Resolving Conflicts Among Congress’s Powers Regarding Statutes’ Constitutionality: The Case of Anti-Bootlegging Statutes

Dotan Oliar*

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* Associate Professor, University of Virginia School of Law. I thank Kerry Abrams, Michal Barzuza, Oren Bracha, Barry Cushman, Brandon Garrett, John Harrison, Mike Klarman, Jody Kraus, Tom Nachbar, Caleb Nelson, Bill Patry, George Rutherglen and Chris Sprigman for valuable comments and discussions, and Tim Hagen for excellent research assistance. © 2007, Dotan Oliar.
INTRODUCTION

In 1994, the United States joined the Agreement on Trade-Related Aspects of Intellectual Property Rights.1 To comply with TRIPS, Congress passed civil2 and criminal3 anti-bootlegging statutes that protect the rights of performers. The main provisions of the statutes are similar.4 Each prohibits the unauthorized fixation of sounds or video of live musical performances and the reproduction of such fixations,5 trafficking in such unauthorized fixations,6 and the transmission to the public of sound or video of such performances.7 In other less technical words, these statutes make it illegal to film or audiotape a live concert, or to use its sound or video in one of the aforementioned ways, without the performer's permission.

Are these anti-bootlegging statutes constitutional? If one were to decide solely on the basis of the Commerce Clause and the Necessary and Proper Clause, there would be little doubt on this score. The current understanding of these clauses would probably empower Congress to pass these statutes.8 At the same time, if one were to decide solely on the basis of the Intellectual Property Clause then these statutes would probably be unconstitutional. This is so because, for example, the protections that these statutes confer are retroactive and perpetual and seem to violate the "promote the progress of science and useful arts" and "limited times" limitations in the IP Clause respectively. They may also violate a fixation requirement, if one is included in the term "writings."9 Specifically, can Congress disregard limitations on its IP power by enacting the anti-bootlegging statutes under its commerce power? Anti-bootlegging is just one of several recent issues that raise an IP Clause/Commerce Clause conflict regarding the constitutionality of

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4. The statutes are not identical. One major difference is that the criminal statute requires the activity to have been committed "knowingly and for purposes of commercial advantage or private financial gain." See 18 U.S.C. § 2319A. The statutes also differ in their remedies. The civil statute adopts the civil remedies of copyright law. See 17 U.S.C. § 1101(a) (incorporating the remedies in 17 U.S.C. §§ 502-05 (2000)). The criminal statute imposes imprisonment of up to five years, and ten years for repeat offenses, in addition to fines and forfeiture, seizure, and destruction of copies and devices used in the bootlegging process. See 18 U.S.C. § 2319A(b)-(c).
9. U.S. CONST. art. I, § 8 cl. 8 [hereinafter "IP Clause"]. Fixation in copyright law means embodiment in a tangible medium of expression—such as a book, a music CD or a DVD—that is stable enough. For a more detailed discussion of how the anti-bootlegging statutes fare vis-à-vis various limitations in the IP Clause, see infra Part III.
RESOLVING CONFLICTS AMONG CONGRESS’S POWERS

How should courts resolve conflicts between these two clauses and between enumerated powers more generally? This Essay contributes to the resolution of these questions.

Part I presents the four cases that ruled on the constitutionality of the anti-bootlegging statutes to date. Two of these cases analyzed the criminal statute and two the civil one. Each of these statutes was upheld by one of the courts discussing it and struck down by the other. Further adding to the confusion is the fact that these cases all relied on basically the same precedents. However, the precedents that were found authoritative by the two courts that upheld these statutes were distinguished by the two courts that struck the statutes down, and vice versa. At the time of this writing, the Second Circuit is about to rule on the criminal statute’s constitutionality. The constitutional status of the anti-bootlegging statutes is currently unclear, and courts do not seem to have a good idea of how to dispose of challenges that raise an inter-clause conflict regarding statutes’ constitutionality in this particular context and more generally.

Though IP commentators focused on IP Clause/Commerce Clause conflicts, similar questions reached the Supreme Court in other contexts. Part II reviews five Supreme Court cases that are highly relevant to analyzing inter-clause conflicts, four of which have been largely overlooked in the IP literature: Head Money Cases, Selective Draft Law Cases, Perry v. U.S., Railway Labor Executives’ Ass’n v. Gibbons, and Perpich v. Department of Defense. In these cases, the Supreme Court explicitly either accepted or rejected the argument that language from one enumerated power limits Congress’s exercise of another power. This Part shows that the anti-bootlegging courts had an incomplete, and therefore distorted, view of Supreme Court precedent on inter-clause conflicts regarding statutes’ constitutionality. Unfortunately, the highly relevant case law reviewed in this Part points in different directions—both in result and methodology—and the Supreme Court has not yet developed a coherent framework for analyzing inter-clause conflicts.

Part III discusses the extent to which the anti-bootlegging statutes violate five limitations in the IP Clause: writings, limited times, authors, promote the progress of science and useful arts and originality. It contains a more complete analysis of various limitations in the IP Clause than the one found in the anti-bootlegging cases, which discussed only the violation of the “writings” and “limited times” requirements. It suggests that the anti-bootlegging statutes might not “promote the progress of science and useful arts” because the IP related costs of their retroactive
application seem to greatly outweigh the benefits of retroactivity. Moreover, the
two courts that upheld these statutes did so because they thought that the statutes
were harmonious with the IP Clause. They believed that the IP Clause, which
“promote[s] the progress of science and useful arts” by securing rights to authors to
their fixed works for a limited time is harmonious with the statutes that they
thought “promote[] progress,” although by securing rights to performers to their
unfixed works in perpetuity. These two courts emphasized the centrality of
“promot[ion of] progress” over the means chosen to achieve it. However, these
courts did not examine whether these statutes truly “promote the progress of
science and useful arts.” Though answering this question conclusively would
probably involve a factual inquiry, it seems highly likely that the statutes violate
the “progress” limitation.

Part IV reviews the major five approaches to resolving conflicts among
enumerated powers present in the literature and case law: formalism, fundamental
inconsistency, structural inference, fundamental principles approach and
particularism. It highlights issues that these approaches leave unresolved. It also
notes that the Supreme Court’s *Eldred v. Ashcroft* (2003) may suggest that
Congress cannot avoid at least some limitations in the IP Clause by acting under
the Commerce Clause. If these clauses were completely alternative, the Court
would have likely upheld the Copyright Term Extension Act of 1998 under the
Commerce Clause rather than struggle with the language of the IP Clause. Lastly,
this Part highlights a “particularist” approach to resolving inter-clause conflicts,
namely that whether limitations in one enumerated power can be circumvented by
Congressional use of another power may not depend solely on the two enumerated
powers involved (even with respect to a particular limitation), but can also depend
on the particular attributes of the statute passed. Relevant to a particularist analysis
here is the fact that the perpetual duration, the applicability to video recordings of
live performances, and the retroactive application respecting U.S. performances of
the anti-bootlegging statutes are not mandated by TRIPS, and therefore may
conflict unnecessarily with the IP Clause’s “limited times”, “writings”, and
“promote the progress of science and useful arts” limitations. Part V concludes.

I. THE ANTI-BOOTLEGGING CASES

A. General

Four cases—reviewed in greater detail immediately below—disposed of
challenges to the constitutionality of the anti-bootlegging statutes. Plaintiffs in
these cases generally argued that since the anti-bootlegging statutes contain no time
limitation and protect live (rather than pre-recorded) performances they violate the
“limited times” and “writings” limitations in the IP Clause respectively. Two of
these courts struck down the anti-bootlegging statutes, while the other two upheld
them. All anti-bootlegging courts reviewed the same major precedents, but had
divergent views on which of these precedents was authoritative and which was not.
B. The anti-bootlegging cases

*United States v. Moghadam* upheld the constitutionality of the criminal anti-bootlegging provision in 18 U.S.C. § 2319A(a)(3) against the argument that it violated a fixation requirement implicit in the “writings” prescription. The Eleventh Circuit declined to decide whether the “writings” requirement mandates fixation, or whether this term could rather be interpreted broadly “as to encompass live performances that are merely capable of being [fixed], but have not been.” It assumed *arguendo* that “writings” includes a fixation requirement, and that therefore the provision could not be sustained under the IP Clause. The court then found that the Commerce Clause could sustain the provision.

The Eleventh Circuit then turned to deciding whether Congress could avoid limitations in one enumerated power by acting through another. It started off by adopting the view it saw implied in *Trade-Mark Cases*, *Heart of Atlanta Motel*, and *Authors League of America*.

In *Trade-Mark Cases*, the Supreme Court struck down Congress’s first attempt to provide federal trademark protection. The Court found that Congress lacked the power to provide trademark protection under the IP Clause, because the IP clause conditions protection on originality while trademark protection is given based on a mark’s use in commerce. It then moved to examine the Commerce Clause as an alternative constitutional basis, but found it similarly inadequate. Under the contemporaneous understanding of the commerce power, the statute was unconstitutional because it regulated commerce generally, rather than only one that was interstate, foreign or with the Indian tribes. In *Heart of Atlanta*, the Supreme Court upheld the constitutionality of the Civil Rights Act of 1964 under the Commerce Clause, whereas a similar act was found unconstitutional under section five of the Fourteenth Amendment eighty years earlier. In *Authors League of America*, the manufacturing clause—section 601(a) of the Copyright Act—was challenged because it failed to “promote the progress of science and useful arts” as the IP Clause requires. The manufacturing clause made it illegal to import or distribute English language copyrighted literary works printed outside the United States or Canada, thus favoring American printers. The Second Circuit found the manufacturing clause constitutional under the Commerce Clause.
From these three cases, Moghadam learned that as a general rule the enumerated powers are alternative, and that Congress can do under one what it cannot do under another. However, it recognized the tension of this principle with the holding of Railway Labor Executives’ Ass’n. In this case, the Supreme Court struck down the Rock Island Railroad Transition and Employee Assistance Act (RITA)—an act that gave priority to labor over similarly situated creditors in one particular bankruptcy proceeding. The Court held that RITA violated the uniformity requirement in the Bankruptcy Clause. The Court refused to uphold RITA under the Commerce Clause (after all, RITA regulated interstate rail transportation) because doing so would eradicate from the Constitution an express limitation on Congress’s power. Moghadam resolved this tension by holding that the general rule holds as long as an act passed under one power (in this case, the anti-bootlegging statute under the Commerce Clause) is not “fundamentally inconsistent” with the limitation in another (the “writings” requirement in the IP Clause, assumed to include a fixation requirement).

Applying the test, the Eleventh Circuit found that far from being “fundamentally inconsistent,” the anti-bootlegging statute is rather harmonious with the “writings” language. It reasoned that there is nothing in the text of the IP Clause that affirmatively prohibits securing exclusive rights to unfixed works under other enumerated powers. The statute and the IP Clause both share the goal of “promoting the progress of science,” and they both do so by securing exclusive rights in original works. That Congress can “promote the progress of science” by granting exclusive rights in fixed original works under the IP Clause does not conflict with Congress “promot[ing] progress” by granting exclusive rights in unfixed original works under the Commerce Clause. The Eleventh Circuit did not see the “fixation” difference as material because, when a bootleg copy is made, the work is thus “fixed.” The court did not think that the law of copyright, which allows fixation to occur simultaneously with public broadcast of live performances (rather than strictly before it), was fundamentally inconsistent with a new statute that pushed the moment of fixation a little bit further to the time of infringement.

Five years later, United States v. Martignon struck down the criminal anti-bootlegging provision in 18 U.S.C. § 2319A because it violated each of the “writings” and “limited times” limitations. Following Railway Labor Executives’ Ass’n’s analysis, Martignon started with the need to classify the statute as being either a copyright statute or a commerce statute. Based on the statute’s “language,

18. Moghadam, 175 F.3d at 1277.
20. Moghadam, 175 F.3d at 1280 (“The grant itself is stated in positive terms, and does not imply any negative pregnant that suggests that the term ‘Writings’ operates as a ceiling on Congress’ ability to legislate pursuant to other grants.”).
21. Id. (“A live musical performance clearly satisfies the originality requirement.”)
22. Id.
23. See id. at 1280-81 (reviewing the statutory allowance for fixation simultaneous with transmission and concluding that “the anti-bootlegging law seems to us like more of an incremental change than a constitutional breakthrough.”).
history, and placement,"\textsuperscript{25} the court concluded that it was an exercise of Congress's IP Power.\textsuperscript{26} "That the anti-bootlegging statute has its roots in an inter-country initiative,"\textsuperscript{27} the court held, or that it has "ancillary benefits to interstate commerce,"\textsuperscript{28} does not change the fact that the statute "was enacted primarily to cloak artists with copyright-like protection"\textsuperscript{29} and "does not serve to transform what appears on its face to be an intellectual property statute into one whose primary purpose is to regulate commerce."\textsuperscript{30} The court accepted that the term "writings" contains a constitutional fixation requirement that the Framers established and that was respected for two centuries thereafter; as the government conceded that live performances are not fixed, the court found this requirement violated.\textsuperscript{31} The court also found that the statute's seemingly perpetual protection violated the IP Clause's "limited times" prescription.\textsuperscript{32}

The court then addressed the IP Clause/Commerce Clause conflict. It assumed arguendo that the Commerce Clause or the Necessary and Proper Clause could sustain the statute.\textsuperscript{33} Following \textit{Railway Labor Executives' Ass'n}'s reasoning further, Martignon suggested that in order to give meaning to the "writings" and "limited times" express limitations in the IP Clause, Congress must comply with the tenets of the IP Clause, and cannot turn to the Commerce Clause, Necessary and Proper Clause, or any other enumerated power, when enacting copyright-like legislation.\textsuperscript{34} Martignon saw the IP Clause/Commerce Clause conflict before it analogous to the Bankruptcy Clause/Commerce Clause conflict in \textit{Railway Labor Executives' Ass'n}: in both the Commerce Clause that is an outright grant of power conflicted with another enumerated power (the Bankruptcy Clause or the IP Clause) that includes both a grant of power and express limitations. "[I]n order to give meaning to the Constitution's express restrictions," the court reasoned, Congress must abide by them when enacting copyright-like legislation.\textsuperscript{35} The court distinguished the \textit{Trade-Mark Cases} and \textit{Authors League of America} based on the fact that the relevant acts in those cases clearly fell outside the IP Clause.\textsuperscript{36} \textit{Heart of Atlanta Motel} was similarly distinguished because the Fourteenth Amendment is

\begin{itemize}
  \item 25. The court noted various indications, namely Congress's subjective belief that it was exercising its IP power, that the statute was promulgated under TRIPS, the language in the statute, its legislative history, the statute's close proximity in U.S. Code to provisions dealing with criminal liability for copyright infringement, and the statute's resort to terms as defined in the Copyright Act. \textit{Id.} at 419-22.
  \item 26. \textit{Id.} at 418 (concluding that "the anti-bootlegging statute falls within the purview of the Copyright Clause."); \textit{Id.} at 422 (concluding that the anti-bootlegging statute "is clearly a copyright-like regulation.").
  \item 27. \textit{Id.} at 421.
  \item 28. \textit{Id.} at 422.
  \item 29. \textit{Id.}
  \item 30. \textit{Id.} at 421. \textit{See also id.} at 422 (stating the court's conclusion that the statute is "one directed at protecting the interests of artists, rather than commerce").
  \item 31. \textit{Id.} at 423-24.
  \item 32. \textit{Id.} at 424.
  \item 33. \textit{Id.} at 425 n.14.
  \item 34. \textit{Id.} at 425.
  \item 35. \textit{Id.} at 426-27.
  \item 36. \textit{Id.} at 427-28.
\end{itemize}
an outright grant of power which contains no affirmative limitation on Congress’s commerce power, whereas the IP Clause—just like the Bankruptcy Clause—contains several limitations.37

Alternatively, the court reasoned, following Moghadam’s test, even if Congress may enact copyright-like legislation under other enumerated powers, it may still not do so when the statute would be “fundamentally inconsistent” with the limitations in the Clause. Martignon found the anti-bootlegging statute fundamentally inconsistent with “limited times.” The court noted that “limited times” was meant to ensure that after a term of exclusive monopoly, works will become public domain. The court said that the constitutional policy of such balance is important to maintain under any exercise of power. Since there is no such balance in the statute, the statute is fundamentally inconsistent with the IP Clause. The court noted that the fact that the limitations in the Clause were overreached makes it unnecessary to check whether other ones—the First Amendment and the Tenth Amendment—have also been overreached.38 An appeal is currently pending before the Second Circuit, and is due any day.

KISS Catalog dealt with a challenge to the civil anti-bootlegging provision in 17 U.S.C. § 1101(a)(3) that was argued to violate the “writings” and “limited times” prescriptions. The court first found the statute unconstitutional.39 Because of a technicality, this holding was set aside.40 After the case was reassigned because of the Judge’s death, the new court upheld the statute’s constitutionality under the Commerce Clause.41

KISS I found the civil statute to be copyright-like and therefore an exercise of Congress’s IP Power.42 It did not decide whether the statute violated the constitutional “fixation” requirement of “writings.” It accepted that unfixed performances are not “writings” under the Clause, but noted that the relevant part of the statute, 17 U.S.C. § 1101(a)(3), prohibits trafficking in unauthorized recordings (of live performances), which are fixed.43 KISS I found it unnecessary to decide the fixation argument44 because it found that the statute, whose

37. Id. at 428 n.19.
38. Id. at 429 n.22.
40. Neither the defendants nor the court followed Fed. R. Civ. P. 24(c) that instructs courts to notify the Attorney General and allow the United States to intervene whenever the constitutionality of an act of Congress is challenged as provided in 28 U.S.C. § 2403(a), and asks the challenging party to call the attention of the court to its duty.
42. KISS I, 350 F. Supp. 2d at 830 (calling the statute “copyright-like” and “copyright-related” alternatively). The court relied on the reasons supplied in Martignon, and added that the civil statute, located in Title 17, offers the protections afforded in copyright by subjecting those who violate the statute to the remedies in 17 U.S.C. §§ 502-05 “to the same extent as an infringer of copyright.” Id. at 830-31 n.3.
43. Id. at 831-32.
44. The court had reservations over Moghadam’s resolution of this matter. Moghadam’s finding of no fundamental inconsistency between the statute and the IP Clause was based on the argument that “writings” in the Clause is a grant of power, but does not include an express limitation on protecting “non-writings” through the Commerce Clause. KISS I suggested that this argument would not be different from arguing that the Bankruptcy Clause is a positive grant of power to pass uniform bankruptcy laws without being an affirmative limitation against passing non-uniform bankruptcy laws under the Commerce Clause.
KISS I noted that the statute could have been passed under the Commerce Clause (read in isolation) and therefore turned to examine the IP Clause/Commerce Clause conflict. It distinguished Authors League of America, Trade-Mark Cases and Heart of Atlanta Motel on the basis that they did not involve acts that could be upheld under one of Congress’s powers and at the same time violated a limitation in another. It found Railway Labor Executives’ Ass’n authoritative because it involved such a pattern. Following this latter case’s logic, KISS I refused to uphold the statute under the Commerce Clause because that “would be akin to a ‘repeal’ of a provision of the Constitution.”

KISS II started by noting that the statute regulated non-writings, and thus could not have been an exercise of Congress’s IP power. It upheld the statute under the Commerce Clause. Unlike Moghadam, Martignon, and KISS I, the court found it unnecessary to examine whether the statute was fundamentally inconsistent with limitations in the IP Clause. It believed that the inquiry should end once it found that one enumerated power, read in isolation, could sustain the statute. It relied on Trade-Mark Cases, Heart of Atlanta and Authors League of America for the proposition that the powers of Congress are alternative. It distinguished Railway Labor Executives’ Ass’n by suggesting—mistakenly—that all parties there agreed that the statute was covered by the Bankruptcy Clause.

45. The court found it inappropriate to save the statute by reading in copyright’s statutory term because (1) Congress incorporated other terms from the Copyright Act, but chose not to incorporate its duration; (2) courts lack the expertise to determine copyright law’s proper duration; and (3) the anti-bootlegging statute has foreign policy implications that further make Congress the appropriate body to set its term. Id. at 832-33.

46. Id. at 834-36.

47. Id. at 837.

48. KISS Catalog v. Passport Int’l Prods. (KISS II), 405 F. Supp. 2d 1169, 1173 (“Though Judge Rea and the court in Martignon next considered whether the anti-bootlegging law was fundamentally inconsistent with the Copyright Clause, that step is not necessarily mandated. Arguably, a determination that the Statute does not fall within the ambit of the Copyright Clause ends the analysis.”).

49. Id. at 1173-74; id. at 1175 (“[O]nce the Court concludes that the Statute does not fall within the purview of the Copyright Clause, it need no longer consider whether it complies with the limitations of the Copyright Clause. To do so imports into the Commerce Clause limits that clause does not have. That the Statute might provide ‘copyright-like’ or ‘copyright-related’ protection to matters clearly not covered by the Copyright Clause is not important. One need only find an alternative source of constitutional authority. This Court finds such authority in the Commerce Clause.”).

50. Id. at 1174 (“Neither the appellant nor the United States argued that Congress could have enacted the law pursuant to the Commerce Clause.”). KISS II was wrong about that. The United States clearly argued in Railway Labor Executives’ Ass’n that the act was an exercise of its commerce power. What the Supreme Court said there was that it did not understand the United States to argue that an admitted bankruptcy statute could be passed under the commerce power. The Supreme Court rather understood the United States to be in error: the United States thought it was passing a regulation of commerce, while in fact it passed a bankruptcy act. See also id. at 1176 (“In contrast to Railway Labor, the question is not whether legislation empowered by the Copyright Clause— but invalid under it— can otherwise be empowered by the Commerce Clause. The question is whether matters not encompassed within the Copyright Clause can be addressed by the Commerce Clause free of the restrictions of the Copyright Clause.”), infra notes 66, 71.
all agree that the statute does not fall within the purview of the IP Clause, and hence it is not subject to its limitations. *KISS II* criticized *Martignon* and *KISS I* for not giving "sufficient deference to the fundamental premise that legislation is presumed to be constitutional."\(^5\) Even if a "fundamental conflict" with the IP Clause would invalidate the statute, none existed.\(^5\) That the Commerce Clause sustains the statute does not undermine the purposes, protections, or limitations of the IP Clause.\(^5\) Far from a fundamental conflict, *KISS II* found harmony between the statute and the IP Clause: the statute which regulates "an unauthorized and (by this statute) unlawful recording of a live performance" complements the IP Clause that regulates "an authorized, protected, and constitutionally-encouraged fixation of an author’s original work."\(^5\)

### C. TAKING STOCK

The state of the anti-bootlegging statutes' constitutionality is currently unsettled, as the table below, which summarizes the results of the aforementioned four cases, demonstrates:

<table>
<thead>
<tr>
<th>Statute Type</th>
<th>Upheld</th>
<th>Struck down</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criminal statute</td>
<td>Moghadam</td>
<td>Martignon</td>
</tr>
<tr>
<td>Civil statute</td>
<td><em>KISS II</em></td>
<td><em>KISS I</em></td>
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Among other things, the unsettled state of the law is demonstrated by the lack of agreement among courts on which precedents should guide the inquiry in cases of inter-clause conflicts about the constitutionality of statutes. The two courts that upheld the anti-bootlegging statutes found *Trade-Mark Cases, Heart of Atlanta Motel* and *Authors League of America* authoritative and distinguished *Railway Labor Executives' Ass'n*. The two courts that struck down the anti-bootlegging statutes distinguished the former group of cases and followed the latter case. As will become clear towards the end of the next Part, all anti-bootlegging courts had an either distorted or incomplete view of relevant Supreme Court precedent. The next Part advances the debate by presenting cases that are highly relevant to the inquiry.

### II. INFORMING THE DEBATE OVER CONFLICTS AMONG CONGRESS’S POWERS

#### A. HIGHLY RELEVANT PRECEDENTS DEFINED

What would be the most authoritative precedents for the debate over conflicts among Congress’s enumerated powers regarding statutes’ constitutionality? One would want to find Supreme Court cases in which the Court dealt with

\(^{51}\) *Id.* at 1175.
\(^{52}\) *Id.* at 1176 ("Even if a ‘fundamental conflict’ with the Copyright Clause would invalidate the Statute, none exists here.").
\(^{53}\) *Id.* at 1174-75.
\(^{54}\) *Id.* at 1176.
Congressional action that was authorized under one of Congress’s enumerated powers, but nevertheless was argued to violate a limitation in another power. Then, one would want to see how the Supreme Court disposed of such arguments. The following sub-Part reviews five such cases. The extensive commentary and case law to date could identify only one such case, Railway Labor Executives’ Ass’n v. Gibbons, which is reviewed as the first in the group below.

B. ANALYSIS OF HIGHLY RELEVANT PRECEDENTS

1. Cases in Which One Congressional Power Limited the Exercise of Another

   a. The Bankruptcy Power Limited the Exercise of the Commerce Power:
      Railway Labor Executives’ Ass’n v. Gibbons

   Railway Labor Executives’ Ass’n v. Gibbons involved a conflict between Congress’s bankruptcy power and its commerce power.55 As mentioned above, the case discussed the constitutionality of a statute (RITA)56 that afforded employees of a particular rail company (the Chicago, Rock Island and Pacific Railroad Co.) special protection in a pending bankruptcy proceeding. The Court struck down RITA as violating the uniformity requirement in the Bankruptcy Clause.57 The government argued in Court that the statute was an exercise of its interstate commerce power.58 RITA, after all, regulated an instrumentality of interstate commerce. But the government did not just raise the argument in court. RITA’s legislative history includes findings about the need to afford employee protection in order to ensure continued rail service over Rock Island lines, to provide vital commuter service, to prevent harm to the shipping public, as well as meet other interstate commerce-related purposes.59 Such legislative findings were also codified.60 Nevertheless, the Supreme Court refused to sustain the statute under the Commerce Clause.

   The Court started with the need to classify RITA as either a bankruptcy statute or a regulation of interstate commerce. Noting that “[d]istinguishing a congressional exercise of power under the Commerce Clause from an exercise under the Bankruptcy Clause is admittedly not an easy task” and that “[t]he subject

57. U.S. CONST., art. I, § 8, cl. 4 ([Congress shall have power to] “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”).
of bankruptcies is incapable of final definition," the Court adopted the definition of bankruptcy as the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." The Court then reviewed RITA's employee protection provisions—such as the one mandating that employee claims shall be treated as administrative expenses of the bankrupt railroad's estate, and thus given priority over the claims of commercial creditors—and concluded that RITA was a bankruptcy statute.

The Court turned to expound the meaning of "uniform" under the Bankruptcy Clause. Uniformity, the Court said, is not a straightjacket limitation. The Court was ready to go along with less restrictive meanings that the word could reasonably bear: a bankruptcy law could apply "uniformly" only in a certain industry, or only in a certain geographical area, or may incorporate state accommodations (which may differ across states). Uniformity, however, could not be stretched so much as to allow a special purpose bankruptcy statute that applied to one named company.

The Court rejected the government's suggestion that Congress could pass RITA under its commerce power. The Court reasoned that the Bankruptcy Clause contains an express limitation that the Commerce Clause does not. Sustaining the act as a regulation of interstate commerce, the Court said, "would eradicato from the Constitution a limitation on the power of Congress to enact bankruptcy laws" and "would allow Congress to repeal the uniformity requirement from Art. I, § 8, cl. 4, of the Constitution."

Why did Gibbons not apply the canon that a specific provision trumps a more general provision when in conflict, the assumption being that bankruptcy laws are a subset of laws affecting interstate commerce? After all, this argument was explicitly made in the case. The Court did not apply this canon apparently

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62. Id. at 466 (quoting Wright v. Union Central Life Ins. Co., 304 U.S. 502, 513-14 (1938)).
64. Id. at 469-70.
65. Id. at 470 n.11. "Only Rock Island's creditors are affected by RITA's employee protection provisions and only employees of the Rock Island may take benefit of the arrangement . . . : RITA is a response to the problems caused by the bankruptcy of one railroad," the Court emphasized thrice. "A law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by one bankruptcy court having jurisdiction over that debtor," the Court reiterated. See id. at 471.
66. Id. at 468-69 ("We do not understand either appellant or the United States to argue that Congress may enact bankruptcy laws pursuant to its power under the Commerce Clause. Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. [citations omitted] Thus, if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicato from the Constitution a limitation on the power of Congress to enact bankruptcy laws.") Note that the government argued that RITA was an exercise of the Commerce Clause. The Court assumed that the government misidentified the true nature of RITA.
67. Id. at 469.
68. Id. at 473.
69. See Brief for the Rock Island Appellees at 50 n.23, Ry. Labor Executives v. Gibbons, 455 U.S. 457 (1982) (Nos. 80-415, 80-1239), 1981 WL 390394, 50 & n.23 ("Even if this legislation were regarded as an exercise of Congressional power under both the Commerce Clause and the Bankruptcy Clause, it is settled that the broad commerce power is limited by a number of more specific
because it did not understand the appellant to argue that the Commerce Clause allowed Congress to pass bankruptcy laws.\textsuperscript{70} Appellant—perhaps fearing that such argument would lead to the application of that canon—insisted that RITA was a regulation of interstate commerce, rather than a bankruptcy statute.\textsuperscript{71}

\textit{b. The Power to Borrow Money Limited the Exercise of the Power to Regulate Its Value: Perry v. United States}

\textit{Perry v. United States}\textsuperscript{72} involved a conflict between Congress's power to borrow money\textsuperscript{73} and its power to regulate its value.\textsuperscript{74} The plaintiff held U.S. bonds that were issued in 1918 and that included a U.S. obligation to pay $10,000 on or after April 15, 1934 in gold coin of a specified standard. The Supreme Court found the specification of the standard as an assurance of obligees against depreciation or devaluation in the medium of payment. In 1933, however, Congress passed a resolution holding all contractual provisions requiring payment in gold to be against public policy, and that all such obligations—public or private—shall be payable in any valid legal tender. Plaintiff demanded payment of $10,000 in gold coin as promised, or $16,931.25, which was its equivalent in legal tender currency. The government was willing to pay only $10,000.

The Court stated that Congress clearly had the power to regulate the value of money and determine the currency of the U.S, but "[t]he question is whether the Congress can use that power so as to invalidate the terms of the obligations which the government has theretofore issued in the exercise of the power to borrow money on the credit of the United States."\textsuperscript{75} The Court found within Congress's "unqualified power"\textsuperscript{76} to borrow money an implied limitation against repudiating obligations taken in its exercise. It held that Congress could not go around this limitation and impair its own obligations by exercising its power to regulate the constitutional provisions. [...]... The qualification of a broad constitutional provision by a more specific one is analogous to the "basic principle of statutory construction that a specific statute controls over a general provision ...") (citations omitted); Transcript of Oral Argument at 63, \textit{Gibbons} (Nos. 80-415 &., 80-1239) ("[W]e think that the commerce power is qualified by other more specific constitutional provisions, and we think that is the case here. This is a more specific constitutional provision. Any law on bankruptcy must in some sense be uniform. If a Bankruptcy Act can apply only to one railroad, that seems to us to suggest that the uniformity clause really doesn't have any meaning any longer.").

\textsuperscript{70} \textit{Ry. Labor Executives}, 455 U.S. at 466 (describing Congress's bankruptcy power as enabling it to impair the obligations of contracts); \textit{Id.} at 468 ("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.").

\textsuperscript{71} Transcript of Oral Argument at 6-7, \textit{Gibbons} (Nos. 80-415 &., 80-1239) ("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"). \textit{See also supra note 50}.

\textsuperscript{72} 294 U.S. 330 (1935).

\textsuperscript{73} U.S. \textit{CONST.} art. 1, § 8, cl. 2 ("To borrow money on the credit of the United States").

\textsuperscript{74} U.S. \textit{CONST.} art. 1, § 8, cl. 5 ("To coin money, regulate the value thereof").

\textsuperscript{75} \textit{Perry}, 294 U.S. at 350.

\textsuperscript{76} \textit{Id.} at 353.
The Constitution empowers Congress to pledge the credit of the U.S. as an assurance of payment; if Congress could repudiate it, then Congress’s pledge would be “illusory.” 77

The Court supported its holding with various, interconnected arguments, and one could argue about what would be a fair reading of the case. That said, the Court’s reasoning at its core seems to be that the ability to borrow money is essential to the functioning of the federal government. 78 Allowing the government to repudiate obligations it assumed while borrowing money would lead to the government’s inability to borrow because obligees would view the obligation to pay as “a vain promise.” 79

One could argue that this case is not really about a conflict between two enumerated powers, but rather about a conflict between an enumerated power (the power to borrow money) and the Fifth Amendment’s protection against deprivation of property without due process of law, an argument that the plaintiff made. 80 This seems a less convincing reading of the case because the Court does not use due process terminology in its reasoning. Such reading runs counter to the explicit framing of the issue by the Court as a conflict between two enumerated powers. 81

Also, the Court makes a clear distinction between the implications of an exercise of Congress’s power to regulate the value of money for the repayment of private obligations (which Congress can do) and those of the federal government (which Congress cannot do). 82 If the primary rationale behind Perry were the protection of an individual right—creditors’ right to be paid according to the terms of the loan contract—then it would not matter whether the debtor was a private party or the federal government. In both cases, the action of the federal government (banning payments in gold) harms the protected interest to the same extent. The aforementioned distinction between repudiating federal and non-federal obligations may suggest that the driving force behind the decision was not primarily, or only, the protection of an individual right. 83

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77. Id. at 350.
78. Id. at 353 (“The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the government, upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged.”).
79. Id. at 351.
80. Id. at 347.
81. See supra text accompanying note 75.
82. Perry, 294 U.S. at 350-51.
83. I do not mean to overstate the distinction between the rationales of protecting individual rights and the policy of assuring the government’s ability to borrow and contract in the future. Certainly, the latter goal is served by protecting individual promisees against governmental repudiation of obligations. My point is that the Court protected individual promisees not in order to protect their interests as goals in themselves, but rather as means to assure the well functioning of the federal government and to retain its credibility as a contracting partner. This latter rationale is the one emphasized in a recent Supreme Court reading of Perry. See United States v. Winstar Corp., 518 U.S. 839, 883-85 & n.28 (1996) (while discussing the unmistakability doctrine, the Court warned against “undermining the Government’s credibility at the bargaining table and increasing the cost of its engagements” and read Perry as guarding against “the untoward result of compromising the Government’s practical capacity to make contracts, which we have held to be ‘of the essence of sovereignty’ itself.”).
2. Cases in Which One Congressional Power Did Not Limit the Exercise of Another


Whereas Congress's War Powers are plenary, the Constitution allows Congress to call forth the militia only for three specified purposes and reserves to the states the authority to train the militia and appoint its officers.

By the early twentieth century, the militia had become an unreliable fighting force. In 1903, Congress started to organize it using its militia power. It provided funding and mandated army training to create the "organized militia" known as the National Guard of the several States. In 1916, pursuant to doubts about the constitutional power to deploy the National Guard qua militia abroad, Congress decided to "federalize" it. It made each guardsperson take a dual oath to State and Nation, and authorized the President to draft guardsmen to federal army service, at which time they would stand discharged from the State militia duty and status.

In Selective Draft Law Cases the Court upheld various measures of raising an army, including by a draft. Plaintiffs were prosecuted for failing to register for the draft. They denied that Congress had the power to compel service by a selective draft, and that even if it did, the exercise of its Army Power was subject to the limitations in the Militia Clauses. The Court first held that Congress's power to compel military service was unquestionable and derived from its power to raise armies and declare war, "[a]s the mind cannot conceive an army without the men to compose it."

The Court later moved to illuminate the relation between Congress's army and militia powers. The Court noted that the purpose manifest in the Constitution was to give plenary, superior and independent war powers to the federal government.

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84. Congress's war powers include U.S. Const. art. I, § 8, cl. 1 ("to ... provide for the common Defence [sic] ... of the United States"); id. § 8, cl. 11 ("to declare War"); id. § 8, cl. 12 ("to raise and support Armies"); id. § 8, cl. 13 ("to provide and maintain a Navy"); id. § 8, cl. 14 ("to make Rules for the Government and Regulation of the land and naval Forces"); and id. § 18 (the Necessary and Proper Clause).

85. U.S. Const. art. I, § 8, cl. 15 ("to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"); id. § 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").

86. The "unorganized militia" or "reserve militia" is the group of all able-bodied male citizens 17 to 45 year-old who have not joined the National Guard. See 10 U.S.C. § 311; Perpich v. Dep't of Def., 496 U.S. 334, 342 (1990).

87. 245 U.S. 366 (1918).

88. Id. at 377.

89. See also Tarble's Case, 80 U.S. (13 Wall.) 397, 408 (1872) ("Now, among the powers assigned to the National government, is the power 'to raise and support armies,' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by
This purpose was inferred from the text of the Constitution—that gives Congress the ultimate power to declare war and to raise standing armies and denies these to the states—and from the historical difficulty that such grant was designed to solve, namely the Continental Congress’s inability to raise armies and its dependence on State quotas. The Court then rejected plaintiffs’ argument that Congress’s power to compel military service should be subject to the limitations in the Militia Clauses because that would defy the purpose for which the Army Powers were granted.91

The Court interpreted the reach of the Militia Clauses in light of the controlling Constitutional purpose of vesting in Congress plenary, superior and independent military power. The Militia powers should therefore be understood not to reinstate State Confederation-like restraints on Congress’s exercise of its military powers (that the Constitution sought to terminate), but rather to avail Congress of another option to operate militarily. Instead of forcing Congress to resort to the full apparatus of a raising and supporting a standing army for every security need, Congress was wisely allowed to operate militarily in an additional way. It was given the discretion to take advantage of an existing body of armed citizens for certain limited purposes, and could also organize and prepare the militia for a later exercise of its Army Powers. Congress could use the militia if it thought that was all that was needed, but this authority did not come to diminish Congress’s power to operate full standing armies when that became necessary.92 “This, therefore, is what was dealt with by the militia provision.”93

After Selective Draft Law Cases, a 1933 statute made all members of the State National Guard enlist in the National Guard of the United States and thus become part of the Enlisted Reserve Corps of the Army. It provided that they could be called to national service when Congress declared a national emergency, but they would revert to their State National Guard status upon discharge from national duty. Such reversion was not part of the 1916 statute.94 Previously limited to cases voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.

90. Selective Draft Law Cases, 245 U.S. at 381; U.S. Const. art. I, § 10 cl. 3 (“No state shall... keep troops, or ships of war in time of peace... or engage in war”).

91. Selective Draft Law Cases, 245 U.S. at 381-82 (concluding “the want of foundation for the contention that although it be within the power to call the citizen into the army without his consent, the army into which he enters after the call is to be limited in some respects to services for which the militia it is assumed may only be used, since this admits the appropriateness of the call to military service in the army and the power to make it and yet destroys the purpose for which the call is authorized—the raising of armies to be under the control of the United States.”) (emphasis added). See also Cox v. Wood, 247 U.S. 3, 6 (1918) (summarizing Selective Draft Law Cases’ relevant holding to be that Congress’s powers to declare war and raise armies “were not qualified or restricted by the provisions of the militia clause and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause.”).

92. Selective Draft Law Cases, 245 U.S. at 382-84.

93. Id. at 383.

of national emergency, the statutory authority to call the National Guard to federal service was expanded in 1952 to any active duty or training if the relevant governor consented. In 1985, the Governors of California and Maine objected to sending their State National Guards to training missions in Honduras, which made Congress pass the 1986 Montgomery Amendment to The Armed Forces Reserve Act of 1952. This Amendment repealed partially the statutory gubernatorial consent requirement.

Perpich v. Department of Defense touched more directly on the conflict between Congress's militia powers and its army powers. Minnesota's Governor, who objected to sending parts of the Minnesota National Guard to a national training mission in Central America, challenged the Montgomery Amendment as violating the Militia Clauses of the Constitution. The Court upheld the Amendment, holding that the gubernatorial veto was not constitutionally required.

The Court started by assuming the constitutionality of the dual enlistment system, under which State National Guard members lose their state status for the duration of their federal call of Army duty and revert to their state status upon discharge from federal service. It did so for two reasons. First, it assumed, probably wrongly, that Selective Draft Law Cases upheld the constitutionality of the aforementioned 1916 authority to draft members of the State National Guard into the U.S. Army. The second, and probably the main reason, was that the Perpich plaintiffs did not challenge Congress's power to draft members of the state militia to national Army service. Perpich described the post-Selective Draft Law Cases constitutional status-quo:

[M]embers of the State Guard unit... must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time. When the state militia hat is being worn, the 'drilling and other exercises'... are performed pursuant to 'the Authority of training the Militia according to the discipline prescribed by Congress,' but when that hat is replaced by the federal hat, the second Militia Clause is no longer applicable.

95. Id. at 346.
96. Id. at 334.
97. Id. at 347.
98. Id. at 344 n.16 (“During World War I, the President exercised the power to draft members of the National Guard into the Regular Army. That power... was upheld in the Selective Draft Law Cases”). This, however, seems inaccurate. Although Selective Draft Law Cases opened by detailing the five measures for increasing the U.S. military establishment (including a draft and the aforementioned 1916 measure) that were included in the challenged Act of May 18, 1917, it suggested that the case was concerned only with “some of the provisions” of that Act, without specifying exactly which. Reading Selective Draft Law Cases suggests that the part of the Act of May 18, 1917 dealt with is the one relating to the draft. The Court characterizes Plaintiffs as ones who have refused to register for the draft and were thus prosecuted rather than as members of the National Guard who opposed to being called to national duty. Selective Draft Law Cases did not, on this reading, uphold the provision allowing the President to draft members of the State National Guard to the U.S. Army.
99. Id. at 347 n.19.
100. Id. at 348.
When the federal hat is worn, the inconveniences associated with the wearing of a militia hat no longer apply. Therefore, "[t]he congressional power to call forth the militia may in appropriate cases supplement its broader power to raise armies and provide for the common defense and general welfare, but it does not limit those powers". The militia power augments, rather than limits, the Army powers.

The Court then reached the heart of the conflict between the militia and Army powers. The Court engaged in balancing, and in weighing the conflicting constitutional values. It noted that the Federal Government provides "virtually all of the funding, the material, and the leadership for the State Guard units." The adverse effect on the Minnesota militia is only slight, because out of 13,000 members of the Minnesota National Guard unit, at most a few hundred soldiers are ordered into active service at each time, and only for a brief period of time. The State's right to train its militia, and its ability to rely on it in state emergencies, are not "significantly affected." If, however, a federal call of duty would be so intrusive as to deprive the State of the power to train its forces effectively, or undermine the State's ability to address a local emergency, then the Governor would be able to veto it. Further, the State's interest in keeping an armed force is protected to the extent that the law explicitly allows it to keep and maintain militia forces additional to the National Guard at its own expense, and such militia would not be subject to being called, ordered, or drafted into the U.S. Armed Forces. Thus, the State is not deprived of any constitutional right to keep a separate militia of its own.

b. The Tax Power Did Not Limit the Foreign Commerce Power: Head Money Cases

The main issue in the Head Money Cases was an arguable conflict between Congress's foreign commerce and tax powers, although the case implicates additional powers. The 1882 act "to regulate immigration" imposed a 50-cent duty on ship owners for every foreign passenger brought into the United States for

101. Id. at 349 ("[Selective Draft Law Cases] held that, far from being a limitation on [the powers "to provide for the common Defence [sic]", "to raise and support Armies", "to make Rules for the Government and Regulation of the land and naval Forces", and the Necessary and Proper Clause], the Militia Clauses are—as the constitutional text plainly indicates—additional grants of power to Congress.").
102. Id. at 350.
103. Id. at 350-51. Perpich disagreed with the Governor's argument that this interpretation deletes from the Constitution a power expressly reserved to the states, suggesting instead that this interpretation rather recognizes the supremacy of federal power in military affairs. Id. at 351.
104. Id. at 351-52 n.24.
105. See id. at 352 (citing 32 U.S.C. § 109(c)).
107. Since the case regulated immigration, plaintiffs could have argued that the statute violated the uniformity requirement in Congress's naturalization power in U.S. CONST. art. I, § 8, cl. 4 ("to establish an uniform Rule of Naturalization"), perhaps together with the Necessary and Proper Clause. Also, plaintiff argued that the statute conflicted with several treaties with foreign nations. The Court commented on the horizontal conflict between such treaties (an exercise of the Treaty Power) and the immigration statute (an exercise of the foreign commerce power), but there was no analysis of arguable violations of constitutional limitations within it. Head Money Cases, 112 U.S. at 597-600.
the creation of a fund that would defray the costs of immigration regulation and provide for the care and relief of distressed immigrants. Plaintiffs, in the business of maritime transportation, argued that Congress was "exercising the taxing power [and could] derive no aid in support of its action from any other grant of power." Congress arguably violated the limitations on its tax power, namely that taxes be both uniform and imposed to provide for the common defense and general welfare of the United States.108

The Court first found that Congress had the power to pass the act under its foreign commerce power. Later on in the decision, the Court also suggested that it did not have to examine whether the act violated limitations on its power to tax because the act was a regulation of foreign commerce rather than a tax.109 Since the regulation was a tax on the business of bringing foreign immigrants, the argument that the act is a tax or a necessary and proper way to regulate naturalization (equally subject to a uniformity requirement) would seem equally sound.110 But before making this last statement, the Court made sure that none of the arguable limitations in the tax power were truly overreached.

When it examined the tax power limitations, the Court found that the "general welfare" bar was easily met.111 The arguments from uniformity were that the tax

108. Id. at 594-95; U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence [sic] and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States").

109. Head Money Cases, 112 U.S. at 595-96. The Court suggested that the act could either be a regulation of foreign commerce proper, or a measure necessary and proper to exercise such power.

110. The Court doubted whether the regulation truly "can be called a tax", but continued to characterize it as an "excise duty on the business of bringing passengers from foreign countries." Id. at 594-95. An "excise duty" is subject to the uniformity requirement. See U.S. Const. art. I, § 8, cl. 1 ("but all duties, imposts and excises shall be uniform throughout the United States"). Also, the Court noted that "[t]he title of the act, 'An act to regulate immigration,' is well chosen. It describes, as well as any short sentence can describe it, the real purpose and effect of the statute. Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources." Head Money Cases, 112 U.S. at 595. Although not raised by the parties explicitly, the Court does not explain why the act is not an exercise of Congress's naturalization power, which is also subject to a uniformity requirement. See U.S. CONST. art. I, § 8, cl. 4 ("To establish a uniform rule of naturalization"); Head Money Cases, 112 U.S. at 595 (calling the act an "exercise of [Congress's] power to regulate immigration"). Also problematic is the Court's suggestion that the act is not a tax (that goes arguably to fund the general government) because the monies raised are used to fund immigration related purposes. The Court admits that the monies raised go to the U.S. treasury, are used to fund the Government's immigration apparatus, to care for the immigrants, and to protect the citizenry. Id. at 595-96. These seem to suggest that the act could equally be characterized as a tax and spending measure.

111. Head Money Cases, 112 U.S. at 595. Malla Pollack noted briefly the relevance of Head Money Cases to the discussion of inter-clause conflicts. Pollack, however, focuses on the "general welfare" limitation in the Tax Clause, and downplays the importance of the case due to the permissive interpretation of the term by subsequent Supreme Court cases. See Malla Pollack, The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment, 17 CARDOZO ARTS & ENT. L.J. 47, 56 (1999). The analysis here emphasizes the general approach the Court employed in resolving the conflict before it rather than on the nature of a particular limitation. It also focuses on Head Money Cases' analysis of the uniformity

operated only in coastal states (rather than all states), and applied only to naval immigration (rather than also to an inland one). The Court understood uniformity to require equal application of the tax on its subject wherever found, and not to be violated if its subject was not uniformly distributed throughout the United States. The act achieved the constitutional goal of giving no preference to ports of any one state over another, and the evils that it remedied—which were limited to maritime immigration—did not accompany inland immigration (i.e., so that the constitutional policy of uniformity—equal treatment under equal circumstances—was not violated). Analogizing the tax before it to a few other contexts, the Court concluded that the “purpose of the constitution” suggests that “uniform” should be read in the aforementioned sense of requiring “substantial uniformity” rather than imposing plaintiffs’ “[p]erfect uniformity” standard.

C. ANTI-BOOTLEGGING CASES: TAKING STOCK IN LIGHT OF HIGHLY RELEVANT PRECEDENTS

Moghadam and KISS II’s refusal to follow Railway Labor Executives’ Ass’n and their choice to follow Trade-Mark Cases, Heart of Atlanta Motel and Authors League of America instead seem indefensible. These latter three cases are not highly relevant because they do not involve an inter-clause conflict as defined in Part II.A above. In Trade-Mark Cases, the act protecting trademarks was outside Congress’s Commerce Power as well as outside its IP Power. It therefore does not embody the preferred pattern of a statute that is authorized under one enumerated power but at the same time violates a limitation in another. In Heart of Atlanta Motel, the Court did not deal with the argument that the Civil Rights Act of 1964, which the Court sustained under the Commerce Clause, violated a limitation in section five of the Fourteenth Amendment (or any other enumerated power). The Heart of Atlanta Motel Court refused to pass upon, and so did not treat, the argument that the Civil Rights Act of 1964 violated the Fourteenth Amendment.

The Supreme Court’s silence on this point makes the case of limited use in resolving other inter-clause conflicts. For example, it may be that the Court did not limitation in the Tax Clause, which Pollack’s analysis omits. Indeed, Pollack does not quote the latter part of the Tax Clause that includes the uniformity limitation. See id. n.54; 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, 273 & n.90 (1995).

112. Head Money Cases, 112 U.S. at 594 (“Is the tax on tobacco void because in many of the state no tobacco is raised or manufactured? Is the tax on distilled spirits void because a few states pay three-fourths of the revenue arising from it?”).

113. Id. at 595.

114. The arguments in Heart of Atlanta Motel against the Civil Rights Act of 1964’s constitutionality were that it violated the (1) commerce power, (2) Fifth Amendment, and (3) Thirteenth Amendment. See Heart of Atlanta Motel v. U.S., 379 U.S. 241, 243-44 (1964) (finding that the Civil Rights Act was sustained under the commerce power and that this “is not to say that the [Fourteenth Amendment that Congress mentioned as another grounds for the Act] was not adequate, a question upon which we do not pass”). A previous case, Civil Rights Cases, 109 U.S. 3 (1883), found the Civil Rights Act of 1875 unconstitutional under section five of the Fourteenth Amendment. The Supreme Court in Heart of Atlanta, however, does not explicitly either overrule the Civil Rights Cases or agree with their holding while explaining the tension between those cases and its decision.
read the Fourteenth Amendment—rightly or wrongly—as imposing any limitations on Congress against enforcing civil rights beyond its scope under other provisions of the Constitution. Alternatively, the Court may have thought that the Fourteenth Amendment affirmatively limits Congress from passing certain civil rights protections under other powers, but not the ones in the Civil Rights Act of 1964. A third possibility is that the Court saw a tension between the Act and the Fourteenth Amendment, but did not think that the two were “fundamentally inconsistent.” Since the Court’s silence is consistent with alternative explanations its guidance is limited.

In Authors League of America, not a Supreme Court case, the court did not pass judgment on the argument that the manufacturing clause violated the progress limitation from the IP Clause, and did not explain why it turned to the Commerce Clause to uphold the statute. It simply passed over the argument. For example, the hypotheses reviewed just above regarding the silence of Heart of Atlanta Motel on the issue of a conflict are applicable here. An additional hypothesis here could be that the Second Circuit was not sure whether the progress language in the IP Clause is a limitation or a non-binding preamble. Without knowing the Second Circuit’s thoughts and reasons, it is hard either to follow or to criticize its logic.

Martignon and KISS I followed Railway Labor Executives’ Ass’n in striking down the anti-bootlegging statutes. These courts refrained from relying on Trademark Cases, Heart of Atlanta Motel and Authors League of America for reasons similar to those mentioned in the previous paragraphs. Although these courts followed the most authoritative precedent before them, they did not study other highly relevant cases, such as the ones in Part II.B (Head Money Cases, Perry v. United States, Selective Draft Law Cases and Perpich). A more complete review of such cases shows that Supreme Court precedent does not support unequivocally the conclusion that limitations in one enumerated power always apply to Congressional exercise of other powers. Also, although Martignon and KISS I followed Railway Labor Executives’ Ass’n’s result, they did not follow its reasoning closely. Railway Labor Executives’ Ass’n relied heavily on the argument that upholding RITA under the Commerce Clause would be akin to eradicating the Bankruptcy Clause from the Constitution. This was so because under the current expansive reading of the Commerce Clause and the Necessary and Proper Clause, all—or virtually all—bankruptcy statutes would be seen also as regulations of interstate commerce. Different from Railway Labor Executives’ Ass’n, the power invoked in the anti-bootlegging statutes’ cases was the one to regulate foreign commerce. While IP statutes will most probably (if not always) substantially affect interstate commerce, they are less likely to so affect foreign commerce. This seems to be so especially in the case of live musical performances that are performed domestically mostly by American performers in front of American audiences. These clearly affect...
interstate commerce, but their effect on foreign commerce is at least a harder question. In any event, allowing some IP regulations to pass under the foreign commerce clause would not eradicate from the Constitution the IP Clause, if the IP Clause would remain the sole grounds for upholding some statutes that have a very weak relation to foreign commerce.

D. HIGHLY RELEVANT PRECEDENTS: TAKING STOCK

Unfortunately, the highly relevant cases reviewed in Part II.B above differ in their holding—two of them do not allow Congress to circumvent limitations in one enumerated power by acting through another while three others do—and in their reasoning. For example, some of them disposed of the arguable conflict by engaging in essence finding: they categorized the statute under review as falling exclusively under one enumerated power. *Head Money Cases* suggested that the immigration act it reviewed was an exercise of Congress’s foreign commerce power, and that therefore the limitations in the Tax Clause were largely irrelevant. Similarly, *Railway Labor Executives’ Ass’n* disposed of RITA’s constitutionality largely by classifying it as a bankruptcy statute. *Perpich*’s approach, in contrast, was pragmatist. In upholding the Montgomery Amendment, *Perpich* significantly gauged the degree to which the dual enlistment system harmed the Minnesota Governor’s ability to use the State Militia effectively. It suggested that the limitations in the Militia Clause are not violated when the federal government calls to duty only a small fraction of the state militia, for a short time, and when no state emergency is present. In contrast still, *Perry*’s analysis is largely purposive. The limitation it found in Congress’s power to borrow money is not explicit in the language of the power to borrow. Rather, the Court read a limitation against repudiating Governmental obligations into it, based on the Court’s conception of good sovereignty. It then applied this implied limitation to the exercise of Congress’s power to regulate the value of money. Lastly, *Selective Draft Law Cases*’ analysis was largely originalist. It interpreted the interplay between the army and militia clauses based on the original intentions and purposes of creating the federal union. It would be hard to suggest that these cases provide a clear line of reasoning or guidance for courts deciding inter-clause conflicts.

Still, one approach is absent from the cases above: none of the Supreme Court and anti-bootlegging cases upheld a challenged statute solely on the basis that the statute was authorized by one enumerated power, in total disregard of the arguably violated language of another enumerated power. Even when upholding statutes while suggesting that the enumerated powers are alternative, courts examined the arguably violated constitutional limitations at play and explained why they were either not violated or were not in fundamental conflict with the statute reviewed.  

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117. See supra note 109 and accompanying text.

118. Even the most permissive cases—*Head Money Cases* and *KISS II*—made sure to verify that no violence was done to the arguable limitations. *Head Money Cases* verified that the tax was uniform and provided for the general welfare before saying that the true answer to the unconstitutionality challenge was that there was power under the Foreign Commerce Clause, and *KISS II* verified that there was no fundamental inconsistency between the anti-bootlegging statute and the IP Clause before upholding the statute under the Commerce Clause. *Authors League of America* might be a case to the contrary, but it
III. IS THERE A CONFLICT?

Above, we saw that at least in some cases—such as *Head Money Cases*—the Supreme Court upheld a challenged statute because it concluded that it did not actually violate limitations in another Congressional power. Do the anti-bootlegging statutes violate limitations in the IP Clause? The IP Clause empowers 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 anti-bootlegging courts discussed whether the anti-bootlegging statutes violate two limitations: "writings" and "limited times." A more complete resolution of the statutes’ constitutionality would require assessing whether at least three additional limitations are implicated. The following sub-Parts review and augment the discussion in case law and commentary about potentially violated limitations in the IP Clause.

A. DO THE STATUTES CONFLICT WITH "WRITINGS"?

Plaintiffs in the anti-bootlegging cases have suggested that the statutes violate a fixation requirement that they saw implicit in the "writings" language in the IP Clause. Does "writings" include a constitutional fixation requirement? The answer to this question depends on one’s approach to interpretation.

An intentionalist would look for the intentions of those who wrote “writings.” If we looked at the records of the Constitutional Convention, we would find proposals to secure the “copy rights” of “literary authors.” In debating the text of the IP Clause, the Framers consulted contemporaneous texts, and mainly the state copyright statutes. These spoke of protecting maps, books and charts as copyrightable subject matter, which is also the subject matter included in the first Copyright Act of 1790. If so, it seems that the Framers’ subjective intent was to refer to penned works.

An originalist would try to ascertain what an ordinary reader of the Constitution would understand "writings" to mean at the time it was adopted. The answer here would seem to equal the one just discussed above, based on the language of the state copyright statutes and the Copyright Act of 1790—contemporaneous expressions of the meaning of "writings."

A third doctrinal view would look at what previous case law understood “writings” to mean. Luckily, there are three Supreme Court decisions, spreading over more than 100 years, one of which is relatively recent, that expound "writings." All three suggest that the term "writings" denotes a constitutional

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requirement of originality, not fixation. While these cases did not deal with a fixation problem, the fact that the Supreme Court did not mention a constitutional fixation requirement while specifically expounding "writings," and the fact that fixation is not related to the concept of originality which the Supreme Court found "writings" to embody, may suggest that fixation is simply not a constitutional requirement.

A fourth textual approach would stretch "writings" to its greatest reasonable extent. Such an approach suggests that while the term is capable of allowing fixation in any medium, it cannot be extended further to include unfixed works. A fifth pragmatist approach would suggest that the term "writings" contains a constitutional fixation requirement that is justified as an evidentiary tool to make matters of proof easier in infringement cases. A sixth approach adheres to a "living Constitution" view. According to it, a Constitution is a flexible document, a charter for a living people. It is not a document intended to subject the future to the strictures of the past. It is supposed to set a flexible framework for generations to come, and to allow them to solve the problems they are facing according to the needs of their time. If these needs require protection of unfixed performances, the Constitution should be interpreted in a way that would allow that. This approach would be corroborated by the fact that copyrightable subject-matter—the statutory parallel to the term "writings"—has expanded from its original meaning (maps, books and charts) to include sculptures, architecture, paintings, and musical works, among other things. The (statutory) fixation requirement was similarly stretched to allow fixation simultaneous with transmission. According to this approach, we should read "writings" simply to mean "works" or "creative output."

A last approach would determine whether "writings" suggests a constitutional fixation requirement according to the purpose of the IP Clause. This approach follows a distinguished tradition of purposive adjudication within American legal

122. See Hansen et al., U.S. v. Martignon—Case in Controversy, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1223, 1262 (Jane Ginsburg); Peter A. Jaszi, Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law, 29 VAND. J. TRANSNAT’L L. 595, 604 (1996) (suggesting that "the constitutional writings requirement appears to be concerned with assuring the efficient administration of a copyright system or, perhaps more straightforwardly, to reflect the structure of a historically publication-based system of copyright").
123. See Paul J. Heald and Suzanna Sherry, Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress, 2000 U. ILL. L. REV. 1119, 1192 n.515 (2000) ("[as to] whether an unfixed musical performance should be considered a 'writing,' but we see nothing in the history or structure of the Clause to limit Congress's authority to define 'writings' broadly to include many different types of creations."); PAUL GOLDSTEIN, COPYRIGHT § 15.6.1 (2d ed. 2005) ("There is little doubt that the performances subject to protection [in the anti-bootlegging statute] are 'writings' in the constitutional sense for, beyond literalism, there is nothing in the mechanical act of fixation to distinguish writings from nonwritings."). See also Hansen et. al., supra note 122, at 1258-59 (Jane Ginsburg) (suggesting that although tangibility has been a traditional attribute of copyright protection, that does not mean that it is constitutionally required).
thought. In an insightful argument, Joseph Merschman suggests that “writings” entails “fixation” because the purpose of the IP Clause is to grant authors a limited time monopoly as *quid pro quo* for depositing the works into the public domain when protection expires. If protection is given to an unfixed performance, nothing will pass into the public domain eventually. Only one half of the purpose—inducing creativity—would be realized, but the other half—enriching the publicly available inventory of works—would be frustrated. Implying a constitutional fixation requirement best serves the purpose of the IP Clause.

Commendable as the argument truly is, the extent to which purposivism dictates one unique result is debatable. Merschman’s argument assumes that the public domain must be fixed. Ideas and facts, however, are in the public domain, even if they have not been fixed. Normatively, Merschman advances one view of the public domain, but there are at least a dozen others. On another view, protecting live performances (to focus on fixation, assume that protection is for a limited time) may enrich the public domain. If a performing artist performs a song that is in the public domain, for example, in a very unique way that enhances the artistic message of the song, then anyone who watches the show (the audience may include other performing artists) is free to stage a substantially similar performance at the end of the statutory protection term. The current anti-bootlegging statutes allow more than that: one may stage a substantially similar performance the next day. All the current statutes proscribe is misappropriation of the original sound and video. Purposivism, therefore, does not seem to deliver a clear answer to our question. Rather, purposivists would still need to defend and justify specific visions of the public domain.

B. DO THE STATUTES CONFLICT WITH “LIMITED TIMES”?

The overwhelming majority of courts and commentators suggest that the anti-bootlegging statutes violate the limited times requirement. Most view the time limitation as a fundamental policy of intellectual property law. To this general


127. See e.g., Hansen et al., supra note 122, at 1262 (Jane Ginsburg); Jaszi, supra note 122, at 605 (suggesting that the limited times and originality requirements in the IP Clause are fundamental, which would make it probably suggests that they cannot be circumvented through the Commerce Clause); Heald & Sherry, supra note 123, at 1192-93 (arguing that the anti-bootlegging statutes violate limited times because the performer has the potential of preventing the performance from ever entering the public domain).
consensus there are two exceptions. The first suggestion that the anti-bootlegging statutes might not violate limited times has been to read them as incorporating copyright’s statutory term. 128 KISS I refused to do so for powerful reasons, 129 and the United States in KISS II agreed that the term cannot be so read. 130 In the second, much bolder argument, Brian Danitz has argued that the exclusive rights granted under the anti-bootlegging statutes are actually limited in time: they last only for the duration of the performance. 131

While this latter argument applies to violations of the fixation and live broadcasting portions of the anti-bootlegging statute, it does not apply to the prohibition on broadcasting from an unauthorized fixation and to trafficking in unauthorized fixations, the latter prohibition being the part of the anti-bootlegging statutes that was actually discussed in the anti-bootlegging cases. As KISS I and KISS II show, the anti-bootlegging statutes apply retroactively, and their prescriptions apply to trafficking in fixations that happened back in the 1970s, or, for that matter, a hundred years ago.

C. DO THE STATUTES CONFLICT WITH “AUTHORS”?

Are performers authors? Some define “authors” as those who create “writings.” They argue that if performances—being unfixed—are not writings, then those who create them—performers—are not authors. 132 Others counter that authorship turns on the level of creativity rather than on fixation, so that original performers can be constitutional authors. 133

Is “authorship” a constitutional limitation distinct from and additional to “originality” and “writings,” or is it reducible to them? The Supreme Court has defined an author as “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.” 134 This logic may suggest that the word “authors” (and perhaps also “their” from the IP Clause) serves as the basis for the constitutional “independent creation” element in the current standard of “originality.” 135 Under the aforementioned definition of an author, a “performer” may plausibly be called the “author” of her performance. However, the animating spirit behind a performance may be another person, such as the person who conceived of the idea for the performance and produced it or the employer of the performer. 136 In this latter case, the anti-bootlegging statutes grant the exclusive

132. See Hansen et al., supra note 122, at 1238 (Bob Clarida).
133. Id. at 1254-56 (Jane Ginsburg).
right to the performer—rather than to the author—and may for this reason violate the "authorship" limitation.

D. DO THE STATUTES CONFLICT WITH "TO PROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS"?

Elsewhere, I have suggested that the "progress" language from the IP Clause is an independently enforceable limitation. I have also shown that Eldred v. Ashcroft\(^\text{137}\) left this point open: among other things, the Court denied cert on the question of whether this language was, or was not, an independent limitation.\(^\text{138}\)

The anti-bootlegging statutes prohibit trafficking in fixations made legally before the statutes' effective date.\(^\text{139}\) As such, the statutes place public domain works—such as sound recordings and audiovisual works—under copyright protection. Does the retroactive part of the anti-bootlegging statutes “promote the progress of science and useful arts”? There is good reason to believe that the answer is no.

When a performance had already occurred, vesting an exclusive distribution right in its performer would not make her travel back in time and record her previously-unrecorded performance. Such right would therefore not add to the public availability of recordings from past shows. If a non-performer recorded the performance, however, the new right most likely decreases the incentives for public dissemination of the recording. Without the anti-bootlegging statutes, the recording party would disseminate the recording if the revenues from public distribution outweigh the costs of distribution. With the anti-bootlegging statutes in place, the amount she will be able to reap from the market will generally be smaller than without these statutes, so the likelihood of public distribution of the recording is smaller than in the absence of such statutes.

Because of the statutes, the recording party would have to secure the consent of the performer, or otherwise she would face civil and criminal liability. Contacting the performer would add to her costs and reduce her benefits. It would increase her costs because she would have to search and locate the performer (which would be prohibitively costly if the performer—or it seems even one of the performers—died). If she found the performer, she would bear additional transaction costs. These might also be prohibitive because the parties would have a bilateral monopoly—one of them would have the entitlement, the other the recording. Even if the recording had already been widely distributed, it is not clear that the

\(^\text{137}\) 537 U.S. 186 (2003).
\(^\text{138}\) See generally Oliar, supra note 116 (suggesting that the phrase "promote the progress of science and useful arts" limits Congress's IP power). See also id. at 1824-32 & n.244 (showing that Eldred v. Ashcroft refused cert on the question of whether "promote the progress of science and useful arts" is an independently enforceable limitation, and that its analysis left the question open).
performer could simply duplicate it and disseminate it from that point on, as she might be subject to suit by the recording party (e.g., for unjust enrichment). This bargaining setting is prone to strategic bargaining, and the parties may fail to reach a deal. These bargaining related transaction costs would be higher if more than one performer is involved. At the same time, the statutes reduce the original recorder's benefits, because even if she could strike a deal with the performer, she would have to share the proceeds. Overall, her (or her heirs') incentive to disseminate, or to invest in dissemination (e.g., heirs' incentives to look carefully in dusty attics in the hope that their parents made a unique bootleg recording) would decrease. The incentive to disseminate a previously made recording is thus greater without the anti-bootlegging statutes in place. An additional cost of the retroactive applicability of the anti-bootlegging statutes is the disincentive they provide for authors (and potential authors) to use public domain materials lest at some point they will be put back under protection. Since every author relies on public domain materials—e.g. ideas, facts, public domain works—this cost is particularly troubling.

Can the anti-bootlegging statutes increase the incentive to disseminate existing recordings of live performances? Only in very peculiar and rare settings. This may happen if a specific performer enjoyed a great distribution cost advantage over the recording party. This is unlikely as performers are generally not in the distribution business, and in any event in the absence of anti-bootlegging statutes the recording party would attempt to contact the least cost disseminator in marketing the bootleg recording. Any unique distribution advantage (which is unlikely to be significant in any event) is likely to be outweighed by the various costs reviewed above and the decrease in revenues to the recording party because of the revenue split. Thus, since the costs of the anti-bootlegging statutes regarding pre-existing recordings of live performances seem to outweigh their benefits by a great margin, they probably violate the “promote the progress” limitation. Assuming that the IP Clause is the governing enumerated power, the distribution provisions of the anti-bootlegging statutes—18 U.S.C. 2319A(a)(3) and 17 U.S.C. 1101(a)(3)—would be unconstitutional because their retrospective part is non-severable from the prospective part.

140. One could counter with the argument that the ban on the post-1994 distribution of pre-1994 fixations of live performances may induce performers to perform more (because old recordings of live performances depress the market for future live performances) and thus “promote the progress of science and useful arts”. This hypothetical possibility does not seem persuasive: sound recordings do not generally serve as a substitute for live performances. They substitute demand for authorized recordings, but if these were made, protection is available under copyright law. Also, performers often come up with new tours/performances, such that pre-1994 recordings are unlikely to deflate the market for post-1994 tours/performances. At the end of the day this is a factual issue that would have to be sorted out in trial as part of the Court's attempt to determine whether the costs of the statutes greatly outweigh their benefits. See also infra note 141.

141. See Oltar, supra note 116, at 1840 (suggesting that a statute violates the progress limitation if its costs in terms of creativity and knowledge extremely outweigh its benefits). The text uses “probably” since it conjectures that the evidence at trial would indeed show such a disparity between great costs and tiny benefits.

142. The anti-bootlegging statutes apply explicitly to disseminations that occur on or after the date of the enactment of the Uruguay Round Agreements Act (12/8/1994), regardless of whether the fixation of the underlying recordings occurred before or after 1994. See 17 U.S.C. 1101(c) (2000), 18 U.S.C.
E. DO THE STATUTES CONFLICT WITH ORIGINALITY?

The statutes do not condition protection of live performances on their originality. In *Feist*, the Supreme Court suggested that originality is the *sine qua non* of copyright, and a constitutional requirement. Originality, *Feist* suggested, requires a modicum of creativity. The fact that the anti-bootlegging statutes do not require it suggests a conflict.143 On the other hand, *Moghadam* suggested that “[a] live musical performance clearly satisfies the originality requirement.”144 Since these statutes regulate live performances, it may be plausible to assume that the vast majority of those include the requisite minimal level of creativity, although it is not hard to imagine performances that would not be original.

F. TAKING STOCK

The anti-bootlegging statutes seem to conflict with “promote the progress of science and useful arts”, “authors”, “limited times” and the originality requirement. The case for a conflict with “writings” seems weaker because, at least so far, the case for fixation as a constitutional requirement has not been made convincingly.

The analysis of the “promote the progress” limitation is of particular significance. As discussed in Part I above, *Moghadam* and *KISS II* upheld the anti-bootlegging statutes under the assumption that they were harmonious with the IP Clause. Such harmony existed because both “promote the progress of science and useful arts” although through different means. IP laws do so by securing to authors exclusive rights in fixed works for limited times, and the anti-bootlegging statutes by securing to performers exclusive rights in unfixed works in perpetuity. These courts therefore found that the purpose of these laws was more important than the specific means employed. These courts, however, did not discuss whether the anti-bootlegging statutes truly “promote the progress”, they simply assumed this was the case. Future resolutions of the constitutionality of these statutes – such as by the forthcoming Second Circuit decision in *Martignon* – should analyze this limitation more meaningfully.

IV. APPROACHES TOWARDS RESOLVING INTER-CLAUSE CONFLICTS

If a court found that the anti-bootlegging statutes conflict with one or more of the aforementioned limitations, how should it proceed? A conflict does not entail unconstitutionality by necessity. We saw, for example, that the anti-bootlegging courts would uphold a statute under one enumerated power as long as its conflict with another enumerated power did not rise to the level of a “fundamental

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2319A(f) (2000). The retrospective and prospective parts of the dissemination provision are therefore non-severable.


inconsistency”. More generally, a court may choose to adopt (among other things) one or more of the five approaches that have loomed large in the inter-clause conflicts’ case law and commentary: formalism, fundamental inconsistency, structural inference, fundamental principles, and particularism. Although these approaches will be reviewed below as ideal types, one should remember that the courts and commentators mentioned below have generally each used more than one type of arguments.

A. FORMALISM

The resort to formalism is perhaps the most recurring theme in the inter-clause conflict controversy. “Formalism” here comes to denote the conception that legal disputes can always be decided by applying a closed set of rules to the facts of the case in a way that involves no indeterminacy.

The issue that best demonstrates the weakness of formalistic reasoning in the context of inter-clause conflicts is courts’ categorization of the challenged statutes. In Head Money Cases, the Court reasoned that the true answer to the arguable violation of the uniformity requirement by the challenged statute was that it actually was an exercise of the commerce power rather than that of the tax power. Since the statute imposed a tax on immigration, finding it to be an exercise of the tax power or a means necessary and proper to the exercise of the naturalization power would not have been significantly less reasonable. Finding it to be truly a regulation of foreign commerce was instrumental to finding the statute constitutional.

Railway Labor Executives’ Ass’n began its discussion with the need to determine whether RITA was an exercise of either the commerce power or the bankruptcy power. Although the Court recognized that this was not easy, it nevertheless believed that this hard taxonomic task would yield the solution to the case. The Court therefore engaged in essence finding: it specified the elements of bankruptcy statutes, detailed the elements of RITA, and found that RITA was, in essence, a bankruptcy statute. As RITA regulated the bankruptcy of an instrumentality of interstate commerce, the conclusion that RITA was a regulation of interstate commerce would not have been substantially more implausible. Categorizing RITA as a bankruptcy statute was instrumental to the Court’s finding it unconstitutional as violative of the uniformity requirement.

This weakness was manifest in the anti-bootlegging decisions. Congress enacted the anti-bootlegging statutes in order to implement TRIPS. The statutes therefore have the characteristics of both intellectual property and foreign commerce. Highlighting the former elements, Martignon found the criminal anti-bootlegging statute to be an exercise of Congress’s IP power. Highlighting the

146. United States v. Martignon, 346 F. Supp. 2d 413, 419-22 (S.D.N.Y. 2004) (finding based on the statute’s “language, history, and placement” that it was an exercise of Congress’s IP Power). See also id. (reviewing Congress’s subjective belief, the fact of the statute’s promulgation under TRIPS, the statute’s plain text, its legislative history, its close proximity in U.S. code to provisions dealing with criminal liability to copyright infringement, and the statute’s resort to terms as defined in the Copyright
latter elements instead, Moghadam found the same statute to be an exercise of Congress’s foreign commerce power.\textsuperscript{147} Neither side in this debate let the statute’s incompatible characteristics destabilize its categorization. “That the anti-bootlegging statute has its roots in an inter-country initiative’,\textsuperscript{148} Martignon held, or that it has “ancillary benefits to interstate commerce”,\textsuperscript{149} does not change the fact that the statute “was enacted primarily to cloak artists with copyright-like protection”\textsuperscript{150} and “cannot . . . serve to transform what appears on its face to be an intellectual property statute into one whose primary purpose is to regulate commerce.”\textsuperscript{151} Moghadam, by contrast, did not let the copyright-related characteristics of the statute disturb its conclusion that the ‘purpose and focus of Congress were on foreign commerce.’\textsuperscript{152}

As the examples above show, formalistic argumentation thus far has failed to provide a satisfying guideline to resolving inter-clause conflicts. This is not to suggest that formalism cannot do better. For example, one could adopt either the rule that the powers of Congress are strictly alternative or the rule that limitations in one enumerated power always limit Congressional action under other enumerated powers. These rules would promote stability, predictability, conserve judicial time, and may help courts evade questions that are better addressed by other branches of government. These rules would also come at a high substantive cost, which may or may not be worthwhile incurring socially. The formalism that appears in the anti-bootlegging cases so far, however, does not even deliver certainty or predictability. Whether future courts and commentators adopting this approach will be able to do better remains to be seen.

\textbf{B. FUNDAMENTAL INCONSISTENCY}

The anti-bootlegging cases include a potentially more promising approach to resolving inter-clause conflicts: the fundamental inconsistency test adopted in Moghadam and used by the other anti-bootlegging courts. Moghadam reviewed authorities that suggested that the enumerated powers are strictly alternative and others that suggested that they may qualify one another. Attempting to reconcile among these authorities, it suggested that the enumerated powers are alternative as

\begin{footnotesize}
\begin{enumerate}
\item \footnote{Act); \textit{id.} at 419 ( "the anti-bootlegging statute falls within the purview of the Copyright Clause"); \textit{id.} at 422 (concluding that the anti-bootlegging statute “is clearly a copyright-like regulation.”).}
\item \footnote{\textit{Moghadam}, 175 F.3d at 1276 ("The specific context in which § 2319A was enacted involved a treaty with foreign nations, called for by the World Trade Organization, whose purpose was to ensure uniform recognition and treatment of intellectual property in international commerce. The context reveals that the focus of Congress was on interstate and international commerce.").}
\item \footnote{\textit{Martignon}, 346 F. Supp. 2d at 421.}
\item \footnote{\textit{Id.} at 422.}
\item \footnote{\textit{Id.} at 421. See also \textit{id.} at 422 (stating the court’s conclusion that the statute is “one directed at protecting the interests of artists, rather than commerce").}
\item \footnote{\textit{Moghadam}, 175 F.3d at 1276.}
\end{enumerate}
\end{footnotesize}
long as there is no "fundamental inconsistency" between a statute passed under one enumerated power and the language of another. 153

A "fundamental inconsistency" test can be more satisfying than an arbitrary classification of a statute that is truly at the intersection of two enumerated powers. It has the potential of having courts confront and recognize that a tension exists, to describe the conflicting constitutional interests, and to suggest which should take precedence in general or in the particular case. The Eleventh Circuit's execution of the test, however, fell short of realizing its full promise.

The Eleventh Circuit applied the fundamental inconsistency test by using another formalistic categorization between what I will term "limiting" and "constitutive" constitutional text.154 "Limiting" refers to text in Congress's powers that suggests that Congress is affirmatively prevented from doing something, even under another power. "Constitutive" comes to describe constitutional text that grants power to Congress without implying the negative on Congressional action beyond that grant. Where that power runs out, Congress may still act if some other power lets it. The Eleventh Circuit held that since the grant of power to Congress under the IP Clause is stated in positive terms, it does not imply an affirmative limitation against protecting non-writings through other clauses, so that "writings" is constitutive rather than limiting.

That constitutional language acts as one or the other in any specific case is undeniable—courts would have to decide whether the invoked limitation from one power prevents Congress from acting under another power or not—but the answer is unlikely to be found in the text of enumerated powers. Moghadam's observation that the IP Clause does not explicitly bar Congress from circumventing its limitations by acting under the commerce clause is correct. However, the IP Clause also does not affirmatively say the opposite. Moreover, almost any limitation in enumerated powers can be described as either "constitutive" or "limiting." For example, one could argue that the bankruptcy clause is formulated as a positive grant of power to Congress to enact uniform bankruptcy laws, but does not state that Congress is affirmatively prohibited from passing non-uniform bankruptcy laws under the Commerce Clause. If qualifying language is

153. Moghadam, for example, started with the premise that "[i]n general, the various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed. In other words, each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another." Id. at 1277. Nevertheless, Moghadam did not follow this approach so strictly as to uphold the statute under the Commerce Clause, regardless of the text of the IP Clause. Although Moghadam found support for doing so in Trade-Mark Cases, Heart of Atlanta Motel and Authors League of America, it found the opposite authority, Railway Labor Executive, bothering. As Part II.C argued, the former three cases are not highly relevant, so that the Eleventh Circuit should have followed Railway Labor Executives according to the precedents it reviewed. Id. ("We note that there is some tension between the former line of cases (Heart of Atlanta Motel, the Trade-Mark Cases and Authors League) and the Railway Labor Executives case [internal citations omitted]."). Because of the additional cases Part II.B reviewed, however—Head Money Cases, Selective Draft Law Cases, Perry and Perpich—this tension in Supreme Court precedent truly exists. The Eleventh Circuit suggested that Congress could use the Commerce Clause to achieve what the IP Clause does not allow if the statute is not "fundamentally inconsistent" (or "irreconcilably inconsistent") with the IP Clause or its limitations. Moghadam, 175 F.3d at 1281-82 & n.12 (using "fundamentally inconsistent", "irreconcilably inconsistent").

154. See supra note 20 and accompanying text.
characterized as "constitutive," then harmony between it and the statute will be found by assumption: language that does not prevent something does not conflict with it. But the lack of a conflict assuming that language is not limiting cannot serve as a basis for concluding that it is not limiting. Unsurprisingly, based on the assumption that "writings" is not limiting, the Eleventh Circuit did not find any inconsistency: that Congress can "promote the progress of science and useful arts" by granting exclusive rights to authors for their fixed works under the IP Clause was found to be harmonious with Congress doing the same for unfixed works through the Commerce Clause.

The fundamental inconsistency test was applied more satisfactorily in Elcom. Elcom upheld Sections 1201(b)(1)(A) and (C) of the Digital Millennium Copyright Act (DMCA) under the commerce clause against arguable violations of limitations in the IP Clause. These sections of the DMCA ban trafficking in devices primarily designed to circumvent technological measures that effectively protect the rights of copyright owners (or marketed for use in such circumvention).

Elcom detailed the harms to copyright law values—fair use, public domain, limited times—and eventually concluded that these harms were not too great. This finding about harms seemingly led the court to conclude that the conflict was not fundamental and to uphold the DMCA. Elcom can be criticized for its assessment of the DMCA's copyright-related costs and benefits. It also did not explain when an inconsistency would be "fundamental." Still, its approach of examining the degree of harm to copyright-related values as means of determining whether a fundamental inconsistency existed is commendable.

Commentators have followed a similar logic. Some have made a distinction between the fixation requirement—justified mainly on the grounds of efficient administration of the copyright system—and the limited times requirement, which they see as embodying a fundamental policy. They would therefore justify reading the "limited times" limitation externally (but not the fixation limitation) if Congress attempted to grant rights equivalent to those of copyright under the Commerce Clause.

One may use this distinction to argue that a conflict may be "fundamental" if it relates to a fundamental value in the IP Clause.
C. STRUCTURAL INFERENCE

Several commentators used a structural approach to resolve inter-clause conflicts. They analogized the IP/Commerce Clause interface to other contexts in which the Court was asked to apply limitations from one part of the Constitution to language found in another part. Malla Pollack reviewed case law suggesting that the Tenth Amendment may limit Congress's exercise of its commerce power. Building on these cases (and others), she concluded that Congress cannot bypass the “limited times” limitation from the IP Clause by acting under the Commerce Clause. William Parry drew on Laurence Tribe’s analysis of the government’s treaty powers. Tribe—warning against reading Constitutional provisions in isolation—implied from the President’s Article II treaty power a limitation on Congress’s ability to use its “veto override” power to approve bicamerally an international agreement over the President’s objection. Building on Tribe’s structural logic, Patry suggested that the IP Clause’s “limited times” and originality requirements limit Congress’s exercise of its commerce power. Brian Danitz suggested that the resolution of IP Clause/Commerce Clause conflicts should be guided by the Court’s analysis in Morrison v. Olson. At issue in Morrison were the independent counsel provisions of the Ethics in Government Act of 1978. These provisions empowered a court to appoint a special counsel to investigate and prosecute violations of federal law and left to the executive only a limited role in the counsel’s appointment and removal. Morrison upheld these provisions against the argument that Congress lacked the power to delegate the special counsel’s appointment because the Court failed to find that “there was some ‘incongruity’ between the functions normally performed by the courts and the performance of their duty to appoint.” It also upheld these provisions, which restricted the Attorney General’s power to remove the independent counsel to only cases of “good cause,” against a separation of power argument because these provisions did not “unduly trammel[] on executive authority.” Applying Morrison’s logic, Danitz concludes that the anti-bootlegging statutes are constitutional because they are not “incongruous with the commerce power” and do

162. U.S. Const. art. II, § 2, cl. 2.
163. U.S. Const. art. I, § 7, cl. 3.
166. See id. at 376-77, 398.
168. Morrison, 487 U.S. at 676.
169. Id. at 691.
not "interfere with the copyright power." Additionally, power sharing among enumerated powers should be less problematic than the inter-branch power sharing that Morrison upheld.170

These approaches advance the inquiry by suggesting contexts in which the Court was either willing or unwilling to imply a limitation on Congress's power from the structure of the Constitution or of the system of government it institutes. A limitation of these analogies is that they rely on certain checks and balances—such as between the three branches of the federal government and the state/federal balance of powers—that are absent in conflicts among Congress's powers. Additionally, commentators applying structural inferences reached opposite conclusions at least in part based on the context from which they chose to analogize. Whether future research will be able to justify and defend the choice of context from which to analogize remains to be seen.

D. FUNDAMENTAL PRINCIPLES APPROACH

Commentators under this approach argue that conflicts among enumerated powers should be resolved by resorting to fundamental constitutional principles. They agree that fundamental principles that underlie the text of one enumerated power may limit Congressional exercise of another power.

Two insightful and rigorous articles spearhead this approach and merit special attention. They share the assumption above, but still disagree on its application for IP/Commerce Clause conflicts.171 Paul Heald and Suzanna Sherry argue that four "principles of constitutional weight"172 underlie the IP Clause and may limit173 Congressional action under other powers:174 the suspect grant principle, the quid pro quo principle, the authorship principle, and the public domain principle ("Implied Limits Argument").175 Thomas Nachbar reaches an opposite conclusion, namely that no "constitutional norm" underlies the IP Clause, and therefore that the restrictions on Congress's IP Power are inapplicable to statutes passed under its commerce or other enumerated powers ("Constitutional Norms Argument").176 Although apparently conflicting, some of the disagreement between these two Arguments can be explained away because they refer to different things. The

171. Others share this approach's assumption. See infra note 199.
172. See Heald & Sherry, supra note 123, at 1123 (describing their enterprise as an attempt to "determine which of [the IP Clause's] limits are so fundamental that they should absolutely constrain Congress's power").
173. Id. at 1167 (suggesting that these principles are not outcome determinative but rather "frame the Court's rhetoric, providing the shape for the arguments that the Court will find most persuasive").
174. Id. ("[T]hese four principles will guide [the Supreme Court's] decisions regardless of the constitutional provision under which Congress purports to act").
175. Id. at 1159-66.
176. See Thomas B. Nachbar, Intellectual Property and Constitutional Norms, 104 Colum. L. Rev. 272, 272 (2004) ("no [] generally applicable norm is at work in the limits on Congress's intellectual property power"); Id. at 277 ("the limitations in the IP Clause do not rise to the level of constitutional norms requiring application throughout Article I").
Implied Limits Argument refers to constitutional policies (e.g., IP rights should not be perpetual) whereas the Constitutional Norms Argument refers to the most basic maxims of the constitutional structure (e.g., the system of dual sovereignty). Nevertheless, disagreement remains as to whether topical constitutional limitations may limit congressional action through other powers in their coverage area, as the Implied Limits Argument suggests, or whether the ability to limit congressional action beyond the clause in which a limitation appears is the sole province of high-level constitutional principles, as the Constitutional Norms Argument suggests.

Its considerable merit notwithstanding, two aspects of the Fundamental Principles Approach raise difficulty. The first is that the two arguments draw substantially on case law in justifying their conclusions, but the support such case law provides is equivocal. The Implied Limits Argument relies mainly on Tenth and Eleventh Amendment Supreme Court jurisprudence. As Thomas Nachbar has argued, the logic of conflicts from federalism (and the justification for implying limitations on Congress’s power) does not provide a perfect analogy for conflicts and limitations that are internal to Congress’s power.

The Constitutional Norms Argument introduces and draws support from (in addition to the cases analyzed by the anti-bootlegging statutes) a dozen Supreme Court cases dealing with the constitutionality of regulatory taxes. Underlying these cases are congressional attempts to regulate various intrastate activities such as child labor, sales of narcotics, and futures contracts by taxing them. In these cases, the Court did not examine the legislative motive and was not bothered by incidental regulatory effects: all it asked was whether the measures under review could be fairly called “taxes.” Importantly, “[t]he possibility that a tax might overlap with another [Article I] Section 8 power in a way that would result in regulation not permitted under another power bothered the Court not one whit.” When regulatory taxes were struck down, it was generally because they violated the Tenth Amendment that embodies the constitutional norm of federalism, not the Commerce Clause. The Argument extrapolates from the Commerce/Tax Clause interface to IP/Commerce Clause conflicts. It suggests that because no overarching and fundamental constitutional norms underlie the IP Clause, Congress can pass intellectual property legislation – such as issue perpetual patents—under the

177. Compare Heald & Sherry, supra note 123, at 1142 (“Principles Underlying the Intellectual Property Clause of the Constitution”), with Nachbar, supra note 176, at 317 (“by ‘constitutional norm,’ I do not mean merely a policy argument about the wisdom of the restriction [, which policy] could be tied to some piece of text in the Constitution. […] Rather, by ‘constitutional norm’ I mean a rule required by and even inherent in the form of government adopted in the Constitution.”).

178. See Nachbar, supra note 176, at 287-94.
179. Id. at 290-92.
180. Id. at 307.
181. See Nachbar, supra note 176, at 316.
182. Id. at 276-77 (“an inquiry into the values incorporated in the Intellectual Property Clause and its limits leads inexorably to the conclusion that they do not rise to the level of constitutional norms requiring application throughout Article I.”).
183. See id. at 292 n.88 (suggesting that the Constitution’s structure does not imply the unconstitutionality of perpetual patents); Id. at 293 (“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”).
Commerce Clause regardless of contrary language in the IP Clause (i.e., "limited times").

The reason that the Court did not imply from the Commerce Clause a limitation against taxation statutes that have incidental regulatory effect on intrastate productive activities may well have been specific to the interface between the Tax Clause and the Commerce Clause. But it does not follow that none of the other clauses in Article I carries any such implications. It would be perfectly coherent for a court to hold that the Commerce Clause does not prevent Congress from using its other enumerated powers in ways that have incidental regulatory effects on intrastate productive activities, but that the IP Clause implicitly strips Congress of its ability to use other enumerated powers to authorize perpetual patents, for example.

Even with respect to the interface between the Tax Power and the Commerce Power, some of the regulatory-taxation cases arguably undermine the idea that the exercise of one enumerated power can be limited only by overarching "constitutional norms" rather than in addition also by topical limitation in another enumerated power. Three of the cases, in particular, seem to take the contrary view; they can be read to indicate that the limited nature of the regulatory powers conferred upon Congress in the Commerce Clause does imply some restrictions on the uses to which Congress can put the tax power.

To be sure, as Professor Nachbar observes, the relatively restrictive Butler case suggested that the confines of Congress's tax power "are set in the clause which confers it, and not [in the other clauses of Article I, Section 8] which bestow and define the legislative powers of the Congress." This language, however, seems to be referring only to the victory in doctrine of the Hamiltonian view (over the Madisonian view) that the meaning of "general welfare" in the Tax Clause is not reducible to the ends of the other enumerated powers, and that the Tax Clause implicitly grants Congress the power to raise and spend money for additional ends. Indeed, later in the opinion

184. See id. at 277 ("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.").

185. At least in one recent case, the Court did not read the Commerce Clause as containing any affirmative limitation on Congress's power. See Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 468 (1982) ("Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power.").

186. See Veazie Bank v. Fenno, 75 U.S. 533, 541 (1869) ("There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the [taxing] power if so exercised as to impair the separate existence and independent self-government of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution.")

This passage is quoted in Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 41 (1922) and in Butler v. U.S., 297 U.S. 1, 69-70 (1936). One may read the latter part of the quote to mean that the taxing power may not be exercised so broadly as to nullify the system of a limited government of enumerated powers. Although possible, this is a less plausible interpretation because it would seem to repeat the first part of the quote (guaranteeing the separate existence of the States), and would seem to be in tension with the use of the words "or if exercised".

187. See Nachbar, supra note 176, at 306 & n.150 (quoting U.S. v. Butler, 297 U.S. 1, 66 (1936)).

188. See Butler, 297 U.S. at 65-66 (accepting the Hamiltonian view).
Butler seems to acknowledge that language in one enumerated power may limit the exercise of another.\textsuperscript{189} In any event, the relevance of the regulatory-taxation cases to the Constitutional Norms Argument is an inference from silence: because most of the regulatory-taxation cases did not discuss how the limited nature of the commerce power might restrict exercises of the tax power, the Constitutional Norms Argument infers a consensus that no such restrictions existed. Silence can be interpreted in various ways; while it is consistent with the Constitutional Norms Argument, it is also consistent with alternative approaches, such as the fundamental inconsistency approach.\textsuperscript{190} Moreover, silence in the recent \textit{Eldred} case seems to cut against the Constitutional Norms Argument, at least in the context of the interface between the Commerce Clause and the IP Clause.\textsuperscript{191} The fact that the \textit{Eldred} Court did not turn to uphold the Copyright Term Extension Act of 1998 under the Commerce Clause (which would have been a much easier task than dealing with the limitations in the IP Clause) seems to suggest that the Court did not think that Congress could circumvent all of the IP Clause’s limitations simply by invoking a different enumerated power.

The second source of difficulty in the Fundamental Principles Approach is that, at the end of the day, it falls back on one out of two equally important constitutional principles. Implied Limits Argument suggests, for example, that a specific database protection bill\textsuperscript{192} is unconstitutional because it violates the public domain principle.\textsuperscript{193} Congress, however, may believe that the bill’s benefits—in terms of providing added incentive to create databases and their additional use—outweigh their costs, which Congress attempted to decrease.\textsuperscript{194} It is unclear why the Implied Limits Argument follows the result dictated by the public domain principle rather than the one that would have followed had it fallen back on its competing “flexibility principle” that mandates deference to Congress. The Constitutional Norms Argument, on the other hand, seems to fall back on a constitutional norm similar to the “flexibility principle,” namely “the norm favoring legislative over judicial policymaking”.\textsuperscript{195} However, there is the equally important countervailing constitutional norm that it is the judiciary’s duty to say what the law is and apply it.\textsuperscript{196} Although statutes passed under Article I powers are

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\item[189.] See supra note 186.
\item[190.] For example, the regulatory taxation cases approved of taxes that had an incidental intrastate regulatory effect. Such taxes may have been upheld because they were not “fundamentally inconsistent” with the Commerce Clause.
\item[193.] Heald & Sherry, supra note 123, at 1176-79.
\item[194.] As they note, the bill made an exception for independent researchers. Heald & Sherry, supra note 123, at 1178 n.413.
\item[195.] See Nachbar, supra note 176, at 318.
\item[196.] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding
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generally subject to a deferential review, it still is the judiciary’s duty to determine
whether language in one enumerated power implicitly limits Congress’s exercise of
another. For example, in striking down RITA, Railway Labor Executives’ Ass’n
applied a deferential standard of review. However, it held that RITA had to pass a
deerential review of the Bankruptcy Clause, not the Commerce Clause. Similarly,
in upholding CTEA, Eldred applied a deferential standard of review. However, the
fact that the Court did not turn to uphold CTEA under the Commerce Clause may
suggest that the Court believed that CTEA had to pass a deferential review of the
IP Clause, not the Commerce Clause.

To date, writers under the Fundamental Principles Approach remain in
disagreement as to both the level of constitutional norms that one must resort to in
order to resolve inter-clause conflicts, and the superiority of particular principles
over others that seem to be on an equal normative level. It remains to be seen
whether future research would resolve these two questions.

E. PARTICULARISM

Particularism refers to the Legal Realist observation that courts adjudicating
cases are far more sensitive to the peculiarities of the fact patterns before them than
is usually supposed. In light of the tendency, or aspiration, manifest in some of
the aforementioned four approaches to derive the result to particular inter-clause
conflicts from more generally applicable principles or frameworks, it is worth
noting the role that the particular plays in courts’ analyses.

A particularist approach is manifest in Perpich. In the latter part of the
decision, after the Court has suggested why Congress’s army power is not limited
by the militia clause as a general matter, the Court moved to examine the particular
harm to state interests. The Court’s analysis seems to suggest that as long as only a

the law: the court must determine which of these conflicting rules governs the case. This is of the very
essence of judicial duty.

197. It is unclear whether a perpetual patent would be necessarily constitutional under a flexibility
principle. See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that the
presumption of constitutionality is weaker “when legislation appears on its face to be within a specific
prohibition of the Constitution”). Whether a perpetual patent “appears on its face to be within” the
“limited times” limitation is at least an open question for courts to decide.

198. For example, Eldred v. Ashcroft, 537 U.S. 186 (2003) was largely deferential to Congress in
disposing of the constitutionality of CTEA, but it did so while deferring to Congress on the meaning of
“limited times” rather than towards the meaning of “interstate commerce” or “economic regulation.”
very deferential to Congress. Still, it was deferential by stretching “uniform” to the greatest reasonable
degree favorable to Congress, not by doing the same regarding “interstate commerce” or “economic
regulation.”

199. Jane Ginsburg suggests that “fundamental [constitutional] policies” present in one enumerated
power may limit congressional action under another. These seem to be more fundamental than Paul
Heald and Suzanna Sherry’s “principles of constitutional weight”, but less fundamental than Thomas
Nachbar’s “constitutional norms.” See Hansen et al., supra note 122, at 1262 (Jane Ginsburg)
suggesting that “limited times” may limit congressional action under other enumerated powers, while
“writings” may not.

200. See generally Fisher, supra note 124.
small fraction of the state militia is called to federal duty at any given time and no state emergency is present, the exercise of Congress's army power is not limited by the Militia Clause. However, the Court's analysis suggests that if Congress were to call to federal duty the vast majority of the individuals serving in a state militia at a time of state emergency, then such action may be unconstitutional. This approach suggests that, at least in certain cases, it would be inaccurate to suggest that an exercise of one enumerated power is categorically either immune from or subject to limitations in another enumerated power. Rather, it suggests that the constitutional analysis may depend on the particulars of the act passed, and that such particulars include the degree of harm that the exercise of one Congressional power may inflict on interests and policies implicit in another.

KISS I showed a particularist approach when it noted that all that TRIPS requires is that signatory countries protect performers' rights for at least fifty years. The anti-bootlegging statutes contain no time limitation, however. Thus, the United States could have met its international obligations under TRIPS without violating the IP Clause's "limited times" prescription.

The protections under the anti-bootlegging statutes go beyond that which was required by TRIPS in additional ways that conflict with limitations in the IP Clause. TRIPS requires signatory countries to protect performers against unauthorized recordings of the sound of their live performances, whereas the anti-bootlegging statutes proscribe the making of video recordings as well. If one believed that "writings" embodies a constitutional fixation requirement, for example, then there still might be reason to allow Congress to circumvent this requirement regarding unauthorized fixations of sound through the Commerce Clause, in order to allow the United States to meet its obligations under TRIPS (another, perhaps more plausible, option might be to uphold the anti-bootlegging provisions as necessary and proper for the execution of Congress's IP power). TRIPS compliance, however, would not justify violating the IP Clause's arguable fixation requirement regarding the proscription of unauthorized fixations of video of live musical performances. TRIPS compliance would similarly not justify the retroactive and perpetual proscription on live video recordings.

The proscriptions in the anti-bootlegging statutes also apply to unauthorized, but potentially legal, recordings of live musical performances that occurred before

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201. See KISS I, 350 F.Supp.2d 829 n.2; TRIPS, supra note 1, at art. 14(5).
202. Even if the anti-bootlegging statutes cannot be upheld under the Foreign Commerce Clause or as an implementation of an international treaty, they may still be upheld under the Interstate Commerce Clause. My discussion focuses on the Foreign Commerce Clause under the assumption that it provides Congress more freedom to act relative to the Interstate Commerce Clause. Acting under the Interstate Commerce Clause would involve the problem that any IP statute could also be presented as a regulation of interstate commerce (under the current reading of the Interstate Commerce Clause). This would seem to make the IP Clause superfluous, and the analysis in Railway Labor Executives' Ass'n would seem to be authoritative (either with or without the logic that the specific IP Clause should govern over the more general Commerce Clause). See also supra Part II.C; discussion accompanying notes 69-71.
203. See TRIPS, supra note 1, at art. 14(1) (protecting performers respecting "a fixation of their performance on a phonogram").
204. See 17 U.S.C. § 1101(a) (proscribing various actions respecting "sounds or sounds and images of a live musical performance"); 18 U.S.C. § 2319A(a) (same).
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the statutes’ effective date. However, TRIPS seems to require the United States to provide retroactive protection only respecting unauthorized sound fixations of performances that are still protected under the laws of other signatory countries. Thus, the United States seems to be under no TRIPS obligation to prevent dealings in fixations of live musical performances that took place in the United States prior to the effective date of the anti-bootlegging statutes. Granting such retroactive protection likely retards the progress of science and useful arts (as discussed in Part III) unnecessarily.

Under this approach, one would expect courts to lean more towards upholding statutes when the statutes are strongly needed in order to advance important governmental objectives, and lean more towards striking down statutes that are only weakly needed to advance insignificant governmental objectives, holding the degree of the conflict with another Congressional power constant. One would also expect the balancing to lean more towards unconstitutionality the more statutes conflict with other clauses. Whether courts and commentators resolving inter-clause conflicts will do more to assess the particular necessity in passing statutes and balance it against the degree to which these statutes conflict with other enumerated powers remains to be seen.

V. CONCLUSION

The anti-bootlegging cases raise a hard constitutional law question regarding conflicts among Congress’s powers regarding the constitutionality of statutes. This Essay has reviewed the positions that courts and commentators have taken regarding the anti-bootlegging statutes and inter-clause conflicts more generally. It offered three contributions to the debate. First, it reviewed relevant Supreme Court case law that deals specifically with inter-clause conflicts. This case law would be relevant to the resolution of conflicts between any of Congress’s powers. Second, it suggested that the anti-bootlegging statutes may be violating limitations in the IP Clause other than “limited times” and fixation, which the anti-bootlegging courts

205. See 17 U.S.C. § 1101(c) (suggesting that the statute applies to acts of distribution taking place after its effective date regarding unauthorized recordings of live performances that had taken place before its effective date); 18 U.S.C. § 2319A(f) (same); KISS I, 350 F.Supp.2d at 828-29 (applying the anti-trafficking provision of the civil anti-bootlegging statute to acts of distribution of unauthorized fixations of live musical performances that took place before the statute’s effective date).

206. See TRIPS, supra note 1, at art. 14(6).

207. This assumes that foreign countries’ protections do not extend beyond their geographical boundaries.

208. This of course raises an incentive problem: predicting that courts would take into account its obligations under international treaties, the United States may strive to include in such treaties provisions that would otherwise violate the Constitution. At the same time, holding that statutes that go beyond the scope of current international agreements are unconstitutional may prevent the United States from joining future international accords should the nature of international protections evolve. For example, WIPO has been considering for several years the adoption of a new treaty respecting audiovisual recordings of live performances. See, e.g., http://www.wipo.int/edocs/prdocs/en/2006/wipo_pr_2006_462.html.
focused on. Most importantly, it suggested that the anti-bootlegging statutes may violate the “promote the progress of science and useful arts” limitation. Lastly, it reviewed the major approaches taken so far to resolving inter-clause conflicts. It highlighted the possibility that whether limitations in one Congressional power may qualify Congressional exercise of another power may depend not only on the two enumerated powers involved, but also on the particulars of the statute. Such particulars may include the degree to which the statute conflicts with the purpose and limitations of one enumerated power, and the degree to which the statute is necessary to allow Congress to further other legislative goals (here – participate in international IP treaties). My hope is that the aforementioned will advance the analysis of the anti-bootlegging statutes’ constitutionality and the resolution of inter-clause conflicts regarding statutes’ constitutionality more generally.