norm,” I do not mean merely a policy argument about the wisdom of the restriction; we can identify many candidates for general restrictions on government that are good policy and which could be tied to some piece of text in the Constitution but that have nevertheless been rejected as constitutional in nature. Rather, by “constitutional norm” I mean a rule required by and even inherent in the form of government adopted in the Constitution.

Underlying the question of how to handle the hard cases is one important—and universally applicable—constitutional norm: the norm favoring legislative over judicial policymaking. As between courts and Congress, this norm is exemplified by the counter-majoritarian difficulty and realized in the Supreme Court’s consistent practice of affording Congress a great deal of leeway in applying its constitutional pow-

195. See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (restricting the expansive approach to economic rights under Lochner v. New York, 198 U.S. 45 (1905)).

ers.\textsuperscript{197} When the regulation is economic in character—as is intellectual property legislation—the preference for representative government means that constitutional ambiguities affecting Congress's power are read in Congress's favor.\textsuperscript{198} There is no reason to treat the question of overlapping powers any differently.

But some constitutional norms argue for reading congressional powers narrowly, the initial impulse of the counter-majoritarian difficulty notwithstanding, such as the norms of federalism and separation of powers and the norms of individual liberty underlying many substantive constitutional rights.\textsuperscript{199} The question is whether the Intellectual Property Clause's limits represent a constitutional norm calling for a narrow reading of Congress's power to grant exclusive rights and, consequently, a broad reading of the Intellectual Property Clause's limits as applicable to all intellectual property regulations, regardless of the power Congress purports to use. It is to that question that I shall next turn.

IV. THE SEARCH FOR CONSTITUTIONAL SIGNIFICANCE IN THE INTELLECTUAL PROPERTY CLAUSE

Having identified an approach for determining whether the limits on one Section 8 power must be applied externally, the task remains to determine whether the Intellectual Property Clause and its limits actually reflect constitutional norms. Many who have undertaken the search for constitutional meaning in the Intellectual Property Clause have discovered in the Clause "ideas fundamental to a free society"\textsuperscript{200} or have identified an aspect of the Clause that "serves as the keystone in the constitutional architecture."\textsuperscript{201}

But such broad claims are conclusions, not analysis. Anyone claiming a supervening place for the Intellectual Property Clause's limits must be able to describe both the precise contours of those norms and the place within the constitutional order from which they flow. Constitutional norms informing the relationship between the Commerce Clause and the Intellectual Property Clause might be found in other portions of the Constitution; the First Amendment's protections evidence a constitutional preference for the free exchange of ideas, and intellectual property rules can limit such exchanges. A complete understanding of the constitutional significance of the Intellectual Property Clause's limits also


\textsuperscript{198} See Nachbar, Quest, supra note 87, at 43–44.

\textsuperscript{199} Id. at 43–61.

\textsuperscript{200} L. Ray Patterson, Understanding the Copyright Clause, 47 J. Copyright Soc'y U.S.A. 365, 367 (2000) [hereinafter Patterson, Copyright Clause].

\textsuperscript{201} Patry, supra note 5, at 366.
requires examination of the Supreme Court's intellectual property precedents as well as an historical understanding of the ideas captured by the Intellectual Property Clause and its restrictions. But none of these considerations warrants a reading of Article I that would subject all of Congress's powers to the limits in the Intellectual Property Clause. The First Amendment likely has little to say about intellectual property regulation, but whatever it has to say is to be found in the amendment itself, not in any of the Intellectual Property Clause's limits. Supreme Court intellectual property precedent is of little help, and, properly understood, the history of both the Intellectual Property Clause and American economic regulation calls for a broad, rather than a narrow, approach to Congress's powers to grant exclusive rights.

A. The First Amendment and the Intellectual Property Clause

There has been no shortage of theories advanced—primarily in the copyright context—to support the proposition that the First Amendment limits Congress's ability to grant exclusive rights in information, and the Supreme Court has recognized the potential for First Amendment limits on copyright, even if it has not yet found occasion to enforce them.

But even conceding for the moment that the First Amendment does impose limits on Congress's power to grant exclusive rights, that is not the end of the matter. My point is not that the First Amendment does not apply to grants of exclusive rights. Rather it is the narrower one that, if the constitutional interests captured by the First Amendment's Free


Speech Clause are a limit on Congress’s ability to grant exclusive rights, those interests operate through the First Amendment itself—they neither require nor suggest reading the Intellectual Property Clause’s limits externally.

Some have attempted to construct a speech-based argument for the vesting of copyright in authors by connecting the historical English practice of vesting copyright in publishers with concerns over the use of copyright as speech regulation. During the relevant period, English copyright vested in the same entity charged with assuring that government censorship rules were followed, the Stationers’ Company, leading at least one commentator to find a connection between the copyrights conferred upon and the participation in censorship obtained from the Company.204

But it’s not possible to use copyright, other than as payment for services rendered, to carry out governmental speech regulation. The critical element in the English example of censorship through the Stationers’ Company was not the identity of who owned the copyrights but rather the fact that the Stationers’ Company operated a state-conferred publishing monopoly. Content regulation would have been no different if copyrights had vested in authors, for those authors would still have had to go to the regulated Stationers’ Company in order to get published. It was the publishing monopoly, not the vesting of copyright in publishers, that made censorship through the Stationers’ Company possible,205 a distinction the Framers understood. The relationship between copyright and speech regulation does not appear to have been raised at all during the Federal Convention, and the only recorded mentions of this topic made during the ratification debates specifically distinguish copyright, which cannot serve as speech regulation, from restrictions on publication, which can.206 State censorship may be unconstitutional, and the state

204. See Marci A. Hamilton, Art and the Marketplace of Expression, 17 Cardozo Arts & Ent. L.J. 167, 170–71 (1999). But see Samuelson, supra note 202, at 523–24 (noting that the Stationers’ Company copyrights were conducive to the level of control that the Stationers’ Company exercised on behalf of the crown).

205. Thomas B. Nachbar, Constructing Copyright’s Mythology, 6 Green Bag 2d 37, 45 (2002) [hereinafter Nachbar, Mythology] (arguing that control over content was “a direct product of government-controlled monopoly over printing”).

Take also the more recent example of the Production Code, the motion picture industry’s attempt at self-regulation for content, which effectively controlled the content of motion pictures from 1934 through the 1940s. The Code was successful because, at the time, the five major motion picture studios also controlled seventy percent of the nation’s movie theaters. When the studios were forced to divest themselves of their ownership of the movie theaters because of price-fixing concerns, see United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), the system of enforcement fell apart even though the studios still held the copyrights in the films being distributed. Eventually, the Production Code was replaced with the less censorious system of movie ratings we have in place today. See Richard S. Randall, Censorship of the Movies: The Social and Political Control of a Mass Medium 198–201 (1968).

206. As James Iredell said:

The Liberty of the Press is always a grand topic for declamation; but the future Congress will have no other authority over this than to secure to authors for a
could conceivably use copyright to compensate their chosen censors instead of paying cash or by granting some other governmental favor like a tax break. But the identity of the party in whom copyright vests has no bearing on whether the state will be successful in enforcing a regime of censorship. The Copyright Clause’s identification of authors as the beneficiaries of copyright has nothing to do with speech regulation.

Nor do the other limits on the copyright power address any particular speech interest. While the limited duration of copyright certainly reduces the cost of access for future copiers, it does so in only the most ambivalent and minimal ways. Assuming for the moment that the First Amendment has anything to say about the cost that private parties charge to access information (which is a question well beyond the scope of this Article), the additional cost copyright imposes on copiers correlates roughly to the gains to be had by the original author. Thus, to the extent limits on duration increase access to copiers by reducing their cost, they do so at the expense of incentives to create and publish the work in the first place, which reduces the number of available works, potentially resulting in a net reduction in access. Even if one can demonstrate a net gain in access by showing that the increased access from limited terms exceeds the loss in incentives to produce, the access provided by limiting duration is the least valuable sort of access there is. Limiting terms provides access at a time when the vast majority of works have lost any useful purpose; it has no effect on access for most works because no access is sought for most works by the time their copyright terms have run. As a limit, duration is possibly the least access-producing one imaginable. If the prohibition against perpetual grants is serving a free-speech interest in access, it must not be a very strong interest.

limited time the exclusive privilege of publishing their works. This authority has long been exercised in England, where the press is as free as among ourselves, or in any country in the world, and surely such an encouragement to genius is no restraint on the liberty of the press, since men are allowed to publish what they please of their own.

James Iredell, Marcus IV, Norfolk & Portsmouth J., Mar. 12, 1788 [hereinafter Iredell], reprinted in 16 The Documentary History of the Ratification of the Constitution 382 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter 16 Documentary History] (emphasis added). Hugh Williamson echoed Iredell’s remarks:

We have been told that the Liberty of the Press is not secured by the New Constitution. Be pleased to examine the plan, and you will find that the Liberty of the Press and the laws of Mahomet are equally affected by it. The New Government is to have the power of protecting literary property; the very power which you have by a special act delegated to the present Congress. There was a time in England, when neither book, pamphlet, nor paper could be published without a licence from Government. That restraint was finally removed in the year 1694 and by such removal, their press became perfectly free, for it is not under the restraint of any licence. Certainly the new Government can have no power to impose restraints.

And what is true for the limits on copyright is doubly so for the very same limits as applied to patent protection. There is no detectable First Amendment limit on patents, at least as traditionally construed. A patent confers the exclusive right to make, use, or sell an invention;\textsuperscript{207} it does not restrict one's consideration or discussion of information about the invention. The First Amendment has little to say about limits on the ability to use things; its primary concern is with restricting speech about them.\textsuperscript{208} Even if one could identify a free-speech basis for the vesting of copyright in authors, there is no equal speech interest in vesting patents for "Discoveries" in "Inventors." Only the most outlandish free-speech theory could find the First Amendment applicable to a monopoly, even a perpetual one, in an article of commerce (such as wheat or perhaps an invention). Reading a free-speech norm into the Intellectual Property Clause's duration and vesting limits makes no sense because those same limits apply equally to the patent power, about which it is impossible to build a speech-related argument.\textsuperscript{209}

The strongest argument for reading a free-speech norm into the Intellectual Property Clause is to be made with regard to its subject matter limitations. Copyright has traditionally maintained a distinction between expression, which can be protected, and ideas, which cannot.\textsuperscript{210} Patent has maintained a similar distinction, but between abstract ideas and applications of those ideas.\textsuperscript{211} The Supreme Court has also said that the restriction to "Writings" prevents Congress from granting copyright to facts,\textsuperscript{212} although the historical justification for that conclusion is extremely thin.\textsuperscript{213} As with the limit on duration, the net effects of those


\textsuperscript{208} See United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (distinguishing between speech and nonspeech elements of destroying selective service registration certificate); Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2d Cir. 2001) (distinguishing between the "nonspeech and speech elements, i.e., functional and expressive elements" of computer source code).

\textsuperscript{209} See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661 (1834) (interpreting one of the Intellectual Property Clause's terms, "secure," as having identical meaning when applied to both patent and copyright). But see Eldred v. Ashcroft, 537 U.S. 186, 216-17 (2003) (suggesting the possibility that patent protection may require a quid pro quo from the inventor while copyright protection does not require the same from an author). Eldred's invitation to divorce the copyright and patent powers is unlikely applicable to this circumstance. The quid pro quo requirement evaluated in Eldred is not reflected in the text of the Clause at all; Wheaton, on the other hand, holds that a word used in the Clause has the same meaning when applied to both the copyright and patent powers.


\textsuperscript{211} See, e.g., Donald S. Chisum, Chisum on Patents § 1.03(2) (2001) (distinguishing unpatentable "principle" from patentable process).


\textsuperscript{213} See Ginsburg, No Sweat, supra note 5, at 380 n.202 (noting that copyright protection of facts was arguably within the Framers' intention); Hughes, supra note 5, at 174-77 (collecting sources on the lack of an historical basis for the conclusion in Feist);
limits are ambiguous. The increased access to ideas and facts to be had by excluding them from protection will be either partially, completely, or more than offset by the reduced incentives to make them available to others. Arguing for a free-speech interest implies that granting some kind of protection to facts, for instance, can never increase the net amount of information available, a proposition that has to be false. But, more importantly, if we find in "Writings" a constitutional norm against providing copyright protection for facts, for instance, and apply that norm externally to all other Section 8 powers, that means that Congress can never grant protection to facts under any circumstances. That would be an effect more restrictive on Congress's power than any form of speech interest has been found to have. Even content-based speech restrictions are subject to strict scrutiny; reading the "Writings" requirement to deny copyrightability to facts and then to apply that restriction to all of Section 8 would place an absolute prohibition on protecting facts regardless of the relative interests at stake, rendering facts unique in their immunity from any form of speech regulation.

Nor is it necessary to introduce such confusion into the interpretation of the Intellectual Property Clause. If granting exclusive rights does raise speech-related concerns, there is no possibility that Congress can avoid them by using the commerce power; the First Amendment itself applies to all legislation, regardless of the power under which Congress legislates. To the extent the Intellectual Property Clause's limits reflect free-speech values, those values are served by application of the First Amendment itself to regulations passed pursuant to the Commerce Clause, which is by far the more sensible reading of the Constitution.

To read the Intellectual Property Clause as Section 8's protector of free speech is to draft into the service of free speech a set of restrictions that on their face have very little to do with free speech, which is an interest served explicitly by another part of the Constitution. Conversely, the types of speech interests offered as justifying an external reading of the Intellectual Property Clause's limits are too loosely related to those limits to provide any real guidance to their application. At bottom, attempts to incorporate free-speech interests directly into Article I through the Intellectual Property Clause (and then taking the even more attenuated step of reading those limits on other portions of Article I) are no more than attempts to obtain absolute protection for the free-speech values that some believe underlie the First Amendment, a move inconsistent with the many limitations on the application of the First Amendment that the Court has developed to prevent it from overriding every other part of


215. Hamilton, supra note 5, at 610–11; Nachbar, Quest, supra note 88, at 48–49.
the Constitution.\textsuperscript{216} The very existence of the First Amendment belies any argument that the Intellectual Property Clause's limits represent independently enforceable, speech-related constitutional norms.

B. Statements in the Supreme Court's Intellectual Property Jurisprudence

The Supreme Court's intellectual property jurisprudence provides ample fodder for those arguing that the Intellectual Property Clause's limitations must be read externally. The most striking example comes from the patent context. In \textit{Graham v. John Deere Co.}, the Court proclaimed:

At the outset it must be remembered that the federal patent power stems from a specific constitutional provision[:, the Intellectual Property Clause]. The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the "useful arts." . . . The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, 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." This is the standard expressed in the Constitution and it may not be ignored.\textsuperscript{217}

The Court has also emphasized the substantive content of the Patent Clause. In \textit{Bonito Boats, Inc. v. Thunder Craft Boats, Inc.}, the Court explained, when discussing the pre-emptive effect of the federal patent laws, "[t]he Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'"\textsuperscript{218} "The novelty and nonobviousness requirements of patentability embody a congressional understanding, \textit{implicit in the Patent Clause itself}, that free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception."\textsuperscript{219}

\textsuperscript{216} Nachbar, Quest, supra note 87, at 49–50.
\textsuperscript{218} 489 U.S. 141, 146 (1989). The Court also paraphrased the restrictive nature of the constitutional grant that it offered in \textit{Graham}. See id.
\textsuperscript{219} Id. at 151 (emphasis added); see also id. at 150 ("Taken together, the novelty and nonobviousness requirements express a congressional determination that the purposes behind the Patent Clause are best served by free competition and exploitation of either that which is already available to the public or that which may be readily discerned from publicly available material.").
In the copyright context, too, constitutional limitations have been an element of the Supreme Court’s jurisprudence since 1879, when the Court held that the federal trademark statute was not a valid exercise of power under the Intellectual Property Clause because the statute potentially provided protection to trademarks that were not “original,” a requirement for obtaining the constitutional status of “Writing.” In 1991’s *Feist*, the Court reitered the constitutional nature of the Copyright Clause’s limitations. “As we have explained, originality is a constitutionally mandated prerequisite for copyright protection.” The Court identified a federal intellectual property policy touching on both patent and copyright in the *Sears/Compco* cases, when it announced that a state law that would prohibit copying permitted by federal law “would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.” And, just last term in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, the Supreme Court explained that reading the Lanham Act to provide a right of attribution in works that had fallen into the public domain “would be akin to finding that [section 43(a) of the Lanham Act] created a species of perpetual patent and copyright, which Congress may not do.”

Many have taken these expressions of constitutional restraint as demonstrating that the Intellectual Property Clause’s limitations apply to the Constitution generally. Joined by others, Professor Benkler’s interpretation of *Graham* is that the Court held that the Intellectual Property Clause requires that Congress (a) act only when extending an exclusive right promotes “[i]nnovation, advancement, and . . . add[s] to the sum of useful knowledge” and (b) not recognize exclusive rights “whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.”

The upshot of the Court’s interpretation of the Intellectual Property Clause in *Graham* is that the clause expressly constrains

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220. See The Trade-Mark Cases, 100 U.S. 82, 94 (1879). The Court also explained that trademarks could not satisfy the constitutional standard for “Discoveries.” Id.

221. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 351 (1991). The Court also invoked the language of the Copyright Clause’s call for “progress” when explaining the “thin” nature of the protection in compilations:

As applied to a factual compilation, assuming the absence of original written expression, only the compiler’s selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

Id. at 350.


the power of Congress to create exclusive rights in information.\textsuperscript{224}

\textit{Feist}, too, according to Professor Benkler, represents a constraint on all of Congress's Article I powers: "As with \textit{Graham}, the concern is substantive, not formal. It is a concern, treated as going to the very heart of the constitutional constraint, that Congress not enclose existing information and facts by granting exclusive rights."\textsuperscript{225} He finds a similar sentiment running through the Supreme Court's intellectual property preemption cases. Through \textit{Sears/Compco}, Professor Benkler finds in the Intellectual Property Clause a "basic constitutional mandate" governing the regulation of intellectual property.\textsuperscript{226} William Patry claims that in \textit{Feist} and \textit{Bonito Boats}, "the Court clearly demarcated the boundaries of Congress's enumerated power to vest monopolies in intellectual property creations."\textsuperscript{227} Summarizing, Professor Benkler explains:

In conjunction, the \textit{Graham-Feist} and \textit{Sears-Compco-Bonito Boats} lines of cases suggest that the Intellectual Property Clause imposes a threshold constraint on congressional legislation that regulates information production and exchange. Congress may not create rights that are functionally the type of exclusive right that it is empowered to create under the Intellectual Property Clause, except in compliance with that clause's limitations.\textsuperscript{228}

Nevertheless, there is considerable reason for rejecting these statements by the Court as considered judgments on the external application of the Intellectual Property Clause's limitations. None of the cases cited involved a challenge to Congress's power to grant exclusive rights beyond those described in the Intellectual Property Clause, nor even the suggestion that Congress could avoid the Intellectual Property Clause's limits by legislating under another power. All of the cited cases addressed not the reach of the Intellectual Property Clause but rather were interpretations of federal intellectual property statutes. \textit{Graham}'s citation of the Patent Clause was primarily a rhetorical device to introduce Jefferson's thoughts

\textsuperscript{224} Benkler, supra note 5, at 541 (brackets in original) (footnotes omitted); see also Heald & Sherry, supra note 5, at 1156-59, 1165-66; Merges & Reynolds, supra note 5, at 58 \& n.52; Pollack, The Right to Know, supra note 5, at 50 ("[In \textit{Graham,}] the Court declared that the Constitution prevented Congress from granting patents on improvements which were not sufficiently innovative.").

\textsuperscript{225} Benkler, supra note 5, at 545. Professor Benkler continues:

Three years later, in another unanimous opinion, \textit{Campbell v. Acuff-Rose Music, Inc.}, [510 U.S. 569, 575 (1994)], the Court reiterated its position in \textit{Feist}, and implied that not only originality, but some form of 'fair use' constraint on the scope of intellectual property is implicit in the constitutional constraint itself. Id.

\textsuperscript{226} Benkler, supra note 5, at 549.

\textsuperscript{227} Patry, supra note 5, at 360. See also id. at 361 (describing a rule whose "contours are evident in the Court's two 9-0 opinions in \textit{Feist} and \textit{Bonito Boats}: When a specific clause of the Constitution ... has been construed as containing general limitations on Congress's power, Congress may not avoid those limitations by legislating under another clause").

\textsuperscript{228} Benkler, supra note 5, at 551.
on early patent practice as Secretary of State (discussed further below), which the Court used as an aid to interpreting the requirements imposed by the patent statute itself.\textsuperscript{229} Similarly, there was no challenge to Congress’s power in either \textit{Feist} or \textit{Dastar}, the Court acknowledged in \textit{Feist} that the statute, too, imposed the originality requirement it was describing\textsuperscript{230} and in \textit{Dastar} the Court was not even interpreting the copyright statute but rather section 43(a) of the Lanham Act.\textsuperscript{231} \textit{Bonito Boats} and the other preemption cases relied on by commentators do not involve congressional power at all, but are rather cases about the preemptive reach of the federal patent statute.\textsuperscript{232} To the contrary, \textit{Bonito Boats} emphasized the Patent Clause’s grant of broad discretionary authority to Congress, not its restrictions on congressional action. “It is for Congress to determine if the present system of design and utility patents is ineffectual in promoting the useful arts in the context of industrial design.”\textsuperscript{233}

Not only was the applicability of the Intellectual Property Clause’s limits to other congressional powers irrelevant in these cases,\textsuperscript{234} the


\textsuperscript{230} See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353, 356 (1991) (stating that the 1909 Act incorporated the requirement of originality; the 1976 Act (the act at issue) re-codified the standard without change); see also id. at 363–64 (“As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity. . . . As a statutory matter, 17 U.S.C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality.”); Ginsburg, No Sweat, supra note 5, at 378–79 (arguing that for the Court to reach the constitutional limitation in \textit{Feist} was not only unnecessary, but was also inconsistent with the Court’s practice of avoiding constitutional questions); Paul J. Heald, The Vices of Originality, 1991 Sup. Ct. Rev. 143, 145–47 (providing alternative holdings that would have allowed the Court to avoid the constitutional question in \textit{Feist}).

\textsuperscript{231} See Dastar Corp. v. Twentieth Century Fox Film Corp., 123 S. Ct. 2041, 2047 (2003) (rejecting Fox’s argument that the Lanham Act permitted their action against Dastar because it “would not only stretch the text [of the Lanham Act], but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent”).

\textsuperscript{232} Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 165 (1989) (“Our decisions since \textit{Sears} and \textit{Compco} have made it clear that the Patent and Copyright Clauses do not, by their own force or by negative implication, deprive the States of the power to adopt rules for the promotion of intellectual creation within their own jurisdictions.”) (emphasis added)); see Benkler, supra note 5, at 548 (“[\textit{Bonito Boats} and \textit{Sears/Compco}] are one step removed from the question of direct constraints the Intellectual Property Clause places on Congress, because they involve the respective powers of the states and the federal Constitution.”); Patry, supra note 5, at 381 n.131 (“At the same time, however, it must be acknowledged that in neither \textit{Bonito Boats} nor \textit{Feist} was the Court faced with a challenge to Congress’s power to enact copyright-like legislation in unoriginal material under the Commerce Clause.”).

\textsuperscript{233} Bonito Boats, 489 U.S. at 168.

\textsuperscript{234} The Court’s recent decision in Eldred v. Ashcroft, 537 U.S. 186 (2003), casts some doubt on the equal applicability of the Intellectual Property Clause’s limits even within the Clause itself. In \textit{Eldred}, the Court held that previous cases discussing the presence of a quid pro quo in the patent context do not apply with equal force in the copyright context. Id. at 216–17.
Court's claims of limitation were not well supported in any of them. Other than the quoted language, Graham relied for its constitutional rhetoric on only the general abhorrence of monopolies at the time of the Constitution and on the writings of Thomas Jefferson, whose views on intellectual property protection were rejected by the Framers.\textsuperscript{235} In addition to its irrelevance, Feist's constitutional analysis is subject to criticism for its poor quality.\textsuperscript{236} Bonito Boats's constitutional analysis consists solely of its bald assertions, with no additional support at all.\textsuperscript{237}

Another recent case addressing the reach of the Intellectual Property Clause, Eldred v. Ashcroft, reflects a less restrictive view of the Intellectual Property Clause than any offered by those advocating external application of the Clause's limits: "As petitioners point out, we have described the Copyright Clause as 'both a grant of power and a limitation'.... We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."\textsuperscript{238} That's a pretty low standard of protection for "ideas fundamental to a free society."\textsuperscript{239}

Although they contain forceful sound-bites, cases like Graham, Feist, Sears/Compco, and Bonito Boats provide little precedent for reading the Intellectual Property Clause's limits as applying to other constitutional grants of authority. Indeed, the only case to squarely address the issue, the Trade-Mark Cases, actually looked to alternative grants of authority in order to find a power to grant exclusive rights.\textsuperscript{240} Those arguing for the external application of the Intellectual Property Clause must find other support for their claims that the Intellectual Property Clause's limits operate as a general constraint on Congress's power.

C. History and the Intellectual Property Power

Many arguments about the centrality (and consequently the general applicability) of the limits in the Intellectual Property Clause rely on a series of historical circumstances to prove the case. Professor Lessig, for instance, has argued that "[t]he great evil in the Framers' mind, second only to the great evil of centralized, monarchical government, was the evil of state-sanctioned monopoly."\textsuperscript{241} Historical arguments about the meaning and reach of the Intellectual Property Clause vary widely by their de-

\begin{itemize}
  \item \textsuperscript{235} See infra text accompanying notes 286–299.
  \item \textsuperscript{236} See, e.g., 1 Goldstein, supra note 5, § 2.2.1, at 2:9–2:10 (arguing that Feist's references to creativity as part of originality standard complicated question of copyright protection for forms of data collection); Karjala, supra note 5, at 889 ("The result of [Feist] runs counter to the basic social policy of providing an incentive for the creation of desirable works that are otherwise subject to piracy.").
  \item \textsuperscript{237} See Bonito Boats, 489 U.S. at 146.
  \item \textsuperscript{238} 537 U.S. at 212 (quoting Graham v. John Deere Co., 383 U.S. 1, 5 (1966)).
  \item \textsuperscript{239} Patterson, Copyright Clause, supra note 200, at 367.
  \item \textsuperscript{240} The Trade-Mark Cases, 100 U.S. 82, 94–95 (1879).
  \item \textsuperscript{241} Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. Rev. 1057, 1062 (2001).
\end{itemize}
gree of specificity. I will first consider general claims premised on the historical context in which the Intellectual Property Clause was written. Keeping in mind what we can glean from the historical context, I will discuss what was actually said about the Intellectual Property Clause during the Constitution’s framing and ratification. Finally, I will deduce the conclusions to be sensibly drawn from the historical evidence about the place of the Intellectual Property Clause’s limitations in the constitutional order.

1. The Constitution as a Response to the English Experience with Monopolies. — One set of historical arguments about the meaning of the Intellectual Property Clause attempts to frame the Clause as the continuation of English efforts over the previous century to curtail the practice of granting harmful trade monopolies. Understanding the history of monopolies in England, the argument goes, demonstrates both how mindful the Framers were of the evils of monopolies and how important they considered the Intellectual Property Clause’s limits to be as safeguards against their resurgence.242 Professors Heald and Sherry have, in turn, taken these claims about the anti-monopoly characteristics of the Clause and argued that allowing Congress to avoid its limits by granting exclusive rights pursuant to its commerce power would thwart the Framers’ intent to codify in the Constitution the same set of protections against monopolies present in eighteenth-century England.243 Although they carry little force standing alone, it is worth considering such arguments in order to better understand what actually was said about the Intellectual Property Clause and its limits during the period surrounding the framing.

That England had both recognized the danger of monopolies and acted to drastically curtail them is indisputable. The early English monopolies were granted largely as incentives for either the invention or import of new technologies and goods into the British Isles. However, by Elizabethan times, patents were routinely granted by the Crown to favored supporters, both as a form of compensation and as a method of regulation. For example, it is hard to view as much more than naked rent-seeking the thirty-three-year playing-card patent granted to one of the Queen’s grooms at the heart of the celebrated Darcy v. Allen, which overturned the practice of granting royal trade monopolies.244 And the monopoly granted in printing, bookbinding, and bookselling to the Stationers’ Company in 1557 was both a source of rents for the London publishing trades and a tool for government control over the content of books in England.245

242. See infra note 251.
243. Heald & Sherry, supra note 5, at 1142–44.
245. See Lyman Ray Patterson, Copyright in Historical Perspective 29 (1968) [hereinafter Patterson, Historical Perspective]; Samuelson, supra note 202, at 323–24.
In response to what it considered to be abuse of monopolies by the crown, Parliament in 1623 passed the Statute of Monopolies, which prohibited the granting of royal monopolies, with several exceptions (both general and particular), of which two are relevant: "Letters Patents and Grants of Privilege heretofore made, or hereafter to be made, of, for or concerning Printing," which both preserved the royal monopoly conferred to the Stationers' Company and permitted the continued practice of granting individual royal printing patents, and for "letters patents and grants of privilege for the term of fourteen years or under, hereafter to be made of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures," the seventeenth-century equivalent of modern invention patents. In the copyright context, many have also pointed to two events—the 1710 adoption of the Statute of Anne (which vested copyright in authors rather than publishers) and the 1774 House of Lords decision in Donaldson v. Beckett (which reputedly ruled that there is no perpetual common-law copyright)—as informing the constitutional restriction against broad intellectual property rights in the United States.

Although some have argued that the Intellectual Property Clause should be interpreted in light of the English history of monopoly protection, there is no direct evidence that the Intellectual Property Clause...
and its limits were drawn up in order to reproduce the British protections against state-sanctioned monopoly.

The Framers unsurprisingly failed to cite the Statute of Monopolies as the model for the Constitution, which makes the argument that the Framers incorporated in the Constitution any particular protection against monopolies an argument that they succeeded where they didn’t try. The item most closely tying the American and British intellectual property regimes together is the Statute of Anne. Both the pre-constitutional state copyright laws and the congressional resolution that prompted many of them bear a striking resemblance to the Statute of Anne. For instance, the Statute of Anne calls itself a statute “for the encouragement of learning,” a theme captured in one way or another in ten of the twelve state copyright laws. Similarly, every one of the state copyright laws provided for grants that, like those of the Statute of Anne, were limited in time. Likewise, the Copyright Clause names authors (not publishers) as the recipients of exclusive rights and it also calls for grants to be of limited time. The Copyright Clause’s continuation of the same features of the Statute of Anne adopted by the earlier state copy-

Patent and Copyright Clause, 84 J. Pat. & Trademark Off. Soc’y 909, 925 (2002) (noting that the Intellectual Property Clause with its limits “appears to have been aimed at preventing the kinds of abuses that had prompted the Statute of Monopolies 150 years later”); L. Ray Patterson & Craig Joyce, Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution, 52 Emory L.J. 909, 938 (2003) (“The limitations on copyright specified by the framers in aid of their general purpose provide a concise summary . . . of the lessons learned from the English experience . . . .”); Edward C. Walterscheid, To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution, 2 J. Intell. Prop. L. 1, 37 (1994) (“It is precisely because the delegates were familiar with the Statute of Monopolies either on legal or political terms that they were not about to give the Congress any general power to create monopolies.”); Marci A. Hamilton, The Historical and Philosophical Underpinnings of the Copyright Clause 4 (Benjamin N. Cardozo School of Law, Occasional Papers in Intellectual Property Working Paper No. 5, 1999).

On the role of the Statute of Anne, see Heald & Sherry, supra note 5, at 1164 (noting that “[t]he framers similarly understood that one way to avoid the abuses that occurred under the Stationer’s monopoly was to constrain Congress’s choices as to who could receive statutory protection,” a restriction that applies to the entire Constitution); Ochoa & Rose, supra, at 935 (“When the U.S. Constitution granted Congress the power to secure copyrights ‘for limited Times,’ it did so in the context of the British struggles to restrain the booksellers’ monopoly claims.”).

252. See Thorvald Solberg, Copyright Enactments of the United States 1783–1906, at 11–31 (1906) (reprinting all twelve of the state copyright laws enacted prior to the Constitution).

253. See id. The Continental Congress issued a recommendation to the States to adopt copyright laws, a recommendation embodying a duration of “a certain time, not less than fourteen years” with a renewal to living authors “for another term of time not less than fourteen years.” 24 Journals of the Continental Congress 1774–1789, at 926–27 (Gov’t Printing Office 1922) (1783).

right laws demonstrates a pattern of similarity that is beyond any believable coincidence.

While it would be fantastic to argue that the Statute of Anne had no effect on the framing generation’s approach to intellectual property law, it’s not clear exactly what the Statute of Anne, or reference to it, has to do with preventing the federal government from conferring monopolies using other powers. Some have argued that the Statute of Anne represented a fundamental shift in English intellectual property law that was intended to, and did, lead to the eventual collapse of a particular monopoly: the publishing monopoly enjoyed by the English Stationers’ Company. The adoption by the Framers of language so close to the Statute of Anne’s, the argument continues, demonstrates their inclusion of a similar anti-monopoly imperative in the Intellectual Property Clause, an imperative that applies not only to the Intellectual Property Clause itself, but to all of Congress’s powers.

Even if one is comfortable relying on the inference created by using similar language, there is no suggestion in the Statute of Anne that other forms of exclusive rights are somehow violative of the (English, much less the American) constitutional order. The Statute of Anne doesn’t address trade monopolies at all—a notable absence given its application to an industry that was, at the time, largely monopolized by one: the Stationers’ Company.

Nor are the various limits in the Statute of Anne well-adapted to the prevention of monopolies. The two main innovations of the statute, limited duration and the vesting of copyright in authors, have nothing to do with preventing monopolies. Perpetual copyright may have helped the Stationers’ Company maintain a stranglehold on printing, but that was in a period during which demand was intensely concentrated in a very few, well-known, and older works. Consider instead of eighteenth-century England the dynamic publishing markets of today. A perpetual copyright

255. See Coenen & Heald, supra note 98, at 112–13 (arguing that the Statute of Anne aimed to break the Stationers’ Company monopoly); Heald & Sherry, supra note 5, at 1164 (“In 1710, Parliament saw that one way to end the monopoly was by granting copyright protection directly to authors.”); Ochoa & Rose, supra note 251, at 914–15 (“[T]he Statute of Anne acted in two ways to break the booksellers’ monopolies. First, the Act established authors as the original proprietors of copyrights. . . . Second, the proposed legislation was amended to impose term limits modeled on those in the Statute of Monopolies.”); Patterson, Copyright Clause, supra note 200, at 366 (“[H]istory shows that the author as the grantee of copyright was in fact part of a plan to destroy the booksellers’ monopoly of the booktrade in the Statute of Anne in 1709 . . . .”); Samuelson, supra note 202, at 325 (“[Article I, Section 8, Clause 8] should be viewed in historical context as an American endorsement of England’s repudiation of the speech-suppressing, anti-competitive and otherwise repressive pre-modern copyright system that the English Parliament meant to reshape through the Statute of Anne.”); Hamilton, supra note 251, at 7 (“[T]he Statute of Anne] knocked the legs out from under the Stationers’ Company by introducing the author into British copyright law.”).

256. Heald & Sherry, supra note 5, at 1164.

in Mickey Mouse, for instance, could not allow its owner, Disney, to monopolize publishing. The reason is that the creation of new works would constantly erode whatever market power Disney could obtain through the Mickey Mouse copyright. Even if Mickey Mouse is a more valuable character today than it was in the 1920s, it is inconceivable that the market for Mickey Mouse represents a larger percentage of the market for works of authorship than it did in the past. The same principle, of course, extrapolates to Disney's entire collection of works. Indeed, a better example might be the extensive library of classic Hollywood films pursued and obtained by Ted Turner during the 1980s and 1990s. Owning the still-extant copyrights in those works has not markedly increased (following a series of mergers) Time Warner's ability to monopolize publishing markets. Indeed, even if one were to limit the relevant market to remakes of classic films, there are enough competitors to Time Warner's library of copyrights to prevent them from being able to exercise anything approaching monopoly power. In dynamic intellectual property markets, it is only the ability to control the creation of new works, not perpetual protection of old ones, that could lead to the monopolization of the publishing industry.

So, too, with the vesting of copyright in authors. The Stationers' Company's power was the product of the centralized control that it had over publishing, not its ownership of copyrights. Arguments that the Statute of Anne's grant of rights to authors instead of publishers caused the Stationers' Company's demise ignore the economics of copyright grants. If copyrights are transferable (and transaction costs are low), the identity of the initial holder of the right is and always has been irrelevant; the party who values the right the most will wind up owning the right regardless of who starts out with it. The difference between the

258. Indeed, Mickey seems to be in something of a decline. See Laura M. Holson, No Golden Years Yet for a 75-Year-Old-Mouse, N.Y. Times, Nov. 24, 2003, at C1 (discussing the various reasons, including a failure to "upgrade the character" and intensive use of Mickey as a spokesman for the Disney empire, why Mickey Mouse's popularity has decreased in recent years).


260. Because of the acknowledged need to use previous works as inputs to the creation of new ones, see William M. Landes & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325, 348 (1989), it is of course conceivable that particularly broad intellectual property rights in old works could allow one to close off the development of new ones. My claim is not that it would be impossible to reshape copyright in a way that allowed it to be used to obtain a monopoly in publishing. Rather, my claim is that none of the acknowledged limitations contained in either the Statute of Anne or the Intellectual Property Clause serves to prevent the development or maintenance of publishing monopolies.

261. But see Eldred v. Ashcroft, 537 U.S. 186, 201 n.5 (2003) ("The Framers guarded against the future accumulation of monopoly power in booksellers and publishers by authorizing Congress to vest copyrights only in 'Authors.'").

intellectual property markets of then and those of now is not the scope of authors' legal rights, it is the increase in relative market power that authors enjoy by not facing a publishing monopoly.\textsuperscript{263} If a monopolist or cartel controlled the means of publication today, authors in the twenty-first-century United States would be in no better position by virtue of the Copyright Clause's vesting of exclusive rights in them than authors were under the reign of the dreaded Stationers' Company. Indeed, many have argued that the dominance enjoyed by publishers in many modern content markets has led to gross under-compensation of authors and artists today, even with the author-centric set of rights currently bestowed by the Copyright Act.\textsuperscript{264}

The Statute of Anne is an unlikely source of advice on the prevention of monopolies; it is even more of a stretch to argue that the Framers drew upon the Statute of Anne as a source of federal constitutional intellectual property law in order to prevent the formation of government-sponsored monopolies. The only form of monopoly even remotely touched upon by the Statute of Anne—the publishing monopoly that lobbied for the statute's adoption—was unheard of in the United States at the time of the framing.\textsuperscript{265} When combined with the Statute of Anne's poor suitability to the task of preventing monopolies, the total lack of any recorded reference during the framing period to the Statute of Anne as a brake on monopoly makes any connection between the Statute of Anne and a general prohibition against federally sanctioned monopolies a particularly attenuated one.

2. The Significance of Donaldson v. Beckett. — Many considering the importance of the Intellectual Property Clause's limits have also argued that the Intellectual Property Clause necessarily reflects the 1774 English case of Donaldson v. Beckett\textsuperscript{266} and its rejection of common-law, and consequently perpetual, copyright.\textsuperscript{267} Putting aside for a moment the questionable relevance of the limit that Donaldson is supposed to stand for—the prohibition against perpetual copyrights\textsuperscript{268}—Donaldson, and its applicability to the Constitution, is a subject fraught with uncertainty. There is

\textsuperscript{263} Indeed, the import prohibition in § 601(a), which Professors Heald and Sherry have highlighted as an example of legislation not in conflict with the Intellectual Property Clause, see Heald & Sherry, supra note 5, at 1193–94, is much more likely to result in the conference of market power to American publishers than any of the rights traditionally associated with copyright.


\textsuperscript{265} Eldred, 537 U.S. at 200 n.5; Nachbar, Mythology, supra note 205, at 45.

\textsuperscript{266} 1 Eng. Rep. 837 (H.L. 1774).

\textsuperscript{267} See, e.g., Heald & Sherry, supra note 5, at 1144–46 ("[T]he English House of Lords definitively ruled that authors' rights in published works were limited by the Statute, rather than governed by common law."); Patterson, Copyright Clause, supra note 200, at 383 ("Both Millar and Donaldson can be read as annotations of the clause, Millar telling us what it does not mean, Donaldson tell[ing] us what it does.").

\textsuperscript{268} See supra text accompanying notes 203–204 and 257–260.
no evidence that the Framers were even cognizant of Donaldson when drafting the Intellectual Property Clause, nor does early Supreme Court precedent suggest any constitutional place for the concept of copyright many find in Donaldson.

The story of Donaldson is a complicated one. After the passage of the Statute of Anne, a question arose in England over the status of the copyright in works that had been published prior to its adoption. The statute itself provided previously published works twenty-one years of protection to run from the date of the statute's adoption, the result being that statutory copyright in works published prior to the Statute of Anne would expire in April of 1731. However, many pre-Statute of Anne works were still extremely valuable, and the booksellers who made up the Stationers' Company owned the copyrights in virtually all of them. Thus, the Stationers' Company had a strong incentive to find a way to retain its copyrights in pre-1710 works beyond the twenty-one year limit. Their answer came in the form of common-law copyright. The booksellers argued that the Statute of Anne's protection was not exclusive; it was in addition to the underlying common-law copyright that all authors enjoyed in their work. The authors had transferred their interests in their works to the booksellers, the argument goes, leaving the booksellers in possession of the author's perpetual common-law copyright, without regard to the Statute of Anne. The King's Bench sustained that claim in 1769 in Millar v. Taylor. But Millar was overruled five years later by the House of Lords in Donaldson. Even the weakest reading of Donaldson is that post-publication common-law copyrights had been extinguished by the Statute of Anne; a stronger reading is that the House of Lords denied that they had ever existed at all.

As many have already acknowledged, it appears that the Framers were not mindful of Donaldson in formulating the Intellectual Property Clause. The only mention of English common-law copyright we have in the context of the framing is Madison's in Federalist No. 43, and in that

269. Statute of Anne, 8 Ann., c. 19, § 1 (1710) (Eng.).
270. On the historical context leading up to Donaldson, see Feather, supra note 257, at 75–83.
273. On the uncertainty over the holding of Donaldson, see Howard B. Abrams, The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 Wayne L. Rev. 1119, 1156–71 (1983); see also Mark Rose, Authors and Owners: The Invention of Copyright 107–10 (1993) (discussing confusion over the holding of Donaldson). As will be explained below, the actual holding of Donaldson is of no moment, and thus I will assume that Donaldson rejected common-law post-publication copyrights in toto.
274. For a comprehensive analysis of why the Framers may not have fully comprehended Donaldson, see John F. Whicher, The Ghost of Donaldson v. Beckett: An Inquiry into the Constitutional Distribution of Powers over the Law of Literary Property in the United States—Part I, 9 Bull. Copyright Soc'y U.S.A. 102, 131–40 (1962); see also Ochoa & Rose, supra note 251, at 923–24 (citing several potential factors, including an
text Madison asserted that copyright was a common-law right in England (and in so doing, he perhaps unwarrantedly asserted an equally natural place for patent rights as well).  

The next mention of Donaldson in the constitutional context was forty-seven years later in Wheaton v. Peters, which addressed the existence of a state common-law copyright in Pennsylvania. One of the arguments made by the plaintiffs in Wheaton was constitutional: that the Intellectual Property Clause’s use of the word “securing” demonstrated a constitutional recognition of a pre-existing common-law copyright. The total of the case’s constitutional holding was on a point having nothing to do with Donaldson: that, given the uncontroverted absence of any common-law protection for inventions, “securing” as used in the Intellectual Property Clause could not have been intended to incorporate a pre-existing common-law right in “Writings” because the same word was used with regard to rights in “Discoveries” as well. But, even in addressing the common-law aspects of the case, the Court did not rely on Donaldson as a source of reasoning. Rather, the basis for the decision in Wheaton was that the absence of any pre-1682 English precedent recognizing common-law copyright, combined with the disputed nature of the right when it was first litigated in the eighteenth century (i.e., the five-year reversal between Millar and Donaldson), showed that no English common law of copyright had been established at the time of Pennsylvania’s founding and thus that post-publication copyright was not a part of the common law of Pennsylvania:

Can it be contended, that this common law right, so involved in doubt as to divide the most learned jurists of England, at a period in her history, as much distinguished by learning and talents as any other; was brought into the wilds of Pennsylvania by its first adventurers.

older edition of Blackstone and an erroneous report of the case in wide circulation in the United States.

275. Madison said, “The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors.” The Federalist No. 43, at 271–72 (James Madison) (Clinton Rossiter ed., 1961). Madison was either mistaken or not very careful in his exposition. The lack of a common-law patent right at the time of his writing is beyond dispute. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 659–61 (1854).


277. Id. at 660–61; see U.S. Const., art. I, § 8, cl. 8 (giving Congress power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” (emphasis added)).

278. Wheaton, 33 U.S. (8 Pet.) at 659–61. Of course, the Court did hold that the use of the same word in the 1790 Act did signify the previous existence of a common-law right but that the right referred to was the common-law right to first publication, which had been extinguished in Wheaton’s case by publication of the work in question. Id.

279. Id. at 660.
To the Court in 1834, *Millar* and *Donaldson* were not so much precedents establishing anything fundamental about copyright as they were artifacts of the uncertainty of the English law of copyright in the seventeenth and eighteenth centuries. It is simply implausible to argue that *Donaldson*—whose existence and implications both appear to have been lost on the Framers—provides any definition to the Intellectual Property Clause, much less the scope of the other Article I grants.280

Just as the Intellectual Property Clause would make a weak guardian of free speech, if the Framers' intent in formulating the Intellectual Property Clause was to codify any particular English prohibition against state-sanctioned monopolies, they made a rather poor job of it. None of the limits in the Intellectual Property Clause lend themselves to preventing the formation of monopolies. Take copyright: Like the vesting of copyright in authors and limited duration many believe are derived from the Statute of Anne, the limits on copyrightable subject matter announced by the Supreme Court in *Feist* (which arguably reflect similar limits in the Statute of Monopolies) have nothing to do with preventing monopolies. The ability to copyright facts, for instance, could not possibly result in the ability to monopolize the field of publishing if granted to all (even if granted only to all publishers) equally. Not even the Patent Clause’s vesting of patents in “Inventors” can successfully prevent those rights from being accumulated by a monopolist. The contours of the Intellectual Property Clause and the evils associated with state-controlled monopolies have very little to do with each other. Nor does *Donaldson*, and its prohibition against perpetual copyrights, seem to have provided either rule or reason for the scope of Article I. Article I was motivated by many things, but it’s hard to view it as either a response to English experience with monopolies or as a codification of the largely unknown decision in *Donaldson v. Beckett*. 3

3. Commentary on Intellectual Property During the Ratification. — But we do not completely lack direct evidence about how the Framers viewed the Intellectual Property Clause. There is record of a handful of discussions of the Intellectual Property Clause during the period of the Constitution’s ratification, and some have argued that these comments on the Clause demonstrate the importance of the Intellectual Property Clause’s limits to the Framers281 and consequently the necessity of applying them to all of Article I.282

280. Of course, any claim about the reach of the Intellectual Property Clause premised on *Donaldson* is a narrow one. *Donaldson* only addressed one aspect of copyright alluded to by the constraints in the Intellectual Property Clause: the prohibition against perpetual grants contained in the “limited Times” restriction. Even if the Framers had intended to codify *Donaldson*, doing so would not have resulted in a comprehensive copyright (much less patent) policy on which to base other restrictions (such as against data protection) on congressional power.


282. See, e.g., Heald & Sherry, supra note 5, at 1132–35; Patry, supra note 5, at 370–71.
The most obvious conclusion to be drawn from the mention made of the Intellectual Property Clause during the framing is that the Clause was either uncontroversial or simply unimportant. There was very little discussion of the Intellectual Property Clause among the Framers; there is no record of any debate over it at the Federal Convention. Preventing Congress from succumbing to the insatiable temptation to grant favors in the form of monopolies is heavy lifting indeed for a limitation on a power that was itself adopted without any real discussion.

Of what little there was said about the Intellectual Property Clause during the ratification debates, the most consistent points raised were not that intellectual property regulation should reflect any particular policy but rather that it should be uniform. Madison's defense of the Intellectual Property Clause in Federalist No. 43, for instance, centers on the need for uniformity.\(^\text{283}\) James Iredell and Thomas McKean similarly argued for the inclusion of intellectual property in the federal Constitution largely on the imperative of intellectual property.

\(^{283}\) After briefly making the case for intellectual property generally, Madison argued for the constitutionalization of intellectual property not to restrain Congress but rather to permit uniformity:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.

The Federalist No. 43 (James Madison), supra note 275, at 271–72.

\(^{284}\) Iredell wrote of the copyright power: "If this provision had not been made in the new Constitution, no author could have enjoyed such an advantage in all the United States, unless a similar law constantly subsisted in each of the States separately." Iredell, supra note 206, reprinted in 16 Documentary History, supra note 206, at 386 n.(c). Similarly, McKean explained at the Pennsylvania ratifying convention:

[T]he power of securing to authors and inventors the exclusive right to their writings and discoveries could only with effect be exercised by the Congress. For, sir, the laws of the respective states could only operate within their respective boundaries, and therefore, a work which had cost the author his whole life to complete, when published in one state, however it might there be secured, could easily be carried into another state in which a republication would be accompanied with neither penalty nor punishment—a circumstance manifestly injurious to the author in particular, and to the cause of science in general.

Remarks of Thomas McKean, Nov. 28, 1787, reprinted in 2 The Documentary History of the Ratification of the Constitution 415 (Merrill Jensen ed., 1976) [hereinafter 2 Documentary History]. Concerns over uniformity were well-founded. Of the general copyright laws passed by the States during the years of the Articles of Confederation, two of them (Maryland and Pennsylvania) never even came into effect; they included reciprocity clauses that were never fulfilled because one State, Delaware, never enacted a general copyright law, see Solberg, supra note 252, at 16 (Maryland), 21 (Pennsylvania), and the duration of copyright varied widely among the States from a renewable fourteen-year term to single terms of up to twenty-one years. See id. at 11–31. The disparity among States over patent protection was even more widespread. Only one State, South Carolina, had a
There was, however, reflected in several comments made at the time a disdain for monopolies generally. George Mason, in his objections, mentioned the problem of monopoly twice, with reference both to the use of the Commerce Clause to regulate navigation in favor of eastern interests and as part of a general attack on the Necessary and Proper Clause as opening the door to a whole range of overreaching federal regulation:

By requiring only a Majority to make all commercial and navigation Laws, the five Southern States (whose Produce and Circumstances are totally different from that of the eight Northern and Eastern States) will be ruined; for such rigid and premature Regulations may be made, as will enable the Merchants of the Northern and Eastern States not only to demand an exorbitant Freight, but to monopolize the Purchase of the Commodities at their own Price, for many years: to the great Injury of the landed Interest, and Impoverishment of the People: and the Danger is the greater, as the Gain on one Side will be in Proportion to the Loss on the other. . . .

Under their own Construction of the general Clause at the End of the enumerated powers the Congress may grant Monopolies in Trade and Commerce, constitute new Crimes, inflict unusual and severe Punishments, and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.285

Thomas Jefferson was likewise wary of the power to grant monopolies. In a series of letters he sent to James Madison during the period of ratification, he argued repeatedly for the addition of a bill of rights that included protections to ensure "freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations."286 On monopolies, Jefferson elaborated:

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[It] is better to... abolish... Monopolies, in all cases, than not to do it in any... Saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14[ ] years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.287

Mason and Jefferson were not alone in their disdain for monopolies,288 nor was the concern limited to commentators. Four state ratifying conventions made requests for an amendment prohibiting the federal government from establishing trade companies with powers of exclu-


What Jefferson was trying to accomplish with his suggestion is less than clear. He wrote all of these letters after receiving a copy of the Constitution as it was sent to the States for ratification, and so he must have seen the express provision for exclusive rights in the Intellectual Property Clause. Taking Jefferson’s condemnation of “monopolies in all cases” to be an argument against the power to grant any exclusive rights would make this suggestion unique among all of his for being an attempt to use a bill of rights to divest Congress of a power explicitly granted in the Constitution itself. The rest of his suggestions are clarifications of points left open by the Federal Convention, not attempts to remake the Constitution. The more natural reading of “monopoly” is the definition that was in use at the time: the ability to exclude others from an entire trade, not just from practicing a particular idea or copying a particular work of authorship. See 2 Noah Webster, An American Dictionary of the English Language (Johnson Reprint Co. 1970) (1828) (defining “monopoly” as “[t]he sole power of vending any species of goods, obtained either by engrossing the articles in market by purchase, or by a license from the government confirming this privilege”); Noah Webster, A Compendious Dictionary of the English Language 195 (Bounty Books 1970) (1806) (defining “monopoly” as “the sole property of selling, the act of engrossing all”). Similarly, although two state constitutions prohibited the granting of monopolies, both States enacted general copyright laws, which suggests that “monopolies” were not equated with intellectual property protection at all. See infra note 300. But Jefferson used the term inconsistently. In a 1789 letter to Madison, he argued that “[m]onopolies may be allowed to persons for their own productions in literature and their own inventions,“ a use of “monopoly” that equates it with the kinds of exclusive rights authorized by the Intellectual Property Clause. See infra. These kinds of inconsistent uses make it difficult to develop a coherent historical theory about the Framers’ views about intellectual property, and so I will, for the purposes of my historical analysis, ignore the difference between “monopolies” and exclusive rights in intellectual property.

In any event, it was an argument Jefferson repeated the following year when reviewing a draft of the Bill of Rights sent to him by Madison: “For instance the following alterations and additions would have pleased me... Art. 9. Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding ___ years but for no longer term and for no other purpose.” Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 15 The Papers of Thomas Jefferson, supra note 286, at 367-68.

288. See Ochoa & Rose, supra note 251, at 926-28 (collecting anti-federalist commentary on the evils of monopoly).
sion. But Mason and Jefferson were hardly representative of the views of the Framers. They were extremists in this regard, and their objections were rejected with the adoption of the Constitution as it is.

Importantly, as Professors Ochoa and Rose have pointed out, no one stood up to defend the Intellectual Property Clause by lauding the benefits of monopolies. Those who voiced an opinion seemed to be in agreement that, as a general matter, monopolies were to be shunned. For instance, Madison's response to Jefferson's concerns concedes immediately Jefferson's larger point about the evil of monopolies and seeks to distinguish copyright and patent from common trade monopolies.

With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? . . . Is there not also infinitely less danger of this abuse in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.

But what is also clear from Madison's response is that he did not think the problem of monopolies worthy of a restriction on representative government. Although Madison elsewhere demonstrated his understanding of the problem of special interests, or "faction," his response to Jefferson suggests that he did not consider the public choice problems inherent in the power to grant monopolies to be so strong as to systematically endanger the legislative process. Rather, Madison's response indicates his trust—rightly or wrongly—in representation as the cure to the English experience with monopoly: "Where the power, as with us, is in

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289. See 2 Documentary History, supra note 284, at 95 (Massachusetts), 142 (New Hampshire), 198 (New York), 274 (North Carolina) (U.S. Bureau of Rolls and Library ed., 1894). The requests did not, for the most part, invoke the language of monopoly. Rather they were requests that "Congress erect no Company of Merchants with exclusive advantages of commerce." Id. at 95, 142, 274. The New York version was the only one to mention monopolies specifically. See id. at 198.

290. Schwartz & Treaunor, supra note 285, at 2383.

291. Ochoa & Rose, supra note 251, at 927. But see Schwartz & Treaunor, supra note 285, at 2383 (noting that "[t]he Federalists, in general, believed monopolies could advance the commonweal," as demonstrated by their support for the Bank of the United States and the positions they held in debates over monopolies granted by States).


293. "[Faction is] a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." The Federalist No. 10 (James Madison), supra note 275, at 78.
the many not in the few, the danger can not be very great that the few will be thus favored. 294

Reflecting these themes, some have argued that the public choice problems underlying the granting of exclusive rights represent a constitutional norm favoring a restrictive approach to the Intellectual Property Clause. 295 Grants of exclusive rights are certainly amenable to the lobbying and influence of special interests. But, as I've written elsewhere, that argument proves too much. If the problems of public choice were of sufficient gravity to warrant reading constitutional powers narrowly, virtually all economic regulation would require some form of heightened judicial review, a position that does not stand up in the face of the last several

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294. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14 The Papers of Thomas Jefferson, supra note 286, at 21. Madison's views would have been validated by the brief experience the States had with general copyright laws during the period of the Articles of Confederation. All twelve of the general copyright laws adopted contained grants that were limited in time, with the longest being for twenty-one years. See Solberg, supra note 252, at 11–31 (listing the copyright laws from 1783–1786 in each of the twelve States). Professors Heald and Sherry have argued that state legislation adopting limited copyright terms in language reminiscent of the Statute of Anne demonstrates the fundamental nature of those restrictions. Heald & Sherry, supra note 5, at 1147–48. Such uniform treatment by the States is even more probative as evidence that the Framers would not have perceived a need for a constitutional restraint on the actions of legislatures with regard to copyright.


296. See, e.g., Benkler, supra note 5, at 571 ("What is important to understand for contemporary purposes of institutional design is that insofar as the progress of knowledge is concerned, the basic assumption is that the politics of faction will lead to too much recognition of exclusive rights at the expense of the common good . . . ."); Michael H. Davis, Extending Copyright and the Constitution: "Have I Stayed Too Long?," 52 Fla. L. Rev. 989, 993 (2000) ("The process, however, seems to have failed with [copyright term extension], because massive extensions of future copyrights were enacted—with no real support for such encroachments upon the public domain and the public interest—just to gain retrospective protection of existing copyright terms. John Hart Ely has discussed an analogous problem in the larger area of judicial review generally."); Marci A. Hamilton, Copyright Duration Extension and the Dark Heart of Copyright, 14 Cardozo Arts & Ent. L.J. 655, 659 (1996) ("The marketing and concomitant lobbying power of the copyright industries, and their repeated victories at the expense of individual authors (most particularly in the work-made-for-hire context) is a clarion call to the Court to read the Copyright Clause with fresh attention and historical understanding."); Heald & Sherry, supra note 5, at 1197 (describing much contemporary copyright legislation as "a recent response to intense interest group pressure, which might have suppressed [Congress's] historic constitutional good sense in the intellectual property context"); Dennis S. Karjala, Judicial Review of Copyright Term Extension Legislation, 36 Loy. L.A. L. Rev. 199, 245–46 (2002) ("Especially where special interests have managed to convince Congress to pass legislation that is directly contrary to the express constitutional purpose, some independent review of the basis for the legislation is imperative."); Merges & Reynolds, supra note 5, at 52–56 (describing public choice as one of three reasons for "Taking the Patent and Copyright Clause Seriously").

297. See Nachbar, Quest, supra note 87, at 53–55 (demonstrating the ramifications of allowing public choice to guide constitutional judicial review in economic contexts).
decades of Supreme Court precedent. Whether the subject of the regulation is "monopolies" or "exclusive rights," turning to representative government as an answer to rent seeking reflects Madison's view that the appropriate response to the problem of faction was not constitutional restriction but rather a large republic.

Avoiding the constitutionalization of the monopolies question was also the established practice in the United States. Only two of the original thirteen States had constitutions prohibiting state-sanctioned monopolies; although the issue may have been important enough for the Massachusetts, New Hampshire, and New York ratification conventions to mention it, none of those States could be bothered to include prohibitions against monopolies in their own constitutions. And while it is telling that four States requested adoption of a prohibition against the granting of exclusive rights in commerce, that fact cannot possibly overshadow the significance of the suggestion eventually being rejected.

More importantly, it does not appear that trade regulation favoring particular private interests was categorically abhorrent to the Framers, although it did receive considerably more attention than concerns over the potential for monopolies. In responding to George Mason's objections, James Iredell apparently mistook Mason's attack on the ability to "grant monopolies in trade and commerce" as a complaint about the possibility of shipping and navigation laws restricting carriage to American ships and consequently favoring established eastern shipping interests.

298. See id. at 54.
299. The Federalist No. 10 (James Madison), supra note 275, at 83–84; see Nachbar, Quest, supra note 87, at 55.
300. Md. Const. of 1776, art. XXXIX, reprinted in 1 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States 817, 820 (Ben Perley Poore ed., 2d ed. Washington Gov't Printing Office 1878) [hereinafter Federal and State Constitutions] ("That monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered."); N.C. Const. of 1776, art. XXIII, reprinted in 2 Federal and State Constitutions, supra, at 1410 ("That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.").
301. Iredell, supra note 206, reprinted in 16 Documentary History, supra note 206, at 380. Iredell stated his understanding that Mason was not criticizing the Intellectual Property Clause as an assumption based on the unassailable justifications for the power to grant the exclusive rights described by the Clause. "I am convinced Mr. Mason did not mean to refer to [the Intellectual Property Clause]. He is a gentleman of too much taste and knowledge himself to wish to have our government established upon such principles of barbarism as to be able to afford no encouragement to genius." Id. at 380 n.(a). Of course, we know that Mason was speaking of the Necessary and Proper Clause, not the Intellectual Property Clause. See supra note 285. But Iredell's response appears to have been directed to another concern. One of Mason's objections to the Commerce Clause raised at the Federal Convention was that the power to regulate navigation might lead to monopoly. Madison's notes have Mason expressing his discontent at the power given to Congress by a bare majority to pass navigation acts, which he said would not only enhance the freight, a consequence he did not so much regard—but would enable a few rich merchants
North Carolina's Iredell was not afraid to stand up in support of legislation favoring particular commercial interests:

[W]hat could conduce more to the preservation of the union, than allowing to every kind of industry in America a peculiar preference! . . . Is it not the aim of every wise country to be as much the carriers of their own produce as can be? And would not this be the means in our own of producing a new source of activity among the people, giving to our own fellow citizens what otherwise must be given to strangers . . . .302

Similarly, following the ratification, Hamilton's famous Report on the Subject of Manufactures suggested a host of different protectionist trade regulations, ranging from tariffs (with reductions for the raw materials for manufacturing) to exclusive rights for the first importer (rather than inventor) of a product, many of which would have favored particular interests in the country over others.303

The Framers were certainly cognizant of the inherent dangers of trade laws favoring some interests over others. But it does not appear that the matter was of such grave concern that they constitutionally inoculated the new nation against rent-seeking.

4. Drawing Conclusions from the History. — Arguments that the expression of anti-monopoly sentiment during the period of ratification reflect enforceable constitutional norms are the result of two basic errors of constitutional interpretation. First, there is no indication that the concern over the possibility of federal monopolies was widespread. Mason and a few others objected, but those objections do not appear to have been reflected in anything approaching the kind of "demonstrable consen-
sus"\textsuperscript{304} that an originalist would expect to see before inferring an effect on the meaning of the Constitution. A few isolated statements do not constitute the intent of the Framers. Second, arguments about constitutional limits based on statements the Framers made against monopolies ignore the difference between disdain for monopolies and constitutional prohibitions against them. Even if there had been a consensus among the framing generation that monopolies were problematic, that does not demonstrate either that they thought monopolies should be unconstitutional or that they would have read the Constitution to prohibit them.\textsuperscript{305} Thus, while the Framers' hostility toward monopoly is interesting, it's not particularly relevant to the debate over the reach of the Intellectual Property Clause's limits. Demonstrating a connection between the Intellectual Property Clause's limits and the rest of Article I requires more than establishing that the Framers had a distaste for exclusive rights. Rather, those who would apply the Intellectual Property Clause's limits to all of Article I must identify a link between that general distaste and the need to constrain government from having the power, a link never made by the Framers. Indeed, when faced with George Mason's objection that Congress might be able to grant monopolies, Madison pointed to the weakness of the argument as demonstrating how desperate Mason must have been to find something objectionable in the Constitution:

I have been this day honoured with your favor of the 10th. instant, under the same cover with which is a copy of Col. Mason's objections to the Work of the Convention. As he persists in the temper which produced his dissent it is no small satisfaction to find him reduced to such distress for a proper gloss on it; for no other consideration surely could have led him to dwell on an objection which he acknowledged to have been in some degree removed by the Convention themselves—on the paltry right of the Senate to propose alterations in money bills—on the appointment of the vice President—president of the Senate instead of making the President of the Senate the vice president, which seemed to be the alternative—and on the possibility, that the Congress may misconstrue their powers & betray their trust so far as to grant monopolies in trade &c.\textsuperscript{306} While it is clear that Madison believed it would be wrong for Congress to grant monopolies in trade, he likewise believed there was no need for a

\textsuperscript{304} See Edwin Meese, III, Construing the Constitution, Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), \textit{in} 19 U.C. Davis L. Rev. 22, 26 (1985).

\textsuperscript{305} Different strands of originalism emphasize different aspect of the Framers' understanding; some rely on the Framers' intent, while some rely on the original meaning of the Constitution, which in turn requires a determination of the Framers' understanding of that meaning. See White, supra note 196, at 592–93 n.313 (discussing intellectual history of late-twentieth-century originalism).

restriction on Congress's ability to do so. In 1789, when Madison compiled his suggested list of provisions for the Bill of Rights from the requests made from the various state ratifying conventions, he would have seen that four States recommended a restriction against the power to establish a company of merchants (a rough analog to the granting of monopolies), yet he did not include such a protection in his list of proposed amendments to the Constitution. From the quotation above, it's not clear whether Madison was relying on Congress correctly construing "their powers" or simply refusing to "betray their trust." Probably both. Writing some thirty years later, Madison not only provided a much more utilitarian justification for intellectual property than that contained in Federalist No. 43, but he also provided his estimation about the reach of Congress's power:

Monopolies tho' in certain cases useful ought to be granted with caution, and guarded with strictness [against] abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might hold from public use. There can be no just objection to a temporary monopoly in these cases: but it ought to be temporary, because under that limitation a sufficient recompense and encouragement may be given.

The question remains why Madison thought that the Constitution had limited Congress's power to grant monopolies to the two instances of copyright and patent. There are only two likely possibilities: Either he read the Intellectual Property Clause as a limitation on all Article I powers, or he simply thought that no other power reached the granting of exclusive rights. It is clear that Madison thought that no other power would have permitted the federal government to charter a corporation, as is demonstrated both by his proposal for a separate Corporations Clause and his opposition to the first Bank of the United States. In this regard, Madison's own views do not reflect the original understanding of the Constitution; the absence of a Corporations Clause turned out to be no hindrance to the creation of the Bank of the United States. Madison's restrictive view of Section 8 led him to conclude that the only power Congress could use to encourage inventions was the intellectual

307. See also infra note 352 and accompanying text for a stronger statement by Madison against monopolies that is similarly void of any suggestion to restrict government power.


309. See Schwartz & Treanor, supra note 285, at 2380 (discussing Madison's proposed Corporations Clause).


property power. Given the tenor of the debate over other powers, it is virtually inconceivable that the Framers believed that Congress could have gone mad granting monopolies if the limits listed in the Intellectual Property Clause were not applied to them.

What is clear from an examination of the history surrounding the adoption of the Constitution is that there was no widely held understanding that the limits in the Intellectual Property Clause were so fundamental as to require application across all of Article I. Perhaps the best way to highlight the weakness of the argument for external application of the Intellectual Property Clause's limits is by contrast to the Army Clause, whose prohibition of army appropriations lasting more than two years, many have argued, provides a model for the external application of limitations on Section 8 powers. First, the relationship between the restriction and the Framers' historical perspective is much stronger in the Army Clause context. Standing armies had been England's primary means of enforcing the oppression that the revolutionary generation had fought against, while the problems of monopolies were something not even England, much less America, had experienced for decades. Second, military matters were the subject of intense debate during both the Federal Convention and the ratification debates, and the Army Clause was part of a complex compromise between advocates of a strong standing army and those who wanted there to be no standing army at all. The result was a carefully balanced set of provisions in both Article I, Sections 8 and 10, and Article II—of which the Army Clause was just one part—

312. See id. at 2381; Edward C. Walterscheid, Conforming the General Welfare Clause and the Intellectual Property Clause, 13 Harv. J.L. & Tech. 87, 104-05 (1999) (detailing an exchange Madison had with Tench Coxe concerning the use of land grants given in exchange for the introduction of inventions from other countries).

313. See, e.g., Mason, supra note 285 (noting Mason's concerns with the Necessary and Proper Clause).

314. U.S. Const. art. I, § 8, cl. 12 ("To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . .").


317. Article II gives the President command authority over the military (art. II, § 2, cl. 1: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"), while Article I gives Congress control over the power to declare war and control the formalities of military action (art. I, § 8, cl. 11: "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"), to control the financing of the federal armed forces (§ 8, cl. 12 & 13: "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"; "To provide and maintain a Navy"), to regulate the federal armed forces (§ 8, cl. 14: "To make Rules for the Government and Regulation of the land and naval Forces"), and to
that were designed to prevent the federal executive from using the military to create a dictatorship at the expense of the people and the States. The Intellectual Property Clause, to the contrary, was adopted with practically no debate at all. Indeed, the degree of concern over misuse of the federal power to control the military led Madison to include, Congress to recommend, and the States to adopt an amendment to the Constitution ensuring the continued vitality of citizen militias in the face of federal power. None of this happened in the case of the Intellectual Property Clause. Even if the Army Clause provides a model for the external application of limits on Section 8 powers, a considered approach to the Intellectual Property Clause demonstrates that it is a model that the Clause does not fit.

When considered in perspective, history has little to offer to those arguing that the Intellectual Property Clause's limits must be read externally. Claims about the meaning of the Intellectual Property Clause and its place in Article I based on the English experiences with monopolies generally, or the Stationers' Company specifically, ignore the distinction between intellectual property rights and a monopoly over printing. Of course, given the high degree of competition among publishers and

organize and regulate the militia (§ 8, cls. 15 & 16: "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States ... "). While they were denied the ability to operate their own military or engage in offensive military operations (§ 10, cls. 1 & 3: "No State shall ... grant Letters of Marque and Reprisal ... "; "No State shall, without the Consent of Congress, ... keep Troops, or Ships of War in time of Peace, ... or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay"), the States got the power to appoint the officers of and train the militia (§ 8, cl. 16: "reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress").

318. The debates over the power to raise standing armies and the allocation of federal and state authority over the militia were closely related and were driven by an identical concern over accumulation of too much power in the federal executive. See Notes of Debates, supra note 301, at 481–86. On the balance between executive and legislative branches established by the Constitution, see John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 Cal. L. Rev. 167, 269–86 (1996).

319. The status of the Army was the subject of no fewer than twelve of the Federalist Papers; the intellectual property power garnered a single paragraph. Compare The Federalist Nos. 8, 16, 22–29 (Alexander Hamilton), Nos. 41, 46 (James Madison), with The Federalist No. 43 (James Madison), supra note 275, at 271–72; see also Walterscheid, Nature, supra note 5, at 110 ("[T]he inclusion of the intellectual property clause in the draft Constitution was for all intents and purposes an afterthought, occurring after other more momentous decisions had been taken and acted upon."").

320. U.S. Const. amend. II ("A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."); see David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 Yale L.J. 551, 572–77 (1991) (describing the militia as more republican than a standing army).
printers in America at the time of the framing, it is unlikely the Framers would have focused long on the possibility of publishing monopolies in the nascent United States. Both economic logic and historical context explain why there is no direct evidence that the Framers perceived the Statute of Anne's limitations on copyright as a necessary safeguard against the creation of an American Stationers' Company. Overestimating the amount of attention the Framers gave to intellectual property is likewise at the root of arguments that the Intellectual Property Clause incorporates the holding in Donaldson v. Beckett, recognizing the slight importance of the case in eighteenth-century American law explains the paucity of references to it during the framing. Finally, the ratification debates over the status of "monopolies" do not provide evidence that the Framers thought that restrictions on exclusive rights must be constitutionally protected; to the contrary, it appears that the granting of monopolies was not deemed to be a power different enough in kind or degree from other powers to be worthy of limits beyond those inherent in representative government.

D. Reconciling the Commerce/Intellectual Property Paradox

Even if one takes as a given Madison's retrospective view in 1819 that the Constitution in 1789 did not permit Congress to grant exclusive rights beyond those authorized by the Intellectual Property Clause, it is far more likely that perception was based on the limited reach of the Commerce Clause itself rather than on any particular broadly held understanding of the Intellectual Property Clause's limits. But an interpretation of the Commerce Clause as not reaching the power to grant copyrights or patents is implausible under a post-New Deal understanding of the commerce power, regardless of whether one believes the expansion in the Commerce Clause's reach is because of changes in our understanding of the Constitution or because of changes in the national economy. In the absence of the Intellectual Property Clause, there would be no tenable argument that the Commerce Clause does not empower Congress to grant whatever exclusive rights it wishes. Arguments that the Intellectual Property Clause must be read externally are, in essence, attempts to limit our modern but widely accepted understanding of the commerce power through an originalist understanding of the intellectual property power.

Recognizing the vast difference between the scope of the commerce power in 1789 and its reach today explains why, even if the Intellectual Property Clause does not limit the Commerce Clause, the Intellectual Property Clause was not superfluous. At the time of the framing, the In-

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322. Justice Thomas argued in United States v. Lopez: [O]n this Court's understanding of congressional power under [the Commerce Clause combined with the Necessary and Proper Clause], many of Congress' other enumerated powers under Art. I, § 8, are wholly superfluous. After all, if
intellectual Property Clause was not superfluous; there was no way that Congress could have, under the Commerce Clause as understood in 1789, regulated intellectual property. At that time, the Commerce Clause's *internal* limits would have prevented its use to grant exclusive rights. But the Commerce Clause's internal limits no longer prevent its use to grant exclusive rights and attempting to replicate the effect that those internal limits would have had in this particular circumstance by reading the Intellectual Property Clause's limits externally simply imposes incoherence on Section 8.

If one compares Section 8 as it was applied in 1789 with Section 8 as it is applied today, any number of its provisions have become superfluous. Certainly Congress could establish post offices and post roads today under either the commerce or spending powers, enact bankruptcy and naturalization statutes, fix standards for weights and measures, and criminalize counterfeiting of U.S. currency under the interstate commerce power, or even punish felonies on the high seas under the foreign commerce power. There is no reason to think that any of these powers were considered superfluous at the time, but they have become so. The growth of the commerce power means that we have to get comfortable with redundancy in Section 8. Those who would complain that a reading of the Commerce Clause that allows Congress to grant exclusive rights beyond those authorized by the Intellectual Property Clause would do better to focus their ire on *Wickard v. Filburn* than on those with a political interest in obtaining such rights.

Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may . . . grant patents and copyrights [under] cl. 8 . . . . An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.

514 U.S. 549, 588–89 (1995) (Thomas, J., concurring). At least one commentator has invoked Justice Thomas's arguments as a reason to believe that the Intellectual Property Clause must limit the commerce power. See, e.g., Patry, supra note 5, at 372–73. But see Hetherington, supra note 5, at 490–93 (considering the problem but noting that the "anti-superfluousness argument appears inconclusive").

323. Indeed, the Commerce Clause's integral limits prevented its use to grant exclusive rights even ninety years later. See The Trade-Mark Cases, 100 U.S. 82, 96–97 (1879).

324. U.S. Const. art. I, § 8, cl. 7 ("To establish Post Offices and post Roads").

325. U.S. Const. art. I, § 8, cl. 4 ("To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States"). But see Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 468 (1982) (holding that Congress may not avoid the limits on the bankruptcy power by legislating under the commerce power).

326. U.S. Const. art. I, § 8, cl. 5 ("To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures").

327. U.S. Const. art. I, § 8, cl. 6 ("To provide for the Punishment of counterfeiting the Securities and current Coin of the United States").

328. U.S. Const. art. I, § 8, cl. 10 ("To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations").

329. 317 U.S. 111, 125 (1942).
Actually attempting to apply the restrictions I've considered in this Article would have far-reaching implications for the scope of federal—and state—regulatory power. Considering those implications is the enterprise of the next section.

V. Ramifications of Broad Application of the Intellectual Property Clause's Limits

Not only is the external application of the Intellectual Property Clause's limits unsupported by the history surrounding the framing, but any principled application of the Intellectual Property Clause's limits to trade and competition regulation as it has been practiced throughout the history of the United States would also lead to shocking results. Reliance on the Intellectual Property Clause to limit governmental regulatory power becomes even more problematic when one considers the role of the States.

A. "Exclusive Rights" and Other Preferential Trade Regulations

Reading the Intellectual Property Clause's limits as applying to legislation that grants exclusive rights to non-writings or non-inventions requires a theory about where one should apply the Intellectual Property Clause's limits. As demonstrated above, a theory that the Intellectual Property Clause's limits only apply to non-perpetual exclusive rights in writings or inventions does little to restrain Congress from the most troublesome kinds of regulations: perpetual protection or the protection of facts and non-inventive manufacturing techniques or products. But a broader reading also requires some form of limiting principle; the Intellectual Property Clause's limits could not possibly apply to all "exclusive rights." After all, real property rights are exclusive, and no one would argue that the right to exclude that is part of a fee simple interest in real or personal property can only be conferred in compliance with the Intellectual Property Clause's limits. The most likely limiting principle offered to date is to equate "exclusive right" with "monopoly" and argue that Congress can only grant monopolies if it does so in compliance with the limits set forth in the Intellectual Property Clause. Thus, Professors Heald and Sherry argue that "the limiting language of the Clause does not apply to all legislation but rather only to legislation that imposes monopoly-like costs on the public through the granting of exclusive rights," and they would consequently review any legislation that confers monopoly-like rents for compliance with a set of principles they find in the Intellectual Property Clause. The argument is totally inconsistent with the coun-

330. Heald & Sherry, supra note 5, at 1160; see also Merges & Reynolds, supra note 5, at 55 ("[C]ongressional power to create property rights does not extend to non-productive rent-seeking.").

331. While Professors Heald and Sherry refer to the applicability of the "the limiting language of the clause," their argument is completely atextual. Instead, they rely on the
try's history of trade regulation, and if it were ever accepted by the Court, a vast amount of widely accepted trade regulation would suddenly become unconstitutional.

Our nation's history is rife with grants of rights that result in monopoly rents obtained at the expense of the public, almost none of which have been considered as relating in any way to the Intellectual Property Clause. One need look no further than the 1819 case of *McCulloch v. Maryland* for an example of a federal monopoly granted completely outside the Intellectual Property Clause or any of its limitations. That the Bank of the United States took advantage of its monopoly cannot be doubted; the abuses of the Bank were legendary and eventually led to the Bank's political downfall despite its successful defense to constitutional attack in *McCulloch*. However, no one thought to challenge the Bank because its charter was inconsistent with the Intellectual Property Clause.

The federal government routinely controls entry into markets in order to protect rent-seeking by incumbents. The Motor Carrier Act of 1935, for example, regulated trucking expressly to prevent the growing trucking industry from competing with the railroads. In administering the Act, the Interstate Commerce Commission actively suppressed competition, refusing to issue licenses to motor carriers if their only argument for entry was merely to enhance competition. Tellingly, the rates set by the ICC for motor carriers were *minimum*, not *maximum*, rates. The protectionist purposes underlying much of industry and labor regulation are identical to those that led to the formation and recognition of guilds like the Stationers' Company. The entire area of federal labor regulation, for instance, provides for legal cartels of limited scope for no purpose other than to enhance workers' ability to extract rents from employ-
The policy may or may not be wise, but no one has ever questioned it on the basis that the Intellectual Property Clause limits grants of monopolies to those that promote progress. One might object to my comparisons on the basis that they do not involve "exclusive rights," but that term has no functional meaning. It only takes a small step back from the problem to recognize that granting exclusive rights is only one variety of rent-conferring trade regulation. Exclusive rights have economic effects identical to those of preferential trade regulations of many different stripes: They result in a shift of market power from one party to another that results in higher prices, reduced production, and the potential for deadweight loss. Take, for example, the tax on oleomargarine at issue in McCray v. United States. Under the relevant 1902 statute, the tax on uncolored oleomargarine (which is a lard-resembling white) was set at $0.0025 per pound, but the tax on oleo colored to look like butter was $0.10 per pound, a 4000% difference. The wholesale price of a pound of oleomargarine in 1902 was $0.155, of butter $0.241. The result of the $0.10 tax on colored margarine, therefore, was to eliminate the price advantage colored oleomargarine had over butter, and because oleomargarine's competitive advantage was almost entirely based on price, it effectively eliminated colored oleomargarine as a competitor.

337. See Richard A. Posner, Some Economics of Labor Law, 51 U. Chi. L. Rev. 988, 1001 (1984) (arguing that unionization raises price of labor above competitive level and depresses supply of labor below competitive level). Of course, many believe that the limited de jure cartels enjoyed by labor unions are an appropriate response to de facto bargaining power enjoyed by employers, in effect converting a unilateral employer's monopoly into a bilateral monopoly between an employer and a labor union. See, e.g., Michael H. Gottesman, Wither Goest Labor Law: Law and Economics in the Workplace, 100 Yale L.J. 2767, 2781-98 (1991). Nevertheless, laws allowing the cartelization of labor alter the market for labor by allowing unions to exclude others, albeit imperfectly, from a particular labor market.

338. Professors Heald and Sherry seem to recognize the inapplicability of the Intellectual Property Clause to other rent-conferring legislation, which explains their resort to "principles" found in the Clause rather than to the application of the Clause itself to such legislation. See supra note 331.

339. See Richard A. Posner, Economic Analysis of Law 301-05 (5th ed. 1998) (discussing variety of ways that monopolists may extract rents if they have market power).


341. Id. at 44-45 (citing Act of May 9, 1902, ch. 784 § 2, 32 Stat. 193).


343. Id. at 247-49.

344. In 1902, the last year of the $0.02-per-pound tax on all oleomargarine, the nation produced 123,133,853 pounds of oleomargarine. In 1903, the first year of the tax, the total fell to 48,062,490, less than half. See Statistical Abstracts, supra note 127, at 94. Of that, only 1,639,102 pounds was colored oleomargarine—a little less than 1.5% of what oleomargarine sales had been the year before. See id. at 94 n.f.
But Congress could have conferred the same benefit on the dairy industry by granting it the "exclusive right" to sell colored oleomargarine, which the makers of butter could have then exercised to keep anyone from doing so. Either regime achieves the same result: The butter industry is insulated from competition by colored oleomargarine. And consumers would have fared better under the exclusive-rights regime than they would under the tax regime actually imposed. With the exclusive right in hand, butter makers would likely have agreed to license the right to sell colored oleomargarine at some price less than $0.10 per pound, resulting in lower prices for colored oleomargarine (and consequently less deadweight loss) than was the case under the tax.

Arguments that industry-wide trade regulation is somehow less harmful than exclusive rights ignore the economic realities of intellectual property and trade regulation as well as the limited nature of the rights conferred on holders of intellectual property. Unlike most owners of intellectual property, participants in a regulated industry or beneficiaries of tariffs are likely to actually obtain some form of rent-conferring market power. The average seller of intellectual property makes no more than nominal profits; the intellectual property regime is merely a way to allow intellectual property sellers to charge more than their marginal cost because, for intellectual property producers, selling at marginal cost will always result in a loss. The presence of widespread competition among sellers of intellectual property (especially in the case of copyright) is enough to prevent them from being able to extract supracompetitive rents. Trade regulation, on the other hand, is often designed to affect markets defined broadly enough so that there is no ready substitute, making the capture of monopoly rents by beneficiaries of the regulation much more likely. The Motor Carrier Act is a perfect example: The market for trucking services was not only defined broadly, but was defined as a response to the expansion of the transportation market beyond the purview of the railroads. It is the scope of the market subject to the regulation—not the regulation's characterization as an exclusive right, tax, or regulated monopoly—that determines the amount of market power that beneficiaries of the regulation will derive from it. All one need ask is whether the average maker of butter would gain more market power

345. Butter has quality advantages over oleomargarine, and so the butter industry could have used its ability to license colored oleomargarine in order to price discriminate between consumers driven by price and those willing to pay more for the higher quality good. On the efficiency-enhancing (and pro-consumer) effects of price discrimination, see ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449–50 (7th Cir. 1996) (Easterbrook, J.). Even if there were no price discrimination likely, under the exclusive-rights regime, the color premium would be transferred directly to the butter industry instead of it disappearing into the federal treasury. Giving the butter industry a direct financial gain from the sale of oleomargarine would have given the industry some incentive to grow the oleomargarine market.

from receiving the exclusive right to sell butter than he or she would from a high tax on "all spreadable fat-based products other than butter." The answer is obvious: An exclusive right to a narrow market confers much less market power than a moderate barrier protecting a broad one.\textsuperscript{347}

At the same time, exclusive rights to intellectual property have never been absolute. The exclusive rights conferred by the copyright and patent statutes are replete with exceptions that undermine the ability to capture the benefits of one's intellectual property. Some of them are statutory, such as the Patent Act's requirements of disclosure and publication\textsuperscript{348} or the Copyright Act's fair use defenses and first sale doctrine.\textsuperscript{349} Some of them are judge-made, such as copyright's constantly fluctuating distinction between ideas and expression and the judicial gloss on section 107's defense for fair use. Copyright and patent are both regimes made of sets of protections and exceptions that develop, to some degree, in order to provide a particular level of compensation for owners of intellectual property. In the copyrightable subject matter and fair use contexts, for instance, courts expressly acknowledge the repercussions of their decisions on the amount of market power, and consequently compensation, that copyright owners will receive, a factor that often drives their interpretation of the statute.\textsuperscript{350}

In the end, the set of rights conferred by intellectual property law is, economically, no different than the set of rents resulting from other limits on competition. Both forms of intervention in markets provide a set of protections calibrated by both the definition of the market they regulate and the scope of their restrictions on free competition to provide particular beneficiaries the power to extract from the market more than they could get without the limiting regulation. Given the interchangeable economic effects of monopolies and tariff regulation, it is little surprise that James Iredell read George Mason's objection to "monopolies" as an objection to protectionist shipping regulation\textsuperscript{351}—both forms of

\textsuperscript{347} The importance of the definition of the conduct being controlled, rather than the form of the regulation, is demonstrated by the oleomargarine tax. Although the statute taxed the sale of colored oleomargarine, it did not tax the sale of the coloring itself. Following a Treasury Department ruling that the sale of uncolored margarine packaged with separate coloring was not subject to the increased tax, manufacturers of oleomargarine routinely included the coloring in packages of uncolored oleomargarine and allowed the consumer (per the treasury regulations) to mix in the coloring, thus evading in large part the payment of the tax. See Snodgrass, supra note 342, at 75–76.


\textsuperscript{349} 17 U.S.C. §§ 107, 109(a) (2000).

\textsuperscript{350} See, e.g., Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523–24 (9th Cir. 1992) (noting that in the fair use analysis, the possibility that the copyright owner will spread market power conferred by copyright into another market is a factor); Computer Assocs. Int'l, Inc. v. Altai, 982 F.2d 695, 707–09 (2d Cir. 1992) (discussing how need to permit other software makers to use most efficient algorithms requires higher standard of similarity for purposes of infringement).

\textsuperscript{351} See text accompanying notes 301–302.
trade regulation present the same potential for economic harm and abuse. Madison, too, recognized the similarity. Writing in 1792, Madison had no small criticism for monopolies:

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties and free choice of their occupations which not only constitute their property in the general sense of the word, but are the means of acquiring property strictly so called.  

But in the same breath, he made an identical criticism of other protectionist measures, including protectionist taxation:

What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth; where the manufacturer and weaver of woolen cloth are again forbidden the economical use of buttons of that material, in favor of the manufacturer of buttons of other materials!

A just security to property is not afforded by that government, ... where the keenness and competitions of want are deemed an insufficient spur to labor, and taxes are again applied by an unfeeling policy, as another spur, in violation of that sacred property which Heaven, in decreeing man to earn his bread by the sweat of his brow, kindly reserved to him in the small repose that could be spared from the supply of his necessities.

Despite his critical rhetoric, Madison himself in 1789 supported port duties intended to discriminate in favor of American shipping, and the acknowledged purpose of the very first tariff law was not only to raise revenues but also "the encouragement and protection of manufactures." Although these provisions did not pass without objection, "no one denied that Congress could constitutionally impose tariffs in order to stimulate domestic production, and it did so." Madison clearly disfavored the widespread use of tariffs, both because he objected to impediments to free trade on principle and because he recognized the political danger of fomenting regional distrust by granting trade preferences for particular industries. But, so long as the object of the regulation was  

353. Id.
356. Currie, supra note 310, at 57. "Many years later Madison would emphatically argue that the power to regulate commerce included the power to impose protective tariffs." Id. at 57 n.18 (citing Letter of James Madison to Joseph C. Cabell (Sept. 18, 1828), in 9 The Writings of James Madison 316–40 (1910)).
357. Currie, supra note 310, at 57 n.18.
within one of the enumerated powers,\textsuperscript{358} neither he nor the vast majority of his peers had any concern that trade preferences were themselves a matter of constitutional significance.

Once one acknowledges the economic similarity between grants of "exclusive rights" and other market-altering regulation, it becomes difficult to identify any constitutional norm implicated by granting exclusive rights that is not implicated by trade regulation generally. Just as there is no good textual rule for determining which forms of regulation are covered by the Intellectual Property Clause, there is no intelligible \textit{functional} criterion for determining which laws have to satisfy the Intellectual Property Clause's limitations and which do not.\textsuperscript{359} If the constitutional norm requiring the Intellectual Property Clause's limits to be applied externally is antipathy toward monopolies, then any regulation that permits a party to exert market power in excess of what they would have in unregulated competition should be subject to the Clause's limitations, a conclusion that is absurd on its face.

Nor are such broad theories of the Intellectual Property Clause amenable to limitation to make them more consistent with the regulatory history of the United States; attempts at limitation only accentuate their incoherence. For instance, Professor Benkler has keyed upon the non-rivalrous nature of information as a reason for applying the Intellectual Property Clause's limits to any grant of "exclusive rights in information," regardless of its constitutional basis.\textsuperscript{360} While limiting the Intellectual Property Clause's restrictions to grants of exclusive rights in information (which one would assume includes not only "Writings" and "Discoveries" but also anything approximating but not meeting their definitions, such as facts or sub-patentable innovations) certainly reduces the number of regulations subject to the Intellectual Property Clause's limits, it does so according to no supportable principle. First, limiting the Intellectual Property Clause's restrictions to grants of exclusive rights in information has even less historical support than the argument that the Intellectual Property Clause's limits apply to all monopoly grants. What little discussion there was over monopolies during the ratification pertained to the problems of \textit{trade} monopolies, not the importance of limiting exclusive rights in information.\textsuperscript{361} Second, and more importantly, it is impossible to distinguish exclusive rights in information from trade monopolies

\textsuperscript{358}There was little argument that discriminatory duties on shipping fell clearly within Congress's power to regulate interstate and foreign commerce, but it is not clear that the framing generation would have considered preferential legislation to encourage domestic production constitutional because production did not fall within "commerce" as understood at the time. Id. at 58–59.

\textsuperscript{359}Of course, comprehensive regulation like the NLRA is less consistent with historical understandings of the Constitution than, for instance, the granting of exclusive rights in facts, which was a common practice at the time of the framing. See Dowd, supra note 213, at 141–47.

\textsuperscript{360}Benkler, supra note 5, at 543–44.

\textsuperscript{361}See text accompanying notes 285–302.
based on their relative susceptibility to rivalry. Both the information whose exchange is limited by exclusive rights and the access to markets limited by trade monopolies are equally non-rivalrous resources. Assuming no physical impediment to the sharing of pricing information, the arrival of a new bidder in a market does not displace an old one; an infinite number of buyers and sellers can bid at the same time. From the standpoint of rivalry, there is no distinction between an intellectual property regulation and any other form of regulation that limits competition. Using "Writings" and "Discoveries" to distinguish exclusive rights that must be limited from those that do not draws a clear line, but from the standpoint of rivalry it is an arbitrary one.

B. The Intellectual Property Clause and the States

Theories placing the Intellectual Property Clause at the center of trade regulation become even more convoluted when one considers the regulatory interests of the States. Recognizing that—if the federal government is constitutionally prohibited—States might provide the protection demanded by intellectual property owners, some have argued that the Intellectual Property Clause serves as an independent substantive limitation on state regulation as well, a sort of "dormant Intellectual Property Clause." 362

The history of state economic regulation is no more amenable to such broad application of the Intellectual Property Clause's limitations than is the history of federal economic regulation. The United States Reports are full of instances of state-granted monopolies, none of which has been seriously considered as, much less held to be, unconstitutional for being inconsistent with the Intellectual Property Clause. Thus, while the slaughter-house monopoly at the center of the Slaughter-House Cases was attacked on many grounds, no one thought to attack it as a violation of some form of "dormant Intellectual Property Clause." 363

The argument

362. See, e.g., Julie E. Cohen, Copyright and the Jurisprudence of Self-Help, 13 Berkeley Tech. L.J. 1089, 1129–35 (1998) (Article 2B of the Uniform Commercial Code); Dreyfuss, supra note 5, at 233 (state copyright protection); Hughes, supra note 5, at 202–08 (state database protection); Maureen A. O’Rourke, Fencing Cyberspace: Drawing Borders in a Virtual World, 82 Minn. L. Rev. 609, 696–97 (1998) (web site license terms prohibiting web linking); Pollack, Unconstitutional Incontestability, supra note 45, at 315 (perpetual state copyrights or patents). But see Whicher, supra note 274, at 144–46 (discussing how the Intellectual Property Clause binds only the federal government); Narayanan, supra note 5, at 493–94 (stating that there is no constitutional preemption of state regulation of unfair extraction).

I am not referring to the interstate regulatory concerns considered by Judge Kozinski in his mention of a "dormant Copyright Clause" in Wendt v. Host Int’l, Inc., 197 F.3d 1284, 1288 (9th Cir. 1999) (Kozinski, J., dissenting), or to the concerns over uniformity the Court found not to control in Goldstein v. California, 412 U.S. 546, 559 (1973), but rather to an absolute substantive limitation on intellectual property regulation by any State.

363. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 44–57 (1872) (describing plaintiff’s arguments). In 1879, the Louisiana Constitution was amended to prohibit the kinds of slaughter-house monopolies at issue in the Slaughter-House Cases, and the city of
that state monopolies might violate the Constitution (and specifically the Intellectual Property Clause) was raised by Daniel Webster in *Gibbons v. Ogden*, but the Court did not seriously consider it, and when it came time for Webster to challenge another state monopoly a decade later, the ferry and bridge franchise at stake in the *Charles River Bridge* case, he did not think to renew the Intellectual Property Clause argument that had been brushed aside in *Gibbons*. The Court has consistently upheld state regulations that have conferred monopoly rents on a chosen few, applying to them the most deferential standard of review.

Even if one were to limit application of a "dormant Intellectual Property Clause" to intellectual property-like rights, the argument of constitutional preemption is no more tenable. There is at the outset the incongruity in finding a substantive limitation on state laws that is found in neither Section 10 of Article I nor in any of the rights incorporated by the Fourteenth Amendment but rather in a Section 8 grant of power to Congress. Although the dormant Commerce Clause restrictions on state au-

New Orleans consequently opened up competition in the slaughter-house business. The incumbent monopoly sued, claiming that the new constitution and the resulting city ordinances were a violation of the "contract" it had with the State under the act granting the monopoly, resulting in another Supreme Court case, *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746 (1884). The Court held that the State of Louisiana lacked the power to divest itself of the police power to protect public health inherent in slaughter-house regulation and therefore that the original monopoly must be revocable. Id. at 750–54. A series of vocal concurrences argued that the original monopoly grant was a violation of the Fourteenth Amendment, because "investing [a private party] with a monopoly, is to invade one of the fundamental privileges of the citizen," id. at 762 (Bradley, J., concurring), and because monopolies "interfere with the liberty of the individual to pursue lawful trade or employment," id. at 755–56 (Field, J., concurring), a position that was largely an objection to the decision in the *Slaughter-House Cases* itself. Notably absent from any opinion was a claim that the monopoly granted by Louisiana violated the Intellectual Property Clause.

Webster argued:

The right set up in this case, under the laws of New-York, is a monopoly. Now, he thought it very reasonable to say, that the constitution never intended to leave with the States the power of granting monopolies, either of trade or of navigation; and, therefore, that as to this, the commercial power was exclusive in Congress.

22 U.S. (9 Wheat.) 1, 10 (1824) (argument of Daniel Webster). But Webster used the monopoly argument generically as part of the Commerce Clause claim that eventually carried the day:

[If] it be not a regulation of commerce, Congress has no concern with it. But the granting of monopolies of this kind is always referred to the power over commerce. . . . If, then, the power of commercial regulation, possessed by Congress, be, in regard to the great branches of it, exclusive; and if this grant of New-York be a commercial regulation, affecting commerce, in respect to these great branches, then the grant is void, whether any case of actual collision had happened or not.

Id. at 26–27.


366. See, e.g., *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 564 (1947) (deferring to the absolute discretion of river-boat pilots controlling the single source of pilots to select new pilots, the result being widespread nepotism).
authority also stem from Section 8, they are neither substantive (they limit
the subject matter on which States may regulate, but not the content of
permissible regulation) nor mandatory; Congress is free to waive them. 367
Further, the dormant Commerce Clause restrictions are understood as
the necessary consequence of the supremacy of the federal government
in exercising its powers, not as a limitation on federal power, as is the case
of the "dormant Intellectual Property Clause." Effectuating a substantive
restriction on state power by placing in Section 8 a restriction on federal
power is opaque drafting to say the least. Although understandable given
the policy positions underlying such constitutional claims, arguing that
the Intellectual Property Clause's limits must apply to the States com-
pletely misunderstands the structure of the federal government as one of
enumerated powers. The concept of enumerated powers was intended to
prevent the imposition of federal power on the States. 368 Reading a limi-
tation on one of Congress's enumerated powers as a limitation on state
power turns the enumerated powers doctrine on its head.

Even more conclusively, the Supreme Court has adjudicated no
fewer than five cases involving the preemption of state intellectual prop-
erty laws, and in none of them has the Court relied on the Intellectual
Property Clause as a source of preemption. Although the Court has spo-
ken of intellectual property "policies" contained in both the patent stat-
ute and the Patent Clause, 369 for instance, it has always confined its pre-
emption rulings to the effect of federal statutes. 370 The Court expressly
disclaimed any preemptory role for the Intellectual Property Clause in
Bonito Boats:

Our decisions since Sears and Compco have made it clear that the
Patent and Copyright Clauses do not, by their own force or by
negative implication, deprive the States of the power to adopt
rules for the promotion of intellectual creation within their own
jurisdictions. Thus, where Congress determines that neither
federal protection nor freedom from restraint is required by the

(1973) ("[I]t is difficult to see how the concurrent exercise of the power to grant
copyrights by Congress and the States will necessarily and inevitably lead to difficulty. At
any time Congress determines that a particular category of 'writing' is worthy of national
protection and the incidental expenses of federal administration, federal copyright
protection may be authorized.").


("The Patent Clause itself reflects a balance between the need to encourage innovation
and the avoidance of monopolies which stifle competition without any concomitant
advance in the 'Progress of Science and useful Arts.'").

370. See, e.g., id. at 143; Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 472 (1974);
Goldstein v. California, 412 U.S. 546, 571 (1973); Compco Corp. v. Day-Brite Lighting,
(1964).
national interest, the States remain free to promote originality and creativity in their own domains.\textsuperscript{371}

The only supportable conclusion, as a matter of both direct constitutional interpretation and Supreme Court precedent, is that the Intellectual Property Clause's limits do not apply to the States, even if Congress may preempt the state intellectual property laws statutorily.\textsuperscript{372}

**Conclusion**

In the final analysis, there is no convincing argument that the limits in the Intellectual Property Clause must apply to all of Congress's Article I powers. Because the enumeration of federal powers is itself a source of limitation, it is impossible to determine from text alone in which ways the subject-matter limits on the reach of the Intellectual Property Clause—to "Writings" and "Discoveries"—define the limits of Congress's powers or merely of the "exclusive rights" awardable under the Intellectual Property Clause itself. Similarly, because each Article I power is self-contained, there is no axiom of textual interpretation under which one could reliably determine which of the Intellectual Property Clause's limits apply to the other Article I powers. Instead, in order to justify encroaching on Congress's other enumerated powers, one must identify an underlying constitutional norm mandating the broad application of a particular limit on a particular power.

In the face of the Constitution's strong preference for representative, over constitutional, economic policymaking, there is no way to locate in either Supreme Court precedent or constitutional history a sufficiently strong countervailing constitutional norm to warrant the external application of the Intellectual Property Clause's limits. The First Amendment may apply to intellectual property regulations, but it does so by its own force, and the Framers understood the difference between speech regulation and the granting of exclusive rights. It is impossible to incorporate the English experience with monopolies generally, or the publishing monopoly of the Stationers' Company particularly, into the Constitution wholesale merely because those events preceded the framing. Nor is there any indication that the limitations in the Intellectual Property Clause that mirror those introduced by the Statute of Anne either could, or were intended to, prevent the abuses of trade monopolies that England experienced during previous centuries. I will not claim that the Framers thought that Congress could grant exclusive rights outside the Intellectual Property Clause, but the limits on which they relied for that belief, the limits internal to the other Section 8 powers (and particularly those on the commerce power), have been eroded over time. The Intel-

\textsuperscript{371} Bonito Boats, 489 U.S. at 165 (internal citations and quotations omitted); see also Goldstein, 412 U.S. at 552-60 (considering Hamilton's specification of three ways in which the Constitution may deprive a state of regulatory authority and finding the Intellectual Property Clause to satisfy none of them).

\textsuperscript{372} See Goldstein, 412 U.S. at 559.
lectual Property Clause's restrictions, which are both fairly weak and highly specific, cannot stand in for the profound limits on federal power resulting from the choice to constitute the national government as one of enumerated powers.

It is also counter-productive to focus on the nature of "exclusive rights" as somehow warranting some special form of constitutional protection. Efforts to do so resemble the somewhat awkward attempts to make modern intellectual property doctrine fit the categories of "patent" and "copyright" as defined by reference to constitutional limitations that we have somehow divined from a provision that mentions neither "patent" nor "copyright" and was written over two hundred years ago by a set of individuals who knew very little about intellectual property and thought about it even less.\(^3\)\(^7\)\(^3\) There simply is no economic distinction between "exclusive rights" and other forms of rent-conferring trade regulation, the enumeration of "exclusive rights" in the Constitution notwithstanding. Just as "advances in production and reproduction make it increasingly clear that the distinctions that seemed to be inherent in the terms 'patent' and 'copyright' are in fact illusory because they fail to capture anything that is significant about the products of human intellect,"\(^3\)\(^7\)\(^4\) arguments that we should treat one set of economic regulation labeled "exclusive rights" as distinct in some constitutionally relevant way from other forms of trade regulation ignore the identical economic ramifications of all forms of competition-limiting trade rules. Although intellectual property rights can be dispensed in both unfair and economically harmful ways, recognizing a constitutional norm against successful rent-seeking would require rolling back much of what government has done in the twentieth century and would simply place an additional hurdle—judicial approval—in the way of making federal economic policy. We are better served by confronting the political realities of preferential trade regulation, including "exclusive rights," than we are by raising the Constitution as a shield against our having to do so.

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\(^3\)\(^7\)\(^3\) Nachbar, Quest, supra note 87, at 64–66.
\(^3\)\(^7\)\(^4\) Dreyfuss, supra note 5, at 221–22.